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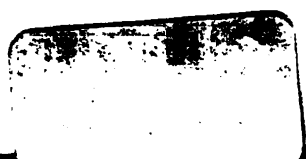
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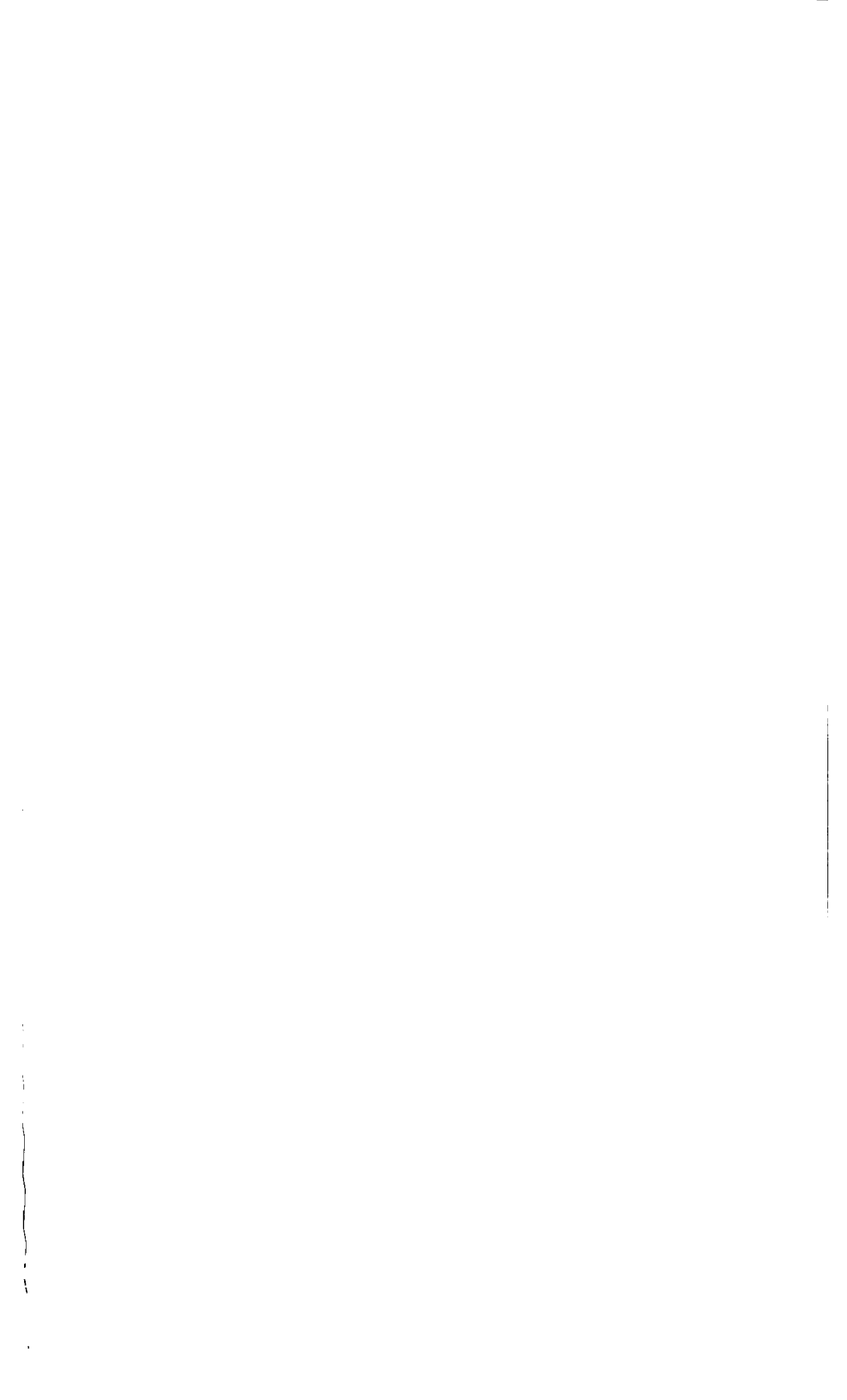
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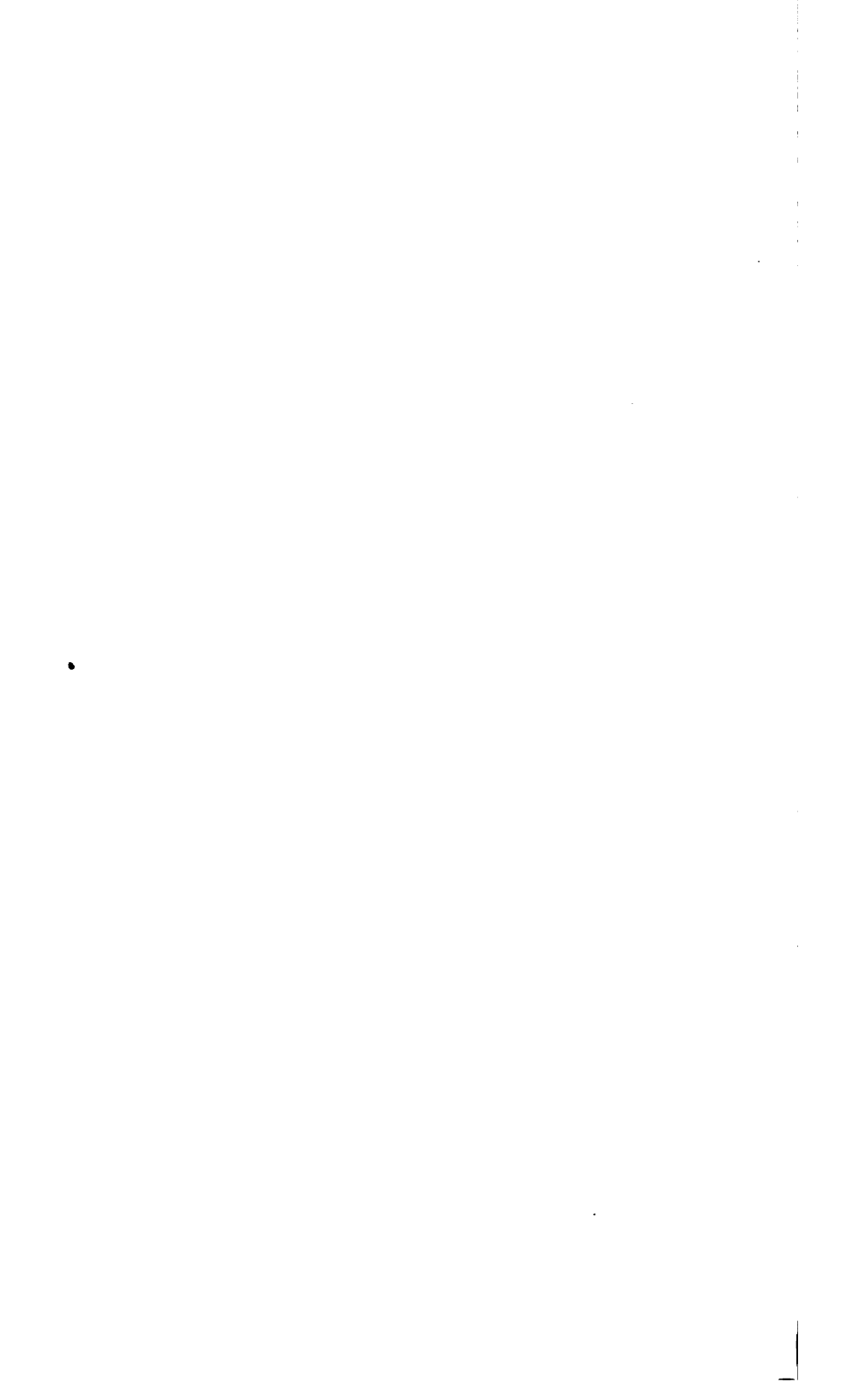
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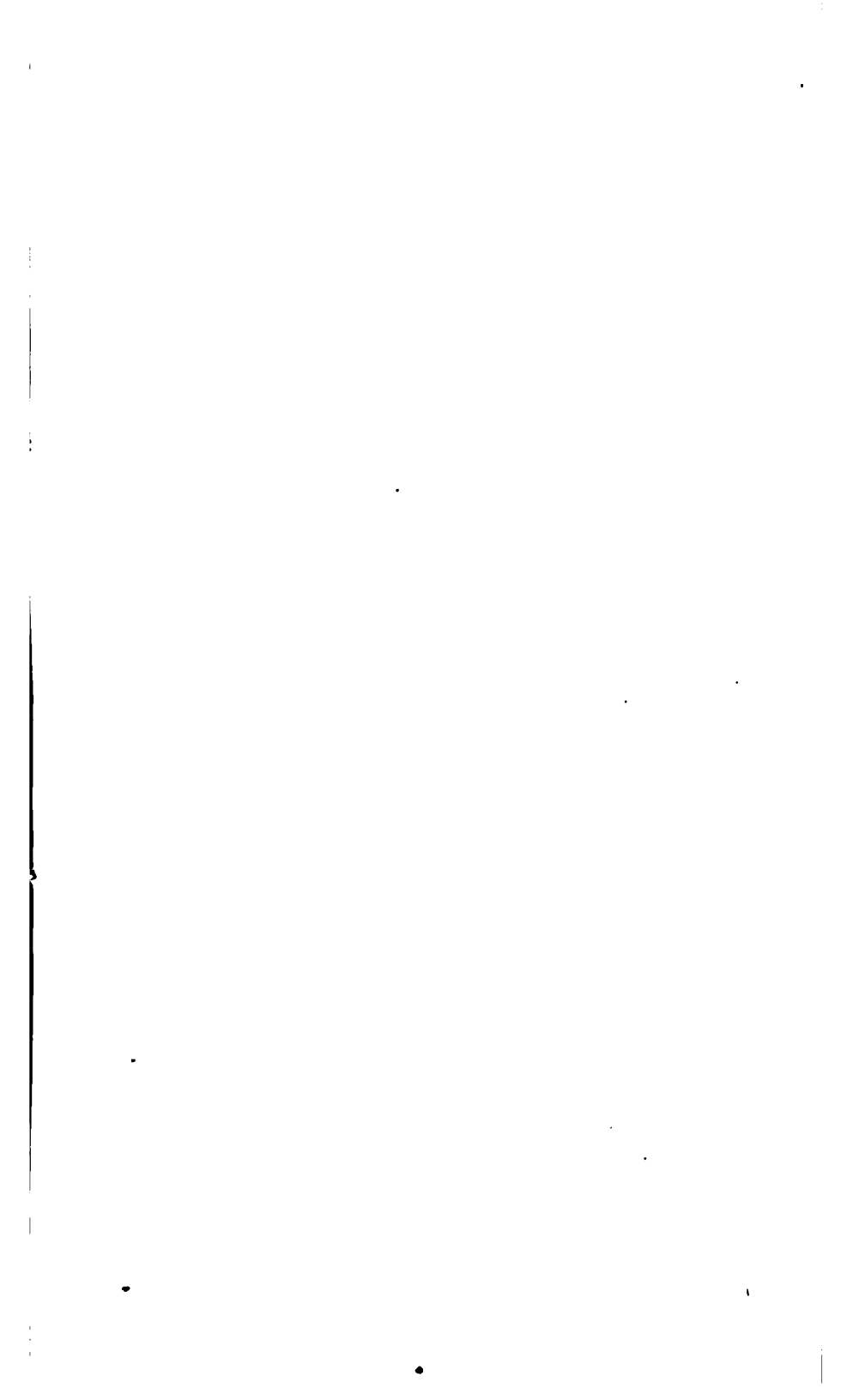












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OF THE SEVERAL STATES

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OF THE LATE

A. C. FREEMAN

VOLUME 139

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VOLUME 139.

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AMERICAN STATE REPORTS.

VOLUME 139.

(15)

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

CITY OF NORTH BIRMINGHAM v. STATE.

[166 Ala. 122, 52 South. 202.]

QUO WARRANTO—Testing Municipal Franchise.—Quo warranto is the proper remedy to test the right to the exercise of a particular franchise not embraced within those granted by the charter of a municipality, and to oust the corporation from the exercise of such franchise. (p. 19.)

QUO WARRANTO—Corporate Limits of Municipality.—Quo warranto does not lie for the purpose of testing the validity of the corporate limits of a municipality. (p. 19.)

QUO WARRANTO—Limits of Municipality—Injunction.—Where city authorities assume to exercise mere corporate powers beyond the territorial boundaries of the corporation, the remedy is not quo warranto, but injunction. (p. 19.)

Quo warranto by the state, on the relation of G. W. Sparks and others, against the city of North Birmingham and its officers, to test the validity of the extension of the corporate limits of the town made by an order and decree of a probate judge. The petition set out the preliminary steps taken and designated the papers filed in the office of such judge. It showed that an election was had and that a majority was in favor of the incorporation. It was set out that the relator was a resident and owner of real estate within the extension proposed, and that he was opposed to the alteration or change. Irregularities were charged and fraud alleged in procuring signatures to the petition for extension. It was also alleged that the defendants were seeking to make all the laws and ordinances governing North Birmingham apply to the territory sought to be included; that efforts were being made to enforce the collection of taxes, etc., within such extension; and that notice had been served that, if the taxes were not paid, the property would be sold, etc. The prayer of the petition was that the proposed extension be declared inoperative and void; and that the defendants be excluded from the offices and franchises they were usurping and attempting to hold in the territory sought to be incorporated.

C. B. Smith, for the appellant.

Frank S. Address, for the appellee.

¹²⁵ ANDERSON, J. Section 5450 of the Code of 1907, as to quo warranto, has no application to municipal corporations, and this proceeding must have been attempted under section 5453, which provides for the action in the cases there enumerated. Subdivisions 2 and 3 can have no bearing on the present case, and the relator must be proceeding under subdivision 1 of section 5453. This subdivision provides that the action may be brought in the following cases: "(1) When any person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state." The information and proof shows that the respondents are legal officers of North Birmingham, and it does not appear, by averment or proof, that they are exercising any franchise or powers not authorized by the charter. It does not appear that the things they are doing or attempting to do are not authorized by the charter of North Birmingham.

The only complaint against the respondents is that they are exceeding their jurisdiction by doing or threatening to do charter or franchise acts beyond the legal limits of North Birmingham. This would not be the unlawful holding or exercise of a public office, or the unlawful holding or exercise of a franchise. They are properly in office, and the franchise that they are using is not questioned, nor are the acts complained of unauthorized. They are merely charged with going beyond the limits of jurisdiction in the exercise of an office or franchise. Section 5453 was not intended to correct a mere abuse or excessive use of an office, or franchise, ¹²⁶ but to remove a usurper from an office, or to prevent the use of a franchise which did not exist. It may be that an abuse of power might forfeit the charter of a business corporation under section 5450; but, as we have observed, this section does not apply to municipal corporations. We are borne out in the correctness of this conclusion by section 5465, which fixes the character of judgment as to the unlawful use of a franchise and which requires an exclusion from the office or franchise. The manifest purpose of the present information is to test the validity of the annexation of certain territory to North Birmingham and to restrain the respondents from exercising acts over same—not to oust them from the exercise of a franchise. Indeed, the judgment rendered does not comply with the statute. It excludes the respondents from the franchise, but in effect merely restrains or enjoins them from doing certain things in this newly acquired territory. If the respondents are exceeding their jurisdiction or au-

thority, this may be checked by an appropriate proceeding, but not by a quo warranto to test their title to an office or right to a franchise. Here the franchise exists, and the respondents are only charged with an excessive use of same, and are sought to be enjoined from using same in a certain way, and not that they be ousted from said franchise.

Quo warranto is the proper remedy to test the right to the exercise of particular franchises not embraced within those granted by the charter, and to oust the corporation from the exercise of such franchise: *Uniontown v. Glass*, 145 Ala. 471, 39 South. 814, 8 Ann. Cas. 320; 17 Am. & Eng. Ency. of Pl. & Pr. 396; *Spelling on Extraordinary Relief*, 1801. The act complained of in the *Glass* case (145 Ala. 471, 39 South. 814, 8 Ann. Cas. 320) was the exercise of a franchise not given by the charter, and not the excessive use of a chartered right. On the other hand, it seems well settled by the ¹²⁷ great weight of authority that where city authorities assume to exercise mere corporate powers beyond the territorial boundaries of the corporation, the remedy is not quo warranto, but injunction: *Spelling on Extraordinary Relief*, sec. 1802; *High on Extraordinary Remedies*, sec. 618; *Stultz v. State*, 65 Ind. 492; *People v. Whitcomb*, 55 Ill. 172; *Delphi v. Startzman*, 104 Ind. 343, 3 N. E. 937. The Indiana statute on quo warranto, considered in *Stultz v. State*, 65 Ind. 492, was identical to subdivision 1 of section 5453 of the Code of Alabama of 1907: *Leigh v. State*, 69 Ala. 261.

The circuit judge erred in giving the relator relief, and the judgment must be reversed, and one is here rendered dismissing the information.

Dowdell, C. J., and Sayre and Evans, JJ., concur.

As to Quo Warranto to Test the Validity of a Municipal Incorporation, see *State v. City of South Park*, 34 Wash. 162, 101 Am. St. Rep. 998, and cases cited in the cross-reference note thereto.

SHRINER v. CRAFT.

[166 Ala. 146, 51 South. 884.]

CONTRACTS—Parties—Name of Third Person at End.—If a contract states distinctly that it is between two designated parties, the fact that another person's name appears at the end of the contract with that of one of the parties does not make it his contract. (p. 23.)

PLEADING—Amendment.—The Striking Out of an Improper Party does not work a discontinuance of the case; and it cannot be material how the fact comes to the knowledge of the court that such person is an improper party; whether it appears upon the face of the

pleading, or is brought to the attention of the court by demurrer, or is subsequently made to appear in the evidence. (p. 23.)

CONTRACTS—Modification by Oral Agreement.—The parties to a written contract may, by mutual parol agreement, modify the contract; but such modification can be nothing but a new contract and must be supported by a consideration like every other contract. (pp. 23, 24.)

CONTRACTS—Rescission, What Constitutes—New Contract.—It is essential to the mutual assent to a written contract that there be something to be assented and agreed to on each side; and if the parties agree to rescind the contract, and each one gives up the provisions for his benefit, the mutual assent is complete, and the parties are then competent to make any new contract that may suit them. (p. 26.)

CONTRACTS—Modification by Parol Agreement—Consideration.—Where the parties to a written contract seek to modify it by a parol agreement, the mutual obligations assumed by the parties, at the time of the modification, constitute a sufficient consideration. If one piece of contract work is substituted for another, the contractor is released from doing one in consideration that he will do the other. (pp. 23, 26.)

CONTRACTS—Modification by Parol Agreement—Nudum Pactum.—Where the parties to a written contract seek to modify it by a parol agreement, but one of the parties does not assume any obligation or release any right, then a promise by the other is a nudum pactum and void. (p. 23.)

CONTRACT—Refusal to Perform Unless Paid More.—If a party refuses to do the work which his contract requires him to do, or even threatens to abandon the work unless he is paid more, and the other promises, while the original contract is still subsisting, to pay more, such promise is merely one to pay for what the promisee was already obliged to do, and a nudum pactum. (pp. 23, 24.)

CONTRACT TO BUILD—Action for Breach—Demurrer to Plea. There is no error in sustaining a demurrer to a plea, in an action for the breach of a contract to build, alleging a breach of the plaintiff's agreement to have an ordinance passed taking out of the fire limits the lots on which the contractor was to build in time to enable him to begin work as required by the contract, where such plea alleges that the ordinance was not passed until two weeks after the time when the defendant was to commence work on the houses according to the contract; and where the contract, set out in the complaint, does not fix any time when work was to be commenced. Such plea is also subject to demurrer in not showing whether the agreement to have the ordinance passed was made at the time of the original contract or afterward, and in not showing whether there was any consideration for it. (p. 27.)

CONTRACT TO BUILD—Architect's Certificate—Evidence.—Where the owner brings an action for the breach of a building contract by abandonment, the certificate of the architect is admissible in evidence if the contract provides that the certificate as to the expenses incurred by the owner and the damages incurred through default shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties. (p. 27.)

CONTRACT TO BUILD—Architect's Certificate—Conclusiveness.—The mere admission in evidence of an architect's certificate does not necessarily make it conclusive evidence of the facts recited; but where a building contract specially provides that such certificate shall be final and conclusive, it is so in its legal effect on the parties to the contract, and can be impeached only for fraud,

or such gross mistakes as would imply bad faith or a failure to exercise an honest judgment. (p. 27.)

Action by John Craft against William H. Shriner. It appears that Mary R. Shriner attached her signature to the contract involved, and was originally sued. The complaint, however, was afterward amended, upon her demurrer and motion, so as to strike her as a party defendant. The other defendant then moved for a discontinuance because of such striking. The other errors complained of were the sustaining of the appellee's demurrer to the second and third pleas of defendant. Those pleas were as follows:

"(2) That subsequently to the making of said contract set out in the complaint, the plaintiff and the defendant modified said contract by mutual agreement, in this: The defendant requested the plaintiff in substance as follows: At the end of each week during the time that defendant should be at work on said contract on said building to advance a sufficient amount to satisfy the laborers on said building, and the plaintiff agreed with the defendant to so advance at the end of each week a sufficient amount to pay the laborers that work on said building.

"(3) And for further answer to said complaint the said William A. Shriner alleges that, after he entered into a contract with the plaintiff, it was agreed between him and the plaintiff that the plaintiff should furnish at the end of each week the money necessary to pay the men employed by the defendant in the erection of said houses; and said defendant alleges that the plaintiff breached such agreement, in that he failed to furnish at the end of each week the money necessary to pay the laborers the defendant had employed in erecting said houses; and the defendant avers that such breach of the agreement by the plaintiff occurred before he (the defendant) abandoned the contract."

The demurrers were: To the second plea, that it did not appear that plaintiff failed to comply with his promise to advance; and that it did not appear that there was any consideration for the promise to advance; and no justification was shown on the part of the defendant for his breach of the contract. To plea 3, because it did not appear that plaintiff elected to rescind such contract on account of the alleged breach; or that defendant's promise was dependent on plaintiff's promise to advance; and also no consideration.

The other pleas set up the same matter in an amplified form and with more particularity, except the ninth, which was as follows:

"(9) The defendant, as a defense to the action of the plaintiff, saith that at the time the said action was commenced the plaintiff was indebted to him in the sum of two

pleading, or is brought to the attention of the court by demurrer, or is subsequently made to appear in the evidence. (p. 23.)

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or such gross mistakes as would imply bad faith or a failure to exercise an honest judgment. (p. 27.)

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The demurrers were: To the second plea, that it did not appear that plaintiff failed to comply with his promise to advance; and that it did not appear that there was any consideration for the promise to advance; and no justification was shown on the part of the defendant for his breach of the contract. To plea 3, because it did not appear that plaintiff elected to rescind such contract on account of the alleged breach; or that defendant's promise was dependent on plaintiff's promise to advance; and also no consideration.

The other pleas set up the same matter in an amplified form and with more particularity, except the ninth, which was as follows:

"(9) The defendant, as a defense to the action of the plaintiff, saith that at the time the said action was commenced the plaintiff was indebted to him in the sum of two

hundred and fifty dollars damages, arising in connection with the contract described in the complaint, in this: That the buildings provided for to be erected under the contract described in the complaint were to be built upon lots of land lying within what are known as the 'fire limits' of the city of Mobile, within which limits it was unlawful to erect frame buildings, such as was provided in the contract described in the complaint should be erected on said lot, and the plaintiff agreed with the defendant that, because he was a member of the general council of the city of Mobile, he would have an ordinance passed by the general council of the city of Mobile excepting these lots from the provisions of said ordinance and permitting defendant to erect frame buildings on said lot, and that he would do this sufficiently in advance of the commencement of the contract to enable the defendant to begin the erection of buildings upon the day prescribed by the terms of the contract; but defendant says that plaintiff negligently failed to secure the passage of such ordinance as would exempt the buildings to be erected under the contract from the provisions of law establishing the fire limits of the city of Mobile, until two weeks had elapsed after the time defendant was required to commence constructing said building under the terms of the contract, and the defendant says that by the said delay of the plaintiff he was damaged in the sum of two hundred and fifty dollars, which he hereby offers to set off against the demand of the plaintiff, and he claims judgment for the excess."

This plea was demurred to on the ground that the agreement alleged was void for uncertainty and because it did not set out the time when the alleged agreement was made. The suit was upon the breach of the contract made by Shriner to construct certain buildings for Craft, which contract seems to have been abandoned by Shriner. There was a judgment for the plaintiff, and the defendant appealed.

Frederick G. Bromberg, for the appellant.

Gregory L. & H. T. Smith, for the appellee.

¹⁵⁰ SIMPSON, J. This is an action by the appellee against the appellant for damages for the breach of a contract, by which the defendant undertook and agreed to furnish material and build two houses in accordance with the contract set out in the record.

¹⁵¹ The first assignments of error insisted on (numbered 1 and 2) are to the sustaining of the demurrer of Mary R. Shriner, on the ground that the complaint shows on its face that Mary R. Shriner was not a party to the contract sued on, and the third, fourth and fifth assignments relate to the same subject, to wit, to the refusal of the court to grant the motion of a discontinuance of the case, because of the amendment of

the complaint, by striking out the name of said Mary R. Shriner.

There was no error in either action of the court. The contract sued on is set out in the complaint, and it states distinctly that it is between W. A. Shriner and John Craft. The fact that Mary R. Shriner's name appears at the end of the contract with W. A. Shriner does not make it her contract. The statute is clear on the right of amendment by striking out parties, and our decisions are uniform to the effect that the striking out of an improper party does not work a discontinuance of the case. It cannot be material how the fact comes to the knowledge of the court that such person is an improper party; whether it appears upon the face of the pleading and is brought to the attention of the court by demurrer or is subsequently made to appear in the evidence: Code 1907, sec. 5367, and cases cited.

A number of the assignments of error are grouped by the appellant in his brief, being questions raised on sustaining motions to strike and demurrers to pleas, which set up a modification of the contract. The first proposition is correct, to wit, that the parties to a written contract may, by mutual parol agreement, modify the contract; but the second proposition, to wit, that said modification is binding without any new consideration, is not so clear. While there are some expressions in the cases which seem to dispense with the necessity of ¹⁵² a consideration to a modification of a contract, yet a modification can be nothing but a new contract, and must be supported by a consideration like every other contract. An analysis of the cases shows that it would be more accurate to say that the mutual obligations assumed by the parties, at the time of the modification, constitute a sufficient consideration, and if one of the parties does not assume any obligation or release any right, then a promise by the other is a nudum pactum and void.

Where a teacher, who had been employed at an annual salary, agreed to give up his definite contract and to serve during the pleasure of the board, it was held that the change in the terms of the teacher's service furnished a sufficient consideration for the promise of increased compensation: *Hildreth v. Pinkerton Academy*, 29 N. H. 227.

Where an agreement to do blasting on certain terms was made upon the representations of the defendant as to the quality of the rock to be blasted, and it was found that the rock was much harder, and useless to the party blasting, in place of being useful, as represented, a new agreement to pay more for the work was supported by the additional work which the other party agreed to perform: *Osborne v. O'Reilly*, 42 N. J. Eq. 467, 9 Atl. 209.

There is a class of cases, in which the original contract had been abandoned, and the parties afterward entered into a new parol contract for the performance of the same work on different terms, and the contract was held to be valid. The theory of these cases seems to be that either party may abandon the contract and subject himself to the penalty or liability therefor, and then the parties are at liberty to make another contract, in which the original work stipulated for in the ¹⁵³ first contract may be a sufficient consideration for the second, leaving the parties to their remedies on account of the abandonment of the first contract, unless special provision be made to release the same: *Munroe v. Perkins*, 9 Pick. 298, 20 Am. Dec. 475; *Coyner v. Lynde*, 10 Ind. 282; *Morrison v. Heath*, 11 Vt. 610; *Koerper v. Royal Inv. Co.*, 102 Mo. App. 543, 77 S. W. 307.

Other cases have gone a step further, and have held that, if one party finds himself in such a position that he cannot carry out the contract on the terms provided, and notifies the other party that he will abandon the contract unless different terms are granted, said second party has the option either to let the contract be abandoned, and depend on his action for damages, or to make the new agreement, the consideration being that he considers it worth more to him to have the benefits of the new agreement than to recover his damages for the breach of the original contract: *Bishop v. Busse*, 69 Ill. 503.

It seems to this court that this latter class of cases has reached a dangerous limit in permitting one party to be bound by his promise to another, who has promised nothing but what he was already under contract obligation to perform, which is no consideration at all: *Koerper v. Royal Inv. Co.*, 102 Mo. App. 543, 77 S. W. 307; *Widiman v. Brown*, 83 Mich. 241, 47 N. W. 231; *Davis v. Morgan*, 117 Ga. 504, 97 Am. St. Rep. 171, 43 S. E. 732, 61 L. R. A. 148; *Willingham Sash & Door Co. v. Drew*, 117 Ga. 850, 45 S. E. 237.

Where, upon the mere statement of the defendant that the drilling of the well would be very expensive, plaintiffs agreed to reduce the price of drilling, it was held no modification of the contract (*Wendling v. Snyder*, 30 Ind. App. 330, 65 N. E. 1041), the court saying: "The evidence did not tend to prove ¹⁵⁴ an abandonment or modification of the original contract," and that the work was done under the new contract.

In our early case of *Young v. Fuller*, 29 Ala. 464, no question was raised about consideration, the only question being that the parties might, by a subsequent written contract, guarantee the genuineness of a note which had been indorsed by one to the other, by providing that if the note turned out to be void, the transaction was, in effect, to be canceled.

In the case of *Thomason v. Dill*, 30 Ala. 444, T. had purchased a slave from D., taken a bill of sale, and given his promissory note, but left the slave with D. until he (T.) went to procure sureties, and the court held that if the promise of T. to procure the surety was after the consummation of the contract, in pursuance merely of a prior unaccepted offer, it was nudum pactum, but if the parties mutually agreed to modify the contract, T.'s right to the slave not to attach until he executed the proposed note, the promise of each is supported by a sufficient consideration: See *Thomason v. Dill*, 34 Ala. 175.

In the case of *Johnson's Admr. v. Sellers' Admr.*, 33 Ala. 265, the defendant had entered into a contract to take charge of a school, and there being a dispute as to whether he was bound, under the original contract, to bring his wife to the school as a teacher, it was agreed to pay him an additional amount to bring her. The court held that the defendant could not refuse to perform his contract and make that a sufficient consideration for a promise of payment of a sum to induce him to perform his contract, though one party might waive the performance of the contract and the two agree to rescind or modify the contract and ingraft new provisions on it, but that, ¹⁵⁵ while the original contract was subsisting, a promise to prevent its breach was without consideration.

In the case of *Burkham v. Mastin*, 54 Ala. 122, emphasis is placed on the fact that the part payment made at the time of the additional contract was before anything was due, thus furnishing a consideration for the modification, and the court held that, in that phase of the case, the modification was supported by a consideration, but "if such agreement is made only to induce a performance, or to prevent a breach of the original contract, it would be without consideration, and could not be supported."

In the case of *Hall v. Jones*, 56 Ala. 493, where the question was whether the assumption of the debt of the old firm by the new one discharged the old one, this court, speaking through Stone, J., said: "It requires the same mutuality to vary or modify a contract as it does to create it in the first instance; for the modification is only a species of contract. The mutual agreement of the parties, a promise for a promise, is sufficient to uphold such modified contract without new consideration."

In the case of *Cooper v. McIlwain*, 58 Ala. 296, the original contract was expressly rescinded and a new written contract made, and on these facts the court says that the parties "may rescind or modify it at pleasure; and their mutual assent is all that is necessary to support the modification or rescission."

In the case of *Robinson v. Bullock*, 66 Ala. 548, the question at issue was whether, by a subsequent agreement, one party was substituted for another who was to furnish the saw-logs (which necessarily involved the mutual promise to release the first, and that the second would perform the work); this court properly said that "no other consideration is necessary to support ¹⁵⁶ such agreement than the mutual assent of the parties."

The case of *Badders v. Davis*, 88 Ala. 367, 6 South. 834, involved the substitution of certain work for others named in the specifications, which, of course, involved the mutual agreements to release the original items on one side and to perform the new work on the other.

In the case of *Clark v. Jones*, 85 Ala. 127, 4 South. 771, the consideration for the new promise was the surrender of the contract and leaving funds in the hands of the defendant to pay the claims assumed, and the court said: "An agreement made to prevent the breach of a contract, or, after a breach, to assume and pay the liabilities of the contractor without other consideration than the mere agreement to rescind, is nudum pactum."

The theory of *Cornish v. Suydam*, 99 Ala. 620, 13 South. 118, is that the new contract was a rescission of the old contract, and the substitution of the new one for it.

In the case of *Pioneer Savings & Loan Co. v. Nonnemacher*, 127 Ala. 521, 30 South. 79, the consideration for the agreement to change the date of maturity of the shareholders' stock was that he was released from liability for extra assessments provided for in the original subscription, and the court properly said that the mutual assent of the parties was all that was necessary.

It is manifest that, in order for there to be a mutual assent, there must be something to be assented and agreed to on each side. Where the parties agree to rescind the contract, each one gives up the provisions for his benefit, the mutual assent is complete, and the parties are then competent to make any new contract that may suit them. Where one piece of work is substituted ¹⁵⁷ for another, the contractor is released from doing one, in consideration that he will do the other. But where one party refuses to do the work, which his contract requires him to do, or even threatens to abandon the work, unless he is paid more, and the other promises to pay more, the original contract still remaining subsisting, we consider it merely a promise to pay for what he was already obliged to do, and a nudum pactum; consequently there was no error in sustaining demurrers and striking pleas, as set out in assignments Nos. 6 to 16, inclusive.

There was no error in sustaining the demurrer to the ninth plea. Said plea alleges that the ordinance in question was not passed until two weeks after the time when defendant was to commence work on the houses according to the contract, and the contract is set out in the complaint, and does not fix any time when work was to be commenced. Moreover, the plea does not show whether the agreement to have the ordinance passed was made at the time of the original contract or after, nor whether there was any consideration for it. It does not set up any supposed invalidity in the agreement.

There was no error in admitting the certificate of the architect. The contract (section 5) particularly provided for the certificate and authorized the plaintiff to act on it. The admission of the paper does not necessarily make it conclusive evidence of the facts recited. That matter could be brought up by the offer to controvert it.

The certificate of the architect (Exhibit "E") is also provided for by section 5 of the contract, and was therefore admissible. The certificate states that the architect had audited the expense incurred, etc., in accordance with the provisions of the contract. The exception to the introduction of this certificate did not suggest that there had been anything wrong about the manner in ¹⁵⁸ which the expense account was audited, but merely that it was "not accompanied by the papers required by article 5 of the contract." Said article does not require such certificate to be accompanied by any papers.

Article 5 of the contract provides that the certificate of the architect as to the expenses incurred by the owner and the damages incurred through default "shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties." The architect's certificate was made out in accordance with the contract, and certified that the amount due plaintiff is one thousand and thirty-five dollars and thirty-four cents, and the court, on request of the plaintiff, instructed the jury, if they believed the evidence, to find for the plaintiff for that amount.

Where a building contract specially provides that the certificate of the architect shall be final and conclusive, it is conclusive and binding in its legal operation and effect on the parties to the contract, and can be impeached only for fraud, or such gross mistakes as would imply bad faith or a failure to exercise an honest judgment: 6 Cyc. 40-45, and notes; Tally v. Parsons, 131 Cal. 516, 63 Pac. 833; Charlton v. Scoville, 144 N. Y. 691, 39 N. E. 394; Baltimore etc. Ry. Co. v. Scholes, 14 Ind. App. 524, 56 Am. St. Rep. 307, 43 N. E. 156; United States v. Gleason, 175 U. S. 588,

20 Sup. Ct. Rep. 228, 44 L. ed. 284; *Martinsburg v. March*, 114 U. S. 549, 9 Sup. Ct. Rep. 1035, 29 L. ed. 255.

There was no error in giving said general charge, and, that being the case, it is unnecessary to discuss other charges and points on evidence raising the same question.

The judgment of the court is affirmed.

Dowdell, C. J., and McClellan and Mayfield, JJ., concur.

A Written Contract may be Modified by Parol.—After a contract has been reduced to writing the parties may, before a breach thereof, make a new and valid contract, not in writing, either annulling the former agreement altogether, or adding to, subtracting from, varying or qualifying its terms: *Harris v. Murphy*, 119 N. C. 34, 56 Am. St. Rep. 656, and note thereto at page 661, discussing subsequent parol agreement to vary a writing. It is to be observed, however, that a past transaction, the obligation of which has been fully satisfied, will not sustain a new promise; and that a promise made to a person to induce him to perform an act which he is already bound in law to perform is without consideration and not binding: *Davis & Co. v. Morgan*, 117 Ga. 504, 97 Am. St. Rep. 171, and cases cited in the cross-reference note thereto.

The Conclusiveness of an Engineer's or Architect's Certificate, in connection with a building contract, is shown in the note to *Baltimore etc. Ry. Co. v. Scholes*, 56 Am. St. Rep. 314; *Young v. Stein*, 152 Mich. 310, 125 Am. St. Rep. 412.

DRENNEN v. DUNN.

[166 Ala. 213, 52 South. 313.]

JUDGMENT—*Suit on Judgment—Scire Facias.*—The judgment at the end of a suit on a judgment is for the debt and damages; but on a scire facias it is that the plaintiff have execution. (p. 29.)

SCIRE FACIAS—*Nature of Writ—Concurrent Remedy.*—The writ of scire facias is not a substitute for the action of debt upon the judgment, but is an independent, concurrent remedy, and, until the debt evidenced by the judgment has been satisfied, the plaintiff may prosecute his action of debt and his proceeding by scire facias at the same time, and the pendency of one is no defense against the other. (p. 29.)

SCIRE FACIAS—*Concurrent Remedies.*—A Plaintiff in Judgment may have his remedy by a rule to show cause why execution should not issue and his action of debt on the judgment concurrently. (p. 30.)

Action by Drennen against Dunn. The plaintiff, as a surviving partner, sought to recover judgment upon a judgment rendered on the fifth day of May, 1890, which judgment was set out in the complaint. The defendant said that the cause should abate, for that, before the filing of this suit, the plaintiff in this cause, with others, had filed a suit in the

city court of Birmingham against defendant and others, seeking to recover for the same cause of action sued on in this cause, and that said cause was still pending. The evidence showed that there was filed in the city court of Birmingham on June 25, 1907, by D. M. Drennen, who is the plaintiff in the above cause, and the executor of the will of William Drennen, against Evans J. Dunn, who is defendant in this suit, a motion to revive the judgment sued on in this cause, and that said motion was still pending for trial on the jury docket of said city court of Birmingham, upon which the court sustained the plea in abatement. There was a judgment for the defendant, and the plaintiff appealed.

Stallings & Drennen, for the appellant.

Bowman, Harsh & Beddow, for the appellee.

²¹⁴ SAYRE, J. To an action of debt on a judgment the trial court sustained a plea in abatement setting up the pendency of a scire facias to revive the judgment sued on, or, to speak more in accordance with the record, the court sustained a plea of a pending suit upon proof of a pending scire facias. This was error. It has been held that for some purposes a writ of scire facias to revive a judgment may be regarded as a suit upon the judgment: *Hanson v. Jacks*, 22 Ala. 549. Certainly, it calls for a defense, and the defendant may plead matters subsequent to the rendition of the judgment. And so in respect to parties it is in the nature of an action upon the judgment: *Baker v. Ingersoll*, 37 Ala. 503. The judgment at the end of the suit on the judgment is for debt and damages; on the scire facias, that the plaintiff have execution. It has long been held that the writ of scire facias is not a substitute for the action of debt upon the judgment, but is an independent, concurrent remedy, and until the debt evidenced by the judgment has been satisfied, the plaintiff may ²¹⁵ prosecute his action of debt and his proceeding by scire facias at the same time, and the pendency of one is no defense against the other: *Carter v. Colman*, 34 N. C. 274; *Lambson v. Moffett*, 61 Md. 426; *Lafayette County v. Wonderly*, 92 Fed. 313, 34 C. C. A. 360; 1 Black on Judgments, sec. 482a.

In *Field v. Sims*, 96 Ala. 540, 11 South. 763, there was suit upon a judgment rendered by a justice of the peace. To a plea of the statute of limitations of six years the plaintiff replied that executions had been issued at regular intervals. The court said: "So long as the judgment remains unsatisfied, the common-law right to sue thereon is not suspended by the plaintiff seeking the benefit of a concurrent remedy given him by the statute for the enforcement of the judgment by means of an execution." In *Kingsland v.*

Forrest, 18 Ala. 519, 52 Am. Dec. 232, a similar question has been decided. It was there said: "The remedy given by the statute (the remedy by execution within ten years without scire facias) is cumulative merely, and a plaintiff may, if his judgment be not satisfied, sue in debt upon it, although he could, under the statute, issue an alias execution." It is clear that the plaintiff in judgment may resort at the same time to execution and his action of debt on the judgment. There seems to be no reason why he may not as well have his remedy by a rule to show cause why execution should not issue and his action of debt concurrently. No reason has been assigned to the contrary, and, upon consideration of the cases cited from other courts and the expressions quoted from our own adjudications, we so hold.

Reversed and remanded.

Dowdell, C. J., and Simpson and McClellan, JJ., concur.

The Object of a Scire Facias is not to extend the lien of a judgment, but to enable the creditor to enforce his lien by execution: *Mower v. Kip*, 6 Paige Ch. 88, 29 Am. Dec. 748. The proper judgment in scire facias is that the plaintiff have execution of the judgment described in the writ: *Bank of Eau Claire v. Reed*, 232 Ill. 238, 122 Am. St. Rep. 66, and note thereto on the subject of scire facias. As to the origin and nature of scire facias, see, also, the note to *Brown v. Bell*, 133 Am. St. Rep. 61.

As to When an Action of Debt will Lie upon a Judgment, see *Kingsland v. Forrest*, 18 Ala. 519, 52 Am. Dec. 232, and cases cited in the cross-reference note thereto; *Citizens' Nat. Bank v. Lucas*, 26 Wash. 417, 90 Am. St. Rep. 748; *Kaufman v. Richardson*, 142 Ala. 429, 110 Am. St. Rep. 40; *Haynes v. Blanchard*, 194 Mass. 244, 120 Am. St. Rep. 551.

CANTERBURY & GILDER v. MARENGO ABSTRACT COMPANY.

[166 Ala. 231, 52 South. 388.]

RECORDED JUDGMENT as Lien upon Another Judgment.—

One holding a recorded judgment acquires no lien thereby upon another judgment obtained by the judgment debtor, as the latter judgment is merely in the nature of a chose in action, and not properly subject "to levy and sale under execution," which is the only property subject to the statutory lien created by recordation. (p. 32.)

AN ASSIGNMENT is a Good Equitable Assignment whenever, by its terms, the person to whom the obligation is due authorizes the payment thereof to another, either for his own use or for that of some other person, or authorizes anyone to receive or hold the moneys and to apply them to any specific purpose other than for the use and benefit of the assignor. (p. 32.)

GARNISHMENT—When Subordinate to Equitable Assignment.

A garnishment is subordinate to a good, pre-existing equitable assignment, though it is not perfect at law. (p. 32.)

GARNISHMENT—When Subordinate to Assignment of Judgment.—The lien of a garnishment is subordinate to the assignment of a judgment, based on a valuable consideration, and made seventeen days prior to the levy of execution by the sheriff under the judgment and a like period before the service of the garnishment on the sheriff. (p. 32.)

The defendant company procured a garnishment, in aid of suit, to be served on the sheriff, who held moneys collected for one Small on an execution on a judgment secured by Small against others. The plaintiffs interposed, without objection, a claim to such moneys under an assignment to them of Small's judgment. The garnisher, the Marengo Abstract Company, obtained judgment and the claimants appealed.

I. Canterbury, for the appellant.

Abraham & Taylor, for the appellee.

²³² **McCLELLAN, J.** G. E. Small secured, in 1904, a judgment in a justice's court against Tim and Susie Fritz. Levy of execution having been made on property as that of the defendants in execution, Ballew interposed a claim thereto. This claim suit was decided in favor of the plaintiff in execution. Ballew's effort to review that judgment, both by appeal and certiorari, respectively, failed in the circuit court of Marengo. Ballew's claim bond was forfeited, and execution was thereupon issued against him and his sureties. On November 19, 1908, the sheriff collected under that execution the sum of seventy-three dollars and four cents. On that day the appellee caused to be issued and served a writ of garnishment, running to the sheriff, in aid of a judgment rendered in the circuit court of Marengo, and seasonably recorded by appellee in the year 1904, for the sum of upward of two hundred dollars, against G. S. Small. Without objection, Canterbury & Gilder, attorneys, interposed as claimants of said sum so shown by the sheriff's answer to appellee's writ of garnishment to be in the custody of the sheriff. The ground of their claim was stated to be an assignment by G. E. Small to Canterbury & Gilder, on November 2, 1908, of his interest in the "judgment which he had recovered against Tim Fritz et al., R. C. Ballew, claimant," and that the money in the hands of ²³³ the garnishee was proceeds arising from an enforcement of an execution by the sheriff in that proceeding.

The agreed statement of facts on which the trial—contest between appellee and appellants for the sum referred to—was had confirms the facts we have stated. But the agreed statement goes further, and upon it appellants assert a claim of a lien, under Code of 1907, section 3011, for services to

Small as attorneys in the proceedings wherefrom the sum in controversy was derived. The recordation of the appellee's judgment, rendered by the circuit court against G. E. Small, did not avail to subject Small's judgment against the Fritzes or Ballew to the statutory lien created by the recordation of such judgment in the probate office, for the reason that that lien is imposed only upon such property as was subject "to levy and sale under execution": Code 1907, sec. 4157. Small's judicially declared rights against the Fritzes, or Ballew, were in nature "things in action" merely: Code, sec. 4091; *Tiffany v. Stewart*, 60 Iowa, 207, 14 N. W. 241; *Gardner v. Mobile etc. R. R. Co.*, 102 Ala. 635, 48 Am. St. Rep. 84, 15 South. 271; *Henderson v. Hall & Farley*, 134 Ala. 455, 32 South. 840, 63 L. R. A. 673; 2 Words and Phrases, p. 1144 et seq. Accordingly, appellee can take nothing, in this instance, as the result of the lien asserted to have been created by the recordation of the judgment in its favor against Small.

This ruling remits the appellee to its right to this money to the garnishment proceeding. The service of the writ was effected on November 19, 1908. The answer was filed July 19, 1909. The assignment to Canterbury & Gilder, based upon valuable consideration, was made on November 2, 1908, seventeen days prior to the collection by the sheriff of the money on Small's execution from the justice's court, and the like period anterior ²³⁴ to the service of the writ of garnishment. The inquiry then is: Must the rights, equitable only, let it be granted for the occasion, created by the assignment, be postponed to the satisfaction of the asserted lien of the garnishment? We cannot improve upon the full response to the stated question to be found in 1 Freeman on Executions, page 859, section 170: "By the common law the assignment of choses in action was not recognized, though the assignee was generally permitted to make the assignment productive by conducting an action in the name of the assignor. But, even under the systems of jurisprudence in which an assignment is not recognized at law, it is enforced against a garnishment. In other words, whether an assignment is recognized at law or not, a garnishment is subordinate to all pre-existing equitable assignments. It is not essential that the assignment should be perfect at law. It is sufficient if it is a good equitable assignment; and it is a good equitable assignment whenever, by its terms, the person to whom the obligation is due authorizes the payment thereof to another, either for his own use or for that of some other person, or authorizes anyone to receive or hold the moneys and to apply them to any specific purpose other than for the use or benefit of the assignor": 1 Freeman on Executions, sec. 170. Investigation of the numerous decisions noted to the

cited section discloses their support of the text. This court, in *Wellborn v. Buck*, 114 Ala. 277, 21 South. 786, and in *Harrison v. Louisville & N. R. R. Co.*, 120 Ala. 42, 23 South. 790, recognized and applied a principle within the declaration of the quoted text.

There is nothing in this record to impeach, or so tending, the bona fides of the assignment by Small to appellants. That assignment expressly covered the source from which the sum in question came. The view ²³⁵ prevailing below enforced appellee's right to the sum involved as superior to that of appellants. The converse, we hold, should have prevailed.

Accordingly, the judgment must be reversed and the cause is remanded.

Dowdell, C. J., and Simpson and Sayre, JJ., concur.

As to What Constitutes a Good Equitable Assignment, see *Wood v. Casserleigh*, 30 Colo. 287, 97 Am. St. Rep. 138; *Southern Mut. Life Ins. Assn. v. Durdin*, 132 Ga. 495, 131 Am. St. Rep. 210, and cases cited in the cross-reference note thereto.

As to the Priority of an Assignment of a Demand Over a Subsequent Garnishment, see *Metcalf v. Kincaid*, 87 Iowa, 443, 43 Am. St. Rep. 391; *Walton v. Horkan*, 112 Ga. 814, 81 Am. St. Rep. 77.

As to the Priority of Assignment of Judgment Over Subsequent Garnishment, see *Schoolfield, Hanauer & Co. v. Hirsh*, 71 Miss. 55, 42 Am. St. Rep. 450. An assignment of a judgment is not liable to be defeated by a subsequent garnishment of the judgment debtor: *Scott v. Rohman*, 43 Neb. 618, 47 Am. St. Rep. 767.

POLLAK v. WINTER.

[166 Ala. 255, 51 South. 998, 52 South. 829, 53 South. 339.]

EVIDENCE—Burden of Proving Negative.—As a general rule, the burden of proving a negative averment is not upon the plaintiff, but this rule does not seem to prevail in actions upon an open account, as distinguished from a stated or uncontroverted one. (p. 34.)

ACCOUNT, ACTION ON—Proof Required of Plaintiff.—When suit is brought upon an open account the plaintiff does not overcome the burden by merely showing the rendition of service and the value of the same, but must offer some proof that it was not paid for when rendered or when due. (p. 34.)

CONTRACTS—Payment—Pleading and Proof.—Payment, after the breach of a contract, is new matter to be specially pleaded and proved by the defendant. Payment after breach cannot be shown under the general issue. (p. 34.)

CONTRACTS—Breach—Proof Required of Plaintiff.—In an action on a contract the plaintiff must prove a breach of the contract

by showing that his debt was not paid when contracted or at maturity. (p. 34.)

CONTRACTS—General Charge.—In an Action on a contract, the plaintiff is not entitled to the general charge where a plea of the general issue has been interposed, and he has not shown a breach of the contract sued on. (p. 34.)

Assumpsit by Sallie Winter, as administratrix, against Pollak. There was a judgment for the plaintiff and the defendant appealed.

J. B. Brown, for the appellant.

Gunter & Gunter, for the appellee.

257 ANDERSON, J. As a general rule, the burden of proving a negative averment is not upon the plaintiff, but this rule does not seem to prevail in actions upon an open account, as distinguished from a stated or uncontroverted one; and when suit is brought upon an open account the plaintiff does not overcome the burden by merely showing the rendition of service and the value of same, but must offer some proof that it was not paid for when rendered or when due: *Rice v. Schloss*, 90 Ala. 416, 7 South. 802; *Cook v. Malone*, 128 Ala. 664, 29 South. 653; *Enis v. Harris*, 103 Ala. 330, 15 South. 834; 16 Ency. of Pl. & Pr. 174-179; *Van Giesen v. Van Giesen*, 10 N. Y. 316; *Lent v. New York R. R. Co.*, 130 N. Y. 504, 29 N. E. 988; *Great Western Railroad v. Bacon*, 30 Ill. 347, 83 Am. Dec. 199. All the authorities seem to agree that payment after a breach is new matter, to be specially pleaded and proven ²⁵⁸ by the defendant, and, while they are divided as to whether or not the plaintiff must prove nonpayment when due or at maturity, the weight is with the holding of this court, and seems to proceed upon the theory that the plaintiff must prove a breach of the contract sued on, and in order to do this he must show that his debt was not paid when contracted or at maturity. After the plaintiff shows a breach of contract, and the defendant relies upon payment subsequent to said breach, he must plead and prove payment, which said subsequent payment cannot be shown under the general issue.

The plaintiff in the case at bar, not having shown a breach of the contract sued on, was not entitled to the general charge, which was erroneously given by the trial court, inasmuch as the defendant interposed a plea of the general issue. The judgment of the circuit court is reversed and the cause is remanded.

Dowdell, C. J., and Sayre and Evans, JJ., concur.

Note by Anderson, J.—After this case was put out, it was again carefully considered upon rehearing, the opinion was considered as sound, and the application was overruled. After this one of the concurring judges put it back on the rehearing docket, and the question was considered en banc; and while Justice Evans withdrew his concurrence, and dissents, the opinion is concurred in by Dowdell, C. J., and McClellan and Sayre, JJ., who, with the writer, constitute a majority of the court. Justice Simpson was absent, and Justice Mayfield did not wish to dissent or concur.

Judge Evans Dissented and in part said: "Our system of pleading is like an exogenous plant, whose capacity for multiplying limbs is only limited by the climate and the fertility of the soil. It must be admitted that no system of pleading can ever be perfect in its operation and effect as long as men are imperfect. And, if men were perfect, almost any system would do; but as long as morality lags behind intelligence, as long as men have more knowledge than virtue, we ought, in all things that pertain to our government, have that system which will give the greatest aid and comfort to these neglected children. What that system should be in this state could, in my opinion, best be devised after a most thorough investigation into the workings of the different systems of pleading of the different states and countries of civilization by a body of men most learned in the law and altruistic in character.

"It may be true that the common-law system had its snake heads; but it seems to me that in nearly every instance where one has been cut off by our legislature, two or more have grown out to take its place. Under our present system one may plead as many pleas as he pleases; he may plead inconsistent pleas. The plaintiff may reply with as many replications as he pleases, and with inconsistent replications, and so on. As to whether there shall be one or a thousand issues of law or fact depends upon 'the climate and the fertility of the soil.' The only natural place for this process to stop, with counsel who understands his business, is when he has reached a point where he feels reasonably sure of a verdict or a reversal of the judgment.

"We have also the written charge which counsel for either party may ask. In this, if his vocabulary is large, his knowledge of the meaning of words accurate, and his imagination vivid, he may ask a dozen of such charges on each point of law involved in the case, each one stating the point correctly but in different words; and he may also ask a dozen more on each point which states the law almost correctly. Supposing that there were only one hundred issues, and only twelve written charges asked by each side upon each issue, there would still be twelve hundred written charges to each side to be passed upon by the trial court. Suppose that six hundred are given and six hundred refused to each side, then there would be twelve hundred to be reviewed by this court, besides the probability that the jury was too much instructed to understand the instruction. Do I object to the system? I cannot say that I do. While, as a citizen or a judge, I deplore it, yet as a lawyer and dialectician I rejoice in it. As a means for the administration of justice, its efficacy is to be doubted; while as an intellectual gymnasium its appointments could scarcely be improved upon. I make this digression merely in explanation of my conduct in not having investigated sooner than I did, and to show why I made two guesses beforehand.

"The complaint is in assumpsit, and contains two of the common counts. They are as follows: 'The plaintiff claims of the defendant the sum of three thousand dollars due by account from him to her testator, John G. Winter, in his lifetime, on, to wit, the twenty-first day of February, 1904; and plaintiff claims of the defendant a like sum for work and labor done by her testator for the defendant at his request, during, to wit, the years 1901, 1902, 1903, and 1904, which said sums, with interest thereon, are due and unpaid.' I wish to say just here that the word 'unpaid,' as used above, is tautologous, as the idea expressed by it is included in the meaning of the word 'due,' which preceded it; for the word 'due' carries with it, not only the meaning that the time for payment has arrived or past, but also that the debt is unpaid—that is, still owing. The Code form for a promissory note is as follows: 'The plaintiff claims of the defendant — dollars, due by promissory note made by him on the — day of — and payable on the — day of —, with interest thereon.' Here the word 'due' means that the debt is owing, and hence unpaid. The sum of money claimed cannot be due if it has been paid. In a suit on an account stated, the Code form, being one of the common counts, ends as follows: 'Which said sum of money, with the interest thereon, is due and unpaid.'

"I have set forth the counts of the complaint, and also the forms for counts upon promissory notes and accounts stated, in order to bring them all before the reader's eye, that he may see that there is either no difference, or no material difference, between them upon the allegation of nonpayment. The opinion says (the italics mine): 'As a general rule, the *burden* of proving a *negative averment* is not upon the plaintiff, but this rule does not seem to prevail in actions upon an *open account*, as distinguished from a *stated or uncontroverted one*; and when suit is brought upon an open account, the plaintiff does not overcome the burden by merely showing the rendition of service and the value of same, but must offer some proof that it was not paid for when rendered or when due'; citing *Rice v. Schloss*, 90 Ala. 416, 7 South. 802; *Cook v. Malone*, 128 Ala. 664, 29 South. 653; *Enis v. Harris*, 103 Ala. 330, 15 South. 834; 16 Cyc. of Pl. & Pr. 174-179; *Van Giesen v. Van Giesen*, 10 N. Y. 316; *Lent v. New York E. R. Co.*, 130 N. Y. 504, 29 N. E. 988; *Great Western R. R. Co. v. Bacon*, 30 Ill. 347, 83 Am. Dec. 199. I hope to demonstrate that there can be no distinction drawn between a suit upon an open account, a suit upon a stated account, and a suit upon a promissory note, so far as the burden of proof as to payment vel non of the debt sued upon is concerned."

He then cited and reviewed the following authorities: *Cook v. Malone*, 128 Ala. 665, 29 South. 653; 19 Am. & Eng. Ency. of Law, 2d ed., 8, 10; *Jones on Evidence*, 2d ed., secs. 65, 67; *Phillips v. Adams*, 78 Ala. 237; *Alston v. Hawkins*, 105 N. C. 3, 18 Am. St. Rep. 874, 11 S. E. 164; 22 Am. & Eng. Ency. of Law, 2d ed., 587; *Great Western R. R. Co. v. Bacon*, 30 Ill. 347, 83 Am. Dec. 199; *Van Giesen v. Van Giesen*, 10 N. Y. 316; *McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696.

As to the Burden of Proving a Negative, see *Great Western R. R. Co. v. Bacon*, 30 Ill. 347, 83 Am. Dec. 199; *Boulden v. McIntire*, 119 Ind. 574, 12 Am. St. Rep. 453.

The Burden of Proving Payment is on the defendant, where the plaintiff has proved the existence of the debt sued on, although, in his complaint, it was necessary for the plaintiff to allege nonpayment: *Melone v. Ruffino*, 129 Cal. 514, 79 Am. St. Rep. 127.

Payment is an Affirmative Defense Which must be Specially Plead: *Harvey v. Denver etc. R. R. Co.*, 44 Colo. 258, 130 Am. St. Rep. 120.

LEHMAN-DURR COMPANY v. FOLMAR.

[166 Ala. 325, 51 South. 954.]

APPEAL—Decree of Restitution will Support.—If a party has been deprived of land by a decree which is subsequently reversed, a decree restoring the land to him is such a final decree as will support an appeal. (p. 39.)

REVERSAL OF JUDGMENT—Restitution of Land—Rents and Interest.—If a party has been deprived of land by a decree which is subsequently reversed, and he is entitled to a judgment for the restoration of the land, he is also entitled to the rents received with the interest thereon during the time they were wrongfully withheld, and is not answerable for compensation for services by the wrongdoer in his assumption of control and management of the land. (pp. 39, 40.)

REVERSAL OF JUDGMENT—Restitution of Property—Nature of Remedy.—The restitution of property of which a person has been deprived by an erroneous judgment that has subsequently been reversed is a remedy to make such person whole. The decree of restitution is intended to restore to the aggrieved party that which he lost in consequence of the erroneous judgment reversed; and it may be a part of the reversed judgment, or it may be a separate judgment based on the one of reversal. (p. 40.)

REVERSAL OF JUDGMENT OF RESTITUTION.—A Judgment of Restitution of land, of which a party has been deprived by a judgment subsequently reversed, does not necessarily finally determine the rights of the parties to the property restored. (p. 40.)

Bill against George A. Folmar and others to set aside a fraudulent conveyance and cross-bill in the nature of setoff. For the facts in the prior proceedings, see *Lehman-Durr Co. v. Folmar*, 154 Ala. 480, 45 South. 289. There was a decree for the respondents and the complainant appealed.

J. M. Chilton, for the appellant.

Gunter & Gunter, for the appellee.

326 **MAYFIELD, J.** The case on appeal is thus correctly and succinctly stated by counsel for appellant:

"Lehman-Durr Company filed a bill to set aside a fraudulent conveyance executed by Folmar to his children. There was a final decree in favor of the complainant, and the property alleged to have been fraudulently conveyed was put up for sale under the decree. George A. Folmar filed

a cross-bill in the main cause, in which he alleged that, when he executed the notes on ³²⁷ which the suit was founded on Lehman-Durr Company, the latter had agreed to transfer to him all the collaterals which it had held for a certain debt, and amongst those collaterals was a note for a large sum which they had not surrendered. He prayed an offset of the amount of this note. There was a demurrer to the cross-bill, which was sustained by the chancellor, and it was dismissed. This court held that the lower court erred in dismissing the cross-bill, and reversed the case. After the reversal, George A. Folmar made a motion in the court below, praying that Lehman-Durr Company be compelled to restore the lands, and to account for the rents thereof pending the time possession of the same had been detained under said purchase (Record, pp. 33, 34). There was a demurrer to the petition (Record, pp. 35, 36). The chancellor sustained the demurrer, but made a decretal order of reference. Lehman-Durr Company appealed to this court, and the appeal was dismissed (154 Ala. 480, 45 South. 289) on the ground that the order of reference was merely interlocutory, and that, until it had ripened into a decree for money, an appeal could not be taken from it.

"After the dismissal of the appeal, the register proceeded to hold the reference. The lands had already been delivered up pursuant to a notice from the solicitors of Lehman-Durr Company to the solicitors for said Folmar (Record, pp. 41, 42), so that the question before the register was simply one of rents and profits for which Lehman-Durr Company should account during the period of its possession. In the decree of reference (Record, p. 37) the chancellor held that the rule applying on an accounting by and between mortgagor and mortgagee, after default and before foreclosure, as to the liability of the mortgagee to account for rents and profits, does not apply. The mortgagee is regarded ³²⁸ as a trustee and must use due diligence in renting the property. Here there is no such relation, and the court merely gives back to the petitioners what has been received from them, and not such as might have been received under certain conditions. The court then rendered a decree sustaining the demurrers to the petition of Folmar and his associate respondents (who had joined in the same amendment); but, notwithstanding the fact that it sustained the demurrers, it proceeded to render a decree directing the register to state an account, in which he should ascertain, and report: (1) What rents and profits had been received by the complainants, of the property and of each parcel separately, and when so received separately; (2) what taxes had been paid out by the complainants on the lands and on each parcel separately, and when paid; and (3) what repairs had been

made on the property, and when made, and the nature of the same, together with the condition of the repairs (Record, pp. 37, 38).

"The register held the reference as required, and stated the account, and reported a balance owing by Lehman-Durr Company of nine hundred and ninety-four dollars and ninety-seven cents (see page 53). On the reference Lehman-Durr Company filed a statement showing the amount of rents collected and when collected, and the taxes paid. They also claimed credit for certain expenses in the way of commissions charged by one Sentell, for renting out the property and collecting the rents. There was an agreement of counsel (shown on page 44 of the Record) that the place of business of Lehman-Durr Company was in the city of Montgomery, Alabama; that the lands sold were situated in Crenshaw county, Alabama, where the plaintiff had no representative; that, after the lands were bought under the decree, plaintiff employed Sentell, who resided near the land, and who was a competent man for that purpose, ³²⁹ to find tenants for the land and collect the rents; that Sentell performed this service and charged ten per cent commissions on the rents collected therefrom; that the charge was a reasonable charge for the service; and that Lehman-Durr Company paid the commissions to him as stated in the account. The account itself, rendered by Lehman-Durr Company, was attached as Exhibit 'A' to the report, and appears on pages 47-50 of the Record. The register allowed these commissions paid to Sentell, and calculated the interest on the balance, refusing to make annual rests in the calculation of the interest. Folmar excepted to the report of the register, on these two grounds, and the chancellor sustained the exception, reversed the register, and proceeded to render such decree as should have been rendered on the evidence before the register, decreeing that Lehman-Durr Company pay to Folmar the sum of nine hundred and ninety-four dollars and ninety-seven cents. This was nearly three hundred dollars more than the register ascertained to be due, as shown by this report (Record, p. 50). The chancellor, in overruling the register, proceeded to calculate the interest on the yearly rents, after giving credit for the taxes, and refused to allow any of the commission paid."

The decree appealed from in this case is final in such sense as to support an appeal under section 2837 (426) of the Code: 1 Black on Judgments, 2d ed., sec. 41; Walker v. Crawford, 70 Ala. 567.

We find no reversible error in the decree of the chancellor appealed from, ordering Lehman-Durr Company to pay over to the defendants the sum of nine hundred and ninety-four

dollars and ninety-seven cents. This appears to have been the amount of the rents, with the interest thereon, received from the lands during the time they were wrongfully held by Lehman-Durr Company, and for which restitution was made by the decree. Rents are incident to the lands, and follow them; interest ³³⁰ is incident to the principal, and follows it. The decree of restitution rendered only restored that which was wrongfully acquired (certainly wrongful, so far as concerns this appeal). It only made Folmar whole—only gave him that which he would have had but for the wrongful holding. It only restored the land taken and held, and its incidents.

Lehman-Durr Company's acts being wrongful, it was properly denied compensation for services in its wrongful assumption of control and management of Folmar's land. Certainly this must be considered to be the attitude and condition of the parties so far as this appeal is concerned.

Restitution, such as this, is a remedy, the purpose of which is to restore to an appellee his own or its equivalent, as near as may be, of which he has been deprived by an erroneous judgment which is reversed. A decree of restitution is intended to restore to the aggrieved party that which he lost in consequence of the erroneous judgment reversed. It may be a part of the reversed judgment, or it may be a separate judgment based on the one of reversal.

A judgment or decree of restitution, such as the one here appealed from, does not necessarily finally determine the rights of the parties to the subject matter restored. It may or may not do so, depending, of course, upon the judgment or decree of reversal. The decree of restitution itself, aside from the decree of reversal, does not undertake to determine the rights of the parties to the subject matter, further than to restore the parties to the condition in which they would have been but for the erroneous judgment or decree which is reversed: *Ex parte Walter*, 89 Ala. 237, 18 Am. St. Rep. 103, 7 South. 400; *Wright v. Hurt*, 92 Ala. 591, 9 South. 386; *West v. Hayes*, 120 Ala. 98, 74 Am. St. Rep. 24, 23 South. 727; ³³¹ *Smith v. Gayle*, 58 Ala. 600. See, also, *Quan Wo Chung Co. v. Laumeister*, 83 Cal. 384, 17 Am. St. Rep. 261, 23 Pac. 320; *Haebler v. Myers*, 132 N. Y. 363, 28 Am. St. Rep. 589, 30 N. E. 963, 15 L. R. A. 588.

The decree of the chancellor is affirmed.

Dowdell, C. J., and Simpson and McClellan, JJ., concur.

For the Object of Restitution and the Form of Judgment, see Haebler v. Myers, 132 N. Y. 363, 28 Am. St. Rep. 589. Restitution upon the reversal of a judgment is discussed in the notes to *Quan Wo Chung Co. v. Laumeister*, 17 Am. St. Rep. 264; *Cowdery v. London* etc.

Bank, 96 Am. St. Rep. 124; and in the subsequent cases of Florence etc. Iron Co. v. Louisville Banking Co., 138 Ala. 588, 100 Am. St. Rep. 50; Ure v. Ure, 223 Ill. 454, 114 Am. St. Rep. 336.

On the Reversal of Judgments, see the note to Cowdry v. London etc. Bank, 96 Am. St. Rep. 124.

GEWIN v. MT. PILGRIM BAPTIST CHURCH.

[166 Ala. 345, 51 South. 947.]

RELIGIOUS SOCIETIES—Power to Hold Property.—An unincorporated religious society is without capacity to acquire or hold title to property. (p. 42.)

CHARITIES—Conveyance to Religious Society.—An agreement to convey land to trustees for an unincorporated religious society does not, in strictness, create a charitable use. (p. 42.)

RELIGIOUS SOCIETIES.—The Jurisdiction of Equity over voluntary religious associations and their property is maintainable, independently of the English statute of charitable uses and of any prerogative power of the court, on the ground of the trust nature of the property, the charitable uses for which it is designed, and the inadequacy of legal remedies. (p. 42.)

RELIGIOUS SOCIETIES—Power to Compel Conveyance to Church.—Equity has power to compel the specific performance of an agreement to convey land, made to the trustees of a religious society before it was incorporated, upon the application of the society after its incorporation. (p. 43.)

RELIGIOUS SOCIETIES—Effect of Incorporation.—An organization, under the statute, by the majority of a religious society, operates, ipso facto, as a transfer of the rights and interests of individual members to the corporation thereby created. (p. 43.)

RELIGIOUS SOCIETIES.—Courts have No Power to revise ordinary acts of church discipline or pass upon controverted rights of membership; but such considerations are attended to when they form the basis upon which civil rights and rights of property depend. While the courts cannot decide who ought to be members, they may inquire whether any disputed act of the church affecting property rights was the act of the church or of persons having no authority. (p. 43.)

RELIGIOUS SOCIETIES—Factional Divisions—Title to Property.—The rule of the civil courts is, where factional differences occur in an ecclesiastical body, that the title to church property is in that part of it which is acting in harmony with its own law, and the ecclesiastical laws, and usages, customs, and principles which were accepted among the members before the dispute began, are the standards for determining which party is right. (p. 43.)

RELIGIOUS SOCIETIES—Property.—Where a Minority Withdraws from a church, organized and governed as is the Baptist church, it relinquishes all right in the property of the church abandoned, and the court, being properly invoked, must so declare. (p. 44.)

RELIGIOUS SOCIETIES—Property—Division in Congregation. If an agreement is made to convey land to the trustees of a certain church, an unincorporated religious society, but the church divides

upon questions not of religious doctrine or denominational practice, and a majority of the members organize as a corporation, maintaining the same doctrine as the church had before its differences, the minority cannot defeat the specific performance of such agreement on a bill filed by the corporation. (pp. 43, 44.)

Bill by the church against Gewin and others for the specific performance of a contract to convey. There was a decree for the complainant and the respondents appealed.

Arthur L. Brown and Bush & Bush, for the appellants.

C. B. Powell, for the appellee.

³⁴⁷ SAYRE, J. At a time when Mt. Pilgrim Baptist Church was an unincorporated religious society, Messrs. Gewin and McGahey contracted to sell to Spencer and others, trustees for the church, a certain lot at Cleveland upon which it was proposed to erect a church building. At that time the services of the church were being held at another place. Schism intervened. The church divided into factions, each having its own pastor, and each claiming to be the true Mt. Pilgrim church. But before differences became irreconcilable payments on the new lot were completed by or for the church, and the old churchhouse was burned. Shortly afterward, when the contest had taken definite shape, the church was incorporated by the filing of a petition by Gray and others for incorporation under the statute. This bill is filed by the incorporated church, and seeks a decree requiring Gewin and McGahey to specifically perform their contract by executing a deed of conveyance of the lot to the incorporated church, that its title to the property be quieted against the claims of the defendants, and that the defendants be enjoined from holding religious services in the name of the complainant church, from collecting money in the name of the church, and from trespassing upon or interfering with the property of the church. Messrs. Gewin and McGahey in their answer avow their willingness and readiness ³⁴⁸ to convey if they only may be informed as to whom they ought in equity to convey.

The unincorporated society was without capacity to acquire or hold title: *Stewart v. White*, 128 Ala. 202, 30 South. 526, 55 L. R. A. 211. Nor did the conveyance to trustees—or rather, the agreement to convey—for the unincorporated society in strictness create a charitable use. Nevertheless, the jurisdiction of the chancery court over such voluntary associations and their property is maintained in this state, independently of the English statute of charitable uses and of any prerogative power of the court, on the ground of the trust nature of the property, the charitable uses for which it is designed, and the inadequacy of legal

remedies: *Burke v. Roper*, 79 Ala. 138; *Williams v. Pearson*, 38 Ala. 299; *Carter v. Balfour's Admr.*, 19 Ala. 814. Equity must therefore have power to compel a conveyance to the incorporated church. This will not involve the court in the impossible function of making a contract for the parties, nor require the performance of a contract differently from its agreed terms. An organization, under the statute, by the majority of a society, operates ipso facto as a transfer of the rights and interests of individual members to the corporation thereby created: *Happy v. Morton*, 33 Ill. 398. The incorporated church has succeeded to all the rights of the unincorporated church. The successor is the sole beneficiary of the contract entered upon by the trustees. The effort to enforce the contract necessarily involves an inquiry as to which of the factions stands for the true Mt. Pilgrim church. It would be unseemly and abhorrent to justice that such a question should be determined by the result of a race of diligence in securing an incorporation under the statute. The two factions of this church are not divided on any question of religious doctrine or denominational ³⁴⁰ practice. They seem to be more intent on the use of a name, and they evidently attach importance to the possession of the property of the church. The Baptist church is congregational in its policy. It is democratic in its organization. It is the right of each congregation to rule itself in accordance with the law of the church. The will of the majority having been expressed, it becomes the minority to submit. There are no appellate judicatories. A majority of the church in question had the right to determine whether the incorporation should be had. If it was had in accordance with the will of the majority, that will must be given effect here, else there would be no remedy for a wrong affecting property rights. It must be conceded that the courts have no power to revise ordinary acts of church discipline or pass upon controverted rights of membership: *Hundley v. Collins*, 131 Ala. 234, 90 Am. St. Rep. 33, 32 South. 575. But such considerations are attended to when they form the basis upon which civil rights and rights of property depend. While the courts cannot decide who ought to be members, they may inquire whether any disputed act of the church affecting property rights was the act of persons having no authority: *Bouldin v. Alexander*, 15 Wall. 131. 21 L. ed. 69. Where factional divisions occur in an ecclesiastical body, the rule of the civil courts is that "the title to church property . . . is in that part of it which is acting in harmony with its own law, and the ecclesiastical laws, and usages, customs and principles which are accepted among them before the dispute began, are the standards for determining which party is right": *Reorganized Church of Jesus Christ v. Church of Jesus Christ (C. C.)*, 60 Fed. 937, citing

McRoberts v. Moudy, 19 Mo. App. 26; Roshi's Appeal, 69 Pa. 462, 8 Am. Rep. 275; Baker v. Fales, 16 Mass. 488; White Lick Quarterly ³⁵⁰ Meeting of Friends v. White Lick Quarterly Meeting of Friends, 89 Ind. 136. It must follow that where a minority withdraws from a church, organized and governed as is the Baptist church, it relinquishes all right in the property of the church abandoned, and the court, being properly invoked, must so declare.

Appellants insist that they are the majority. A careful reading of the evidence does not lead us to that conclusion. The statute imposes no formalities in respect to proceedings for the election of trustees or instructing them to proceed for the incorporation of a church. Nor does the law of the church, so far as we have been informed. In this case we have discovered nothing unfair in the proceedings. The appellants seem to have been in the minority, and seem to have accepted for a time the role of secessionists. They had excommunicated about twenty per centum of the membership, including those who were elected by the appellee faction to the place of trustees. But this exclusion was without trial or ceremony, and was not recognized by the church as a whole nor by the persons excluded.

On the whole evidence, our conclusion is that the chancellor decreed properly, and his decree will be affirmed. The appellants Rogers, Spencer, and Demand must pay the costs of appeal in this court and in the court below.

Anderson, McClellan and Evans, JJ., concur.

As to What are Charitable Uses or Trusts, see the note to Hoeffler v. Clogan, 63 Am. St. Rep. 248; Estate of Graves, 242 Ill. 23, 134 Am. St. Rep. 302.

Jurisdiction Over Charitable Uses or Trusts Exists in Courts of Chancery, independently of the statute of charitable uses, 43 Elizabeth: Urmeys Exrs. v. Wooden, 1 Ohio St. 160, 59 Am. Dec. 615; Hoeffler v. Clogan, 171 Ill. 462, 63 Am. St. Rep. 241; Snider v. Snider, 70 S. C. 555, 106 Am. St. Rep. 754.

The Jurisdiction of Equity Over Voluntary Unincorporated Associations is the subject of a note to Kearns v. Howley, 68 Am. St. Rep. 856.

Property Held in Trust for an Unincorporated Religious Society vests in the corporation whenever the requisites of the statute are complied with so as to render them legally competent to take property in their corporate capacity: First Baptist Church v. Witherell, 3 Paige Ch. 296, 24 Am. Dec. 223.

A Majority of a Church Organization may Direct and Control Church Matters: Long v. Harvey, 177 Pa. 473, 55 Am. St. Rep. 733. The seceding members of a church forfeit all right to church property: McKinney v. Griggs, 5 Bush, 401, 96 Am. Dec. 360; Curd v. Wallace, 7 Dana, 190, 32 Am. Dec. 85; Gass v. Wilhite, 2 Dana, 170, 26 Am. Dec. 446. The title and use of the property of a divided congregation, and the offices pertaining thereto, belong to that portion which adheres to the denomination and conforms to its rules: Roshi's Appeal, 69 Pa. 462, 8 Am. Rep. 275.

The Power of Courts to Adjudicate Disputes Between Warring Church Parties is discussed in *Long v. Harvey*, 177 Pa. 473, 55 Am. St. Rep. 733; and note to *Morris St. Baptist Church v. Dart*, 100 Am. St. Rep. 734, showing the jurisdiction where property rights are involved.

CITY OF HUNTSVILLE v. MADISON COUNTY.

[186 Ala. 389, 52 South. 326.]

TAXATION—Special Assessments.—There is a Well-defined Distinction between general taxation and a local assessment for public improvements, such as pavements, sewerage, etc. (p. 46.)

TAXATION—Exemption from Special Assessment.—A constitutional or statutory exemption of public property from general taxation does not necessarily exempt it from special local assessment for public improvements. (p. 46.)

SPECIAL ASSESSMENTS—Exemption of County Property.—General language in a statute giving a city power to levy assessments for street improvements does not embrace county property within the city, devoted strictly to public uses; nor authorize the city to enforce a special assessment for such improvement against the county, under a general judgment against the latter. (pp. 46, 47.)

TAXATION—Exemption.—County Property, owned and held for public purposes, is generally exempt from taxation of any description, and is not to be deemed subject to taxation in any form, unless the intent of the legislature to render it so clearly appears. (p. 46.)

SPECIAL ASSESSMENTS.—No Lien can be Fixed on County Property, such as a courthouse square and the buildings thereon, situated within a city, for a special assessment levy against such property for street improvements. (p. 46.)

TAXATION—Method of Collection—Action.—Where the legislature has not authorized any method for collecting a tax, an action at law will lie to collect it; but where it has authorized a method of collection, the method is exclusive, and generally no action lies unless the statute expressly authorizes it. (p. 47.)

SPECIAL ASSESSMENTS—County Property.—No Benefit is derived by the taxpayers of a county, generally, who own a courthouse square and the buildings thereon, from the improvement of streets abutting on the square, in a city, within the meaning of a provision of the constitution which limits special assessments to the increased value resulting from the benefit to be derived from such improvements. (p. 47.)

EQUITY—Demurrer.—A Bill Without Equity is subject to demurrer testing its equity. (p. 48.)

Bill by the city against the county to declare and enforce a lien against the county courthouse and property situated within the city for a special assessment levy against it for paving and street curbing, etc. A demurrer to the bill, for want of equity, was sustained, and the complainant appealed.

Brickell & Smith, for the appellant.

Walker & Spragins, for the appellee.

³⁹¹ ANDERSON, J. That there is a well-defined distinction between general taxation and a local assessment for public improvements, such as pavements, sewerage, etc., there can be no doubt. It is also settled that constitutional or statutory exemption of public property from general taxation does not necessarily exempt it from special local assessment for public improvements; but, while there is a conflict, the weight, and, we think, the sounder authorities, hold that general language in a statute giving cities power to levy assessments ³⁹² for street improvements is not sufficient to embrace the property of the state or county which is devoted to strictly public uses, nor authorize the enforcement of such special assessment against it under a general judgment against the county. In other words, property owned and held by the state and counties for public purposes is generally exempt from taxation of any description, and is not to be deemed subject to taxation in any form, unless the intent of the legislature to render it so clearly appears: *Worcester County v. Mayor of Worcester*, 116 Mass. 193, 17 Am. Rep. 159; *Page and Jones on Taxation*, sec. 580; *Gray on Limitation of Taxing Powers*, secs. 1174, 1175, 1906; *Witter v. Mission School District*, 121 Cal. 350, 66 Am. St. Rep. 33, 53 Pac. 905; *Edwards Co. v. Jaspar Co.*, 117 Iowa, 365, 94 Am. St. Rep. 301, and note, 90 N. W. 1006; *City of Clinton v. Henry Co.*, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494; *Franklin Co. v. Ottawa*, 49 Kan. 747, 33 Am. St. Rep. 396, 31 Pac. 788. For an able and complete discussion of the subject, see note, 33 Am. St. Rep. 400. While there are many authorities holding that this special tax is permissible unless prevented by the statute, they are almost uniform in holding that it cannot be enforced by fixing a lien on the public property, and those that permit the levy merely authorize the collection by a personal judgment rather than by an action in rem. It must also be borne in mind that most of the statutes considered in this line of decisions did not confine the right to collect the tax solely by subjecting the property, but authorized a personal judgment. Therefore, in view of the fact that they all hold that the tax could not be enforced by an action in rem, we are of opinion that they would have held that the right to levy against such public property did not exist had the statutes prescribed an action in rem as the exclusive remedy to enforce ³⁹³ the collection of said tax. Article 26, page 638, Code of 1907, provides for the levy and assessment by municipal corporations of this special tax for public improvements and prescribes the remedy for the enforcement of the collection of same, and which is, of course, subject to

the limitations fixed by section 223 of the constitution of 1901. The authority to levy this tax is general, and the statute makes no express provision for the levy of same against state or county property held for public purposes. Nor can the power to do so be necessarily implied in view of the fact that the statute (section 1386) fixes a proceeding in rem as the sole method of enforcing the collection of said special tax. It is true, it authorizes the recovery of the amount of the assessment with interest and cost, but it can only be enforced against the property, and does not authorize a personal judgment against the owner. True, also, section 1398 authorizes a judgment, and section 1400 authorizes execution, but they apply only in case of an appeal to the supreme court and in cases where the appellant gave a supersedeas bond. "The general rule seems to be that, where the legislature has not authorized any method for collecting a tax, an action at law will lie to collect it. While the legislature, however, has authorized a method of collection, the method is exclusive, and generally in such case an action will not lie unless the statute expressly authorizes it": Gray on Limitations of Taxing Powers, secs. 1174, 1175; Worcester v. Worcester, 116 Mass. 193, 17 Am. Rep. 159.

There is another question which should be borne in mind in arriving at the legislative intent, and which seems to have been ignored in those cases holding that county property was liable to said special tax. The constitution expressly limits this tax so as not to exceed the increased value of the property resulting from ³⁹⁴ the benefit to be derived from such improvements. It is a matter of common knowledge that courthouse lots and the buildings thereon were procured and erected for public use, not to sell or rent, and it would be difficult to ascertain how the county could be materially or financially benefited because of the pavement or beautifying the streets of Huntsville. There can be no material enhancement in the value of the courthouse square that would prove of any substantial benefit to the taxpayers of Madison county generally. They own the square for certain purposes, not to rent or sell at a profit, and as a rule the investment is permanent, and for the use to which the property is adapted it is just as valuable to the public whether adjacent property is worth one hundred dollars or one thousand dollars per front foot. The fact that county property is included in the exemptions from general taxation by the terms of section 2061 of the Code of 1907 is no indication that it was intended to be subject to this special tax. It was exempt regardless of this statute, and was doubtless included in the schedule with other property not necessarily exempt, independent of the statute, and for the purpose of setting forth all exempt property.

The bill, being without equity, was subject to the demurrers testing its equity (section 3121 of the Code of 1907), and which were properly sustained, and the decree of the chancery court is affirmed.

Dowdell, C. J., and Mayfield and Sayre, JJ., concur.

The Distinction Between Taxes and Assessments is shown in the note to *People v. Mayor of Brooklyn*, 55 Am. Dec. 287. The taxation and assessment of public property is the subject of a note to *Board of Commissioners etc. v. Ottawa*, 33 Am. St. Rep. 400, 404, 410, in which it is shown that the public property of a city or county used only for governmental purposes is exempt from taxation by the state or city for the purposes of revenue; but that property held for a public use is not exempt from local assessments, although exempt from taxation for general purposes. The exemption from taxation or assessment of lands owned by governmental bodies, or in which they have an interest is the subject of a note to *Herrick & Stevens v. Sargent*, 132 Am. St. Rep. 291.

CALDWELL v. CALDWELL.

[166 Ala. 406, 52 South. 323.]

MORTGAGES—Enjoining Execution of Power of Sale.—Equity will enjoin the execution of a power of sale contained in a mortgage only when the enforcement of the mortgage would be against good conscience, and would work great and irreparable injury. (p. 49.)

MORTGAGES—Enjoining Execution of Power of Sale.—Equity will not enjoin the execution of a power of sale in a mortgage until an unliquidated demand due from the respondent to the complainant can be ascertained and set off, in the absence of an allegation of the defendant's insolvency, or other special equity; and the defendant's refusal to accept a conveyance of the property in full discharge of the debt does not arm the complainant with any special equity. (p. 49.)

Bill to enjoin the execution of a power of sale contained in a mortgage until an unliquidated demand due from the respondent to the complainant could be ascertained and set off. There was a judgment for the respondent and the complainant appealed.

R. W. Clopton, for the appellant.

Lawrence E. Brown, for the appellee.

407 SAYRE, J. This is a case in which the complainant sought to enjoin the foreclosure of a mortgage under a power of sale in order that he might have the benefit of the setoff of an unliquidated demand against the mortgagee, and is to be settled upon familiar principles of equity jurisdiction. Complainant and defendant are brother and sister, living

under the same roof on the mortgaged property, and some ethical reasons are suggested which possibly ought to have consideration by the complainant before a foreclosure is insisted on, but there is no showing of grounds for interference cognizable in a court of chancery. Equity will enjoin an attempt to pervert a power of sale from its legitimate purpose: *Struve v. Childs*, 63 Ala. 473. But it must have substantial reasons for so doing. The interests of society require that such power be not interfered with lightly. It results from contract between the parties, and the party who borrows must consider when he bargains whether he is not giving too large a power to him with whom he is dealing: *Jones v. Matthie*, 11 Jur. 504. The jurisdiction will be exercised only when, because of fraud, or a want of illegality of consideration, or for other sufficient reasons, the enforcement of the collection is against good conscience, and would work great and irreparable injury. So the rule is stated in *Glover v. Hembree*, 82 Ala. 324, 8 South. 251, and in *Vaughan v. Marable*, 64 Ala. 60.

There is no allegation of the defendant's insolvency. In fact, the contrary appears. If it should be assumed that for years the defendant has lived with the complainant ⁴⁰⁸ under circumstances which would imply a promise to pay her for board—as to the merit of which suggestion we intend no intimation—that demand is unascertained, has no agreed relation with the mortgage debt, and in the absence of allegation of defendant's insolvency, or other special equity, the power of sale will not be enjoined in order to enable the mortgagor to establish a setoff against the mortgage debt: *Glover v. Hembree*, 82 Ala. 324, 8 South. 251. The mere existence of a legal demand against the mortgagee will not justify interference: *Gafford v. Proskauer*, 59 Ala. 264; *Knight v. Drane*, 77 Ala. 371. And it would hardly seem necessary to say that defendant's refusal to accept a conveyance of the property in full discharge of the debt arms complainant with no special equity. Defendant is entitled in equity as at law to have her money.

For the reasons and on the authorities noted, we concur in the chancellor's opinion that there is no equity in the bill, and his decree dismissing the same on general demurrer will be affirmed.

Dowdell, C. J., and Simpson and McClellan, JJ., concur.

A Bill to Restrain Trustees Under a Trust Deed from Selling, filed by an unsecured creditor of the same debtor, alleging that after selling and paying the debts secured by the deed the trustees will abuse their trust by applying the residue of the proceeds to the claims of persons not creditors, raises no equity entitling the complainant to relief: *Carter v. Neal*, 24 Ga. 346, 71 Am. Dec. 136.

BROYLES v. CENTRAL OF GEORGIA RAILWAY COMPANY.

[166 Ala. 616, 52 South. 81.]

PLEADING.—Counts in a Complaint Should be Construed most strongly against the pleader. (p. 53.)

CARRIERS—Complaint by Passenger—Demurrer.—If a count in a complaint for an injury to a passenger on a railroad train charges simple negligence only, and does not show that he was rightfully in the car of the defendant, a demurrer to the count is properly sustained, because, in the absence of such showing, it must be concluded that the plaintiff was a trespasser to whom the carrier owed no duty except not to willfully, wantonly or intentionally injure him. (p. 53.)

CARRIERS—Negligence—Wantonness or Willfulness.—In a Complaint for an injury to a passenger on a railroad train, caused by a wreck, simple negligence only is charged by allegations that the wreck was caused by the defendant's gross and reckless negligence, and that such negligence consisted in allowing rotten, unsound and insecure cross-ties to remain under the rails of the road at the place where the wreck occurred. Such allegations do not make a case of wantonness or willfulness. (p. 53.)

CARRIERS—Riding on Pass Issued to Another.—A woman injured in a railroad wreck cannot recover for simple negligence, where it appears that her mother, when both of them were called upon for fare, handed the conductor passes for other persons, which he took, believing the parties entitled to ride thereon. In such a case a fraud was practiced upon the carrier, irrespective of the fact that the plaintiff did not know about the pass, and she was a mere trespasser. (p. 54.)

DEMURRER.—It is Harmless Error to Sustain a demurrer to a replication containing the same averments as are contained in the complaint, to which the general issue is filed. (p. 54.)

PLEADING IN A CIRCLE.—The Proper Way to reach a defect in a plea which is not a sufficient answer to a count is by demurrer. It is not proper to reply to it, for this would be pleading in a circle. (p. 54.)

EVIDENCE—Uncommunicated Motive or Intention.—A witness cannot testify to his uncommunicated motive or purpose. Uncommunicated intention or purpose is an inferential fact not capable of direct proof, but must be inferred from facts proved. (p. 55.)

CARRIERS—Riding on Pass Issued to Another.—In an action for an injury to a person riding on a railroad train, where the issue is whether she was a trespasser by reason of her riding on a pass issued to another, she will not be allowed to answer a question whether it was not customary for her to ride on a pass, as the question does not go far enough to state a custom that would include the case under consideration. (p. 55.)

EVIDENCE.—Uncommunicated Thoughts and Suppositions cannot be testified to. (p. 55.)

CARRIERS—Riding on Pass Issued to Another.—In an action for an injury to a person riding on a railroad train with her mother, the conductor may testify whether the mother, in handing him a pass issued to others, indicated for whom she was tendering the pass. (pp. 55, 56.)

CARRIERS—Riding on Pass Issued to Another.—In an action for an injury to a person on a railroad train, where the whole question is whether she was rightfully on the train, the conductor should be allowed to testify whether the plaintiff, riding upon a pass presented to him, was the person to whom the pass was issued, and as to what a passenger must have to entitle him to ride. (pp. 55, 56.)

CARRIERS—Riding on Pass Issued to Another.—In an action for an injury to a person who was riding on a pass issued to another, where the whole question is whether she was rightfully on the train, it is competent for the conductor to testify whether he agreed to let her ride without the payment of fare, or showing some other right to ride, or whether he had any right to let her ride without paying fare or being provided with a pass, for the purpose of showing that he did not knowingly consent to her riding on a pass issued to another and that he had no authority to do so. (p. 56.)

CARRIERS—Riding on Pass Issued to Another.—In an action for an injury to a person riding on a train with her mother, where the company alleges that they were trespassers because riding on a pass issued to others, the conductor may properly testify that the mother said, in a tone loud enough to be heard by the daughter, that the pass presented to him by the mother was for herself and daughter. (pp. 56, 57.)

CARRIERS—Riding on Pass Issued to Another.—In an action for an injury to a person riding on a train, caused by a wreck, where the issue is whether she was a mere trespasser by reason of riding on a pass issued to another, it is proper for the conductor to testify concerning his duty to compel persons tendering passes to identify themselves as the persons named in the passes. (p. 57.)

CARRIERS—Intention to Pay Fare—Presumption.—When a person boards a train with money sufficient to pay his fare, it will be presumed that he intends to pay it until fare has been demanded, unless his conduct shows that he is trying to evade the demand; but the presumption ceases if he fails to pay after demand and opportunity to do so. (p. 58.)

Action for damages against the railway company. Count 2 of the complaint was as follows: "Plaintiff claims of the defendant the like sum of twenty thousand dollars as damages, for that heretofore, to wit, on or about the fourteenth day of November, 1906, the defendant was engaged in carrying passengers for hire between Birmingham, Alabama, and Montezuma, Georgia; that on or about said date the plaintiff entered a car on one of defendant's trains, in the city of Birmingham, Alabama, and while riding therein, and while the said car was at or about Kellyton, Alabama, the car became wrecked or derailed, and as a result thereof the plaintiff was thrown against a portion of said car in which she was riding, and was bruised, maimed, wounded and injured internally and externally, and as a result thereof she has been caused to suffer," etc.

The following pleas were filed: (1, 2, and 3.) The general issue. (4) "For further answer to each of the counts, separately and severally, defendant says that when plaintiff presented herself as a passenger, and got upon defendant's train at Birmingham, she had in her possession, or her

mother, with whom she was at the time, and who undertook to arrange for the transportation of plaintiff, had in her possession, a pass issued by defendant to one Mrs. J. F. Slover and daughter; and the plaintiff, or her mother, Mrs. Little, presented said pass to the defendant's conductor without disclosing that the plaintiff and Mrs. Little were not the parties mentioned, described and referred to in said pass, but as if they were the parties entitled to ride thereon; and defendant says that plaintiff was not Mrs. J. F. Slover, or Mrs. Slover's daughter, and was not entitled to ride on said pass, and had no other right to be on said train, and was accepted as a passenger and carried upon said train upon the said conduct or act of the plaintiff or her mother in presenting said pass to the defendant's conductor, and the belief of defendant's servant in charge of said train that plaintiff was one of the persons entitled to ride on the pass issued to Mrs. J. F. Slover and daughter; and defendant avers that its servants or agents did not know that plaintiff was not one of the persons entitled to ride on said pass; and defendant says that the plaintiff neither paid nor offered to pay anything for her transportation from Birmingham to Kellyton." Plea 5 set up the same state of facts, and alleged that the pass entitled Mrs. Slover and daughter, and no one else, to ride thereon, and was not intended for the use of the plaintiff, and did not entitle her to ride thereon, and averred that the plaintiff was neither Mrs. Slover nor her daughter. Plea 7 was in all respects similar to the other two.

The following replications were filed to the pleas: (1) "That if any pass or authority for being upon said train was presented to or accepted by the conductor or agent of defendant, and was a pass or authority for another to ride upon the said train other than plaintiff's mother or herself, it was without the knowledge of plaintiff." (2) "Plaintiff says that she entered upon plaintiff's train at Birmingham, intending to be a passenger thereon from Birmingham to Montezuma, Georgia; that she was in company with her mother, who had said pass or token; that she, the plaintiff, did not have possession of said pass or token, and did not deliver the same to the conductor or agent of defendant; but that her mother had the said pass or token, and delivered the same to the said conductor or agent of the defendant, and that the said conductor or agent received the same. Plaintiff avers that she went upon said train or car in good faith, believing that she had a right to be there as a passenger, and not knowing that she had no right to be received as a passenger upon said train or car under said token or pass, and that said conductor or agent of the defendant received from plaintiff the sum of one dollar for the right to ride on said car or train."

Arthur L. Brown, for the appellant.

London & Fitts, for the appellee.

⁶²¹ EVANS, J. This action was brought by the appellant, Mrs. Mamie Broyles, against appellee, the Central of Georgia Railway Company, seeking damages for personal injuries sustained by her while on one of the regular passenger trains of defendant en route from Birmingham, Alabama, to Montezuma, Georgia. The train was derailed at Kellyton, Alabama, and plaintiff sustained injuries by reason thereof. There are twenty-two assignments of error by appellant to the rulings of the court below upon the pleadings and the evidence.

The demurrer to the second count of complaint was properly sustained. Said count charges simple negligence, and does not show that plaintiff was rightfully in the car of defendant. Construing said count most strongly against the pleader, as the law requires, we must conclude therefrom that plaintiff was a trespasser, and, therefore, that defendant owed her no duty except ⁶²² not to willfully, wantonly or intentionally injure her: *Beyer v. Louisville & Nashville R. R. Co.*, 114 Ala. 424, 21 South. 592; *Brown v. Scarborough*, 97 Ala. 316, 12 South. 289.

The demurrer to counts A and B were properly sustained for the same reasons above given for sustaining demurrer to count 2. The allegations of count A as to negligence are as follows: "Plaintiff avers that said wreck or derailment was caused or brought about by the gross or reckless negligence of defendant, its agents, or employees, whilst engaged in or about the duties of their employment. And plaintiff avers that said gross and reckless negligence consisted in this, to wit, that rotten, unsound and insecure cross-ties were allowed to remain under the rails of said road at the place where said wreck or derailment occurred, and that said track was in an unsafe condition, thereby causing said wreck or derailment of said train when passing over said defective track. Plaintiff avers that the injuries so received by her were proximately caused by said gross and reckless negligence." We are of opinion that the facts as set out in said count, when construed most strongly against the pleader, do not constitute anything amounting to willfulness or wantonness. This court could not say that an occasional rotten, unsound and insecure cross-tie amounted to willfulness or wantonness even if known to defendant. We would not be understood as saying that cross-ties might not be rotten, unsound and insecure to sufficient extent in number and degree to constitute wantonness and willfulness to run a passenger train over them at sufficient rate of speed. But what we say is that the averments in said count A, construed as the law construes them, do not make a case of wantonness or willfulness. We there-

fore construe said count to allege that plaintiff was a trespasser on ⁶²³ said car and was injured by the simple negligence of defendant.

We think that count B is subject to the same criticism as count A. The averments in both counts A and B constitute simple negligence: *Stringer v. Alabama M. Ry. Co.*, 99 Ala. 397, 13 South. 75; *Kansas City R. R. Co. v. Crocker*, 95 Ala. 412, 11 South. 262; *Louisville & N. R. R. Co. v. Barker*, 96 Ala. 435, 11 South. 453.

Demurrers to pleas 4, 5 and 7 were properly overruled. The pleas clearly allege facts showing that the plaintiff practiced fraud upon defendant; or her mother, acting for her, practiced a fraud upon defendant; and plaintiff was enjoying the benefits of such fraud, at the time she received the injuries complained of, and after the conductor in charge of the train had demanded her fare. Such being the case, the defendant was under no duty to carry plaintiff as a passenger, and the relation of passenger and carrier did not exist, and plaintiff was a trespasser. If there are any defects in said pleas, they are not pointed out by the demurrer.

The demurrer to replication 1 was well taken and properly sustained. If the other matters set up in the pleas were true, it is manifestly immaterial whether she knew or did not know the matters set up in said replication. If plaintiff's mother was acting as her agent in tendering said pass for plaintiff, she cannot be heard to say that she did not know the contents thereof and thereby escape the consequences of such fraud.

If there was error in sustaining demurrer to replication 2, it was error without injury, in so much as said replication is a substantial reproduction of the allegations of count E of the complaint, so far as said replication undertakes to show the right of plaintiff to be upon defendant's train. The plaintiff had the full benefit of the matter there pleaded in the issue raised by ⁶²⁴ the general issue filed to count E. Pleas 4, 5 and 7 were pleas in confession and avoidance, confessing all of said counts except that part which is reproduced in replication No. 2. If said pleas were not a sufficient answer to count E, the defect should have been pointed out by proper demurrer to said pleas as an answer to that count. To allow that kind of pleading would be pleading in a circle, and there would be no end to it. The court, of its own motion, would have a right to eliminate it as a waste of time.

The plaintiff, testifying for herself, stated: "I did not request Mrs. Little to get or furnish me with a pass or transportation, because I would have gone if she had not said anything about a pass." On motion of defendant the words, "because I would have gone if she had not said anything about a pass," were stricken. It has been so often decided by this court that a witness cannot testify to his uncommu-

nicated motive or intention that we deem it unnecessary to cite authorities. Uncommunicated intention or purpose is an inferential fact not capable of direct proof, but must be inferred from facts proven.

Plaintiff, testifying for herself, was asked by her attorney, "I will ask you if you had money to pay your fare if it had been demanded." Witness had been allowed to testify that she had with her a certain amount of money, and she could not testify to her secret intentions or purposes. The court properly sustained the objection to the question. So, also, to the following question asked plaintiff by her attorney: "I will ask you whether or not you would have been willing to have paid your fare if it had been demanded."

The court also properly ruled in sustaining objection to the following question propounded to plaintiff by her counsel: "I will ask you if it was not customary for ⁶²⁵ you all to ride on passes." The question did not go far enough to state a custom that would include the present case; that is, to ride upon passes issued for other people upon which plaintiff and her mother had no right to ride, and that it was done with the knowledge and consent of the proper authorities of the defendant corporation. So, also, were objections properly sustained to the following questions asked the same witness by her counsel: "Did you know of your mother having a pass before this time over this road?" Whether she did or not was clearly immaterial. So, also, the following question asked the same witness by her counsel: "I will ask you whether you supposed or thought when you boarded the car that you had a right to ride on the pass which was held by your mother." Uncommunicated thoughts and suppositions cannot be testified to.

The defendant asked his witness T. L. Gordy, the conductor who took up the fares upon this occasion, "At the time the pass was handed to you, was any information given you that the plaintiff was not the person named in the pass?" The plaintiff objected to this question, and the court overruled the objection, and plaintiff excepted to the ruling of the court. We think the court properly overruled the objection. If the mother of plaintiff and the plaintiff were not known to witness, and the mother handed to witness a pass in due and proper form, properly signed, and pointed out plaintiff, who was sitting on the same seat with her, as one of the persons to ride upon said pass, the conductor had the right to presume that the mother and plaintiff were the persons named in said pass; and to hand in such a pass and conceal their identity by their silence was a fraud, and entirely relevant to issues raised by the fourth, fifth and seventh pleas. The plaintiff moved ⁶²⁶ to exclude the following testimony of the witness Gordy: "You have a ticket, cash fare, or pass, or

something the conductor can turn into headquarters, showing that each passenger was entitled on that train." The above was an answer to the following question: "What must a passenger have to entitle him to ride on the train?" The question was also objected to, but the overruling of the objection is not assigned as error. There was no error in refusing to exclude said testimony. The conductor of a train, whose duty it is to determine who are passengers and who are not, is presumed to know what a passenger must have in order to entitle him to ride on the train and thereby become a passenger, and that is one of the material inquiries in this case. Defendant asked the witness Gordy the following questions: "At the time the elderly lady handed you the pass, how, if in any way, did she indicate for whom she was tendering the pass?" The objection to this question was properly overruled, as it would naturally call for evidence entirely legal and proper. It called for evidence as to a part of the actual transaction whereby defendant was allowed to ride upon said train. It was a part of the *res gestae*.

Defendant asked the witness Gordy, "Did you agree for her to ride without paying her fare?" The objection to this question was properly overruled because it was inquiring as to right of plaintiff to be upon the car, as was also objection to the following question and for the same reason: "I will ask you if you agreed for the plaintiff to ride without paying her fare, or showing some other right to ride on the train." Also, the objection to the following question: "I will ask you, under the rules of the company, if you had any right to permit plaintiff to ride without she was paying her fare or being provided with a pass." If any inference could ⁶²⁷ arise from the evidence that he was knowingly permitting her to ride without paying her fare or having a pass, then it was proper to show that he, as agent of defendant, had no such authority whereby he could establish the relation of carrier and passenger between defendant and plaintiff. It was evidently competent under the issues of this case that its agent did not knowingly consent for plaintiff to ride as a passenger without paying her fare or to ride upon a pass issued to another and that he had no authority to do so.

Plaintiff assigns as error the overruling of her objection to the following question asked by defendant of the witness Gordy: "Did the lady make the statement for herself and daughter?" The witness had just stated that "the lady handed me the pass and said it was for herself and daughter" in a tone loud enough for plaintiff to hear. The answer of the witness to the said question objected to was: "O, just an ordinary tone. It was loud enough for plaintiff to have heard what she said." It is evident from this answer that the witness did not understand, and did not answer the question;

but if it is an answer to the question, then the question was properly allowed. In either event there was no reversible error. The grounds of objection were that it was incompetent, immaterial and irrelevant. It was not subject to objection on these general grounds.

The following question propounded to the witness Gordy by defendant was objected to by plaintiff: "Are you by the rules required to compel persons who tender passes on your train to identify themselves as the persons named in the passes?" The objection was properly overruled, as it called for evidence pertinent to the inquiry as to whether she was or could have been, under any inference to be drawn from the evidence, a legal passenger on said train.

⁶²⁸ The twentieth assignment of error is the same as the third, fourth and fifth assignments, which have already been considered.

The court, upon request of defendant, gave the general affirmative charge for defendant in writing, viz.: "If the jury believe the evidence, you will find for the defendant." The plaintiff now assigns the giving of said charge as error. As stated in the briefs of both sides to this suit, "The whole question in the case is whether or not appellant was rightfully on defendant's train." It is proper to add, "at the time the injury to plaintiff was inflicted." The decision of this question in the case depends upon whether or not, at the time of the wreck, the relation of carrier and passenger existed between appellee and appellant. There can be no dispute, and it has been universally so held, that to create this relation there must be a contract to that effect either express or implied. There can be no doubt but that the relation exists by implied contract from the moment a person enters the passenger coach of a regular passenger train with the bona fide intention of becoming a passenger and of paying fare according to the rules and regulations of such carrier, when the same is demanded by the proper person, and has with him the means of doing so. In this case we are not concerned with the question of good or bad intent. Under the facts of this case, did the relation of carrier and passenger exist at the time of the accident or injury? Plaintiff's fare had already been demanded by the conductor, and her mother, in her presence, had given the conductor a pass, which was issued for the benefit of other parties than plaintiff and her mother, and which plaintiff and her mother had no right to ride on. The fact that plaintiff's mother and plaintiff were not the persons named in said pass was not known to the conductor, ⁶²⁹ nor was it disclosed by either the mother or plaintiff; and the mother pointed out plaintiff as the other person entitled to ride on said pass besides herself. The conductor took the pass as authority for them to ride on said train, and plain-

tiff continued to ride thereon. Some time after this transaction the accident occurred from which the injury resulted. Can the plaintiff claim that the facts of this transaction made a contract whereby the relation of passenger and carrier was created between the plaintiff and defendant, of which she can take advantage in this suit. We think that the facts show a fraud from which the plaintiff can derive no benefit in this suit. Even if the conductor had known the parties and connived with them to beat the defendant out of the fare due for the transportation, the rule would be the same. As stated in the case of *Condran v. Chicago etc. R. Co.*, 67 Fed. 523, 14 C. C. A. 508, 28 L. R. A. 752: "The law will do nothing to stimulate and encourage fraud and dishonesty, and that would be the effect of holding that a railroad company owed to one riding on its trains, under the conditions named, the duties and obligations it owes to a passenger who has honestly paid his fare. Railroad companies are as much entitled to protection against fraud as natural persons. It is a matter of common knowledge of which the court will take judicial notice, and of which the public are bound to take notice, that railroad passenger trains are operated to carry passengers, for hire. . . . It is equally well known that the authority of a railroad conductor does not extend to the carrying of passengers without the payment of the regular fare. . . . One riding on a train by fraud or stealth, without the payment of fare, takes upon himself all the risk of the ride, and if injured, by an accident happening to the train, not due ^{to} recklessness or willfulness on the part of the company, he cannot recover." Ordinarily, when a person boards a train with money sufficient to pay his fare, it will be presumed that he intends to pay his fare until his fare has been demanded, unless his conduct should be such as to show that he was trying to evade the demand being made on him by secreting himself or otherwise; but after demand is made, and he has the opportunity of paying, and he fails to do so, the presumption ceases unless some good excuse is shown for not then paying.

The affirmative charge was properly given for the defendant.

Affirmed.

Dowdell, C. J., and Anderson and Sayre, JJ., concur.

There is No Remedy Against a Carrier by One Injured While He is Being Fraudulently Conveyed. Thus, one who is injured by the negligence of a railway company while traveling on one of its trains upon a commutation ticket issued to another person, and by its terms not transferable, has no remedy against the company. So, one who fraudulently attempts to ride on a nontransferable pass issued to another

is not a passenger for hire: Note to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. St. Rep. 104.

If One is on a Railway Train, not as a Passenger, but as a Trespasser, the corporation owes him no duty except to avoid willful and wanton negligence: Mendenhall v. Atchison etc. Ry. Co., 66 Kan. 438, 97 Am. St. Rep. 380.

SOUTHERN RAILWAY COMPANY v. HARRINGTON.

[166 Ala. 630, 52 South. 57.]

VENUE—Action Against Corporation for Injuries.—It is not required by the Alabama statute that an injury for which a corporation is sued should have wholly occurred within the county in which suit is brought. (p. 61.)

VENUE—Action for Injuries—Residence of Plaintiff.—It is enough that the plaintiff, in an action for damages for wrongs and injuries suffered, resides in the county when suit is brought; it is not necessary that he should have resided in the county at the time of the injury. (p. 61.)

CARRIERS—Postal Clerks as Passengers.—The relation of carrier and passenger, not that of master and servant, exists between railroads carrying United States mails, and the mail agents, postal clerks, and express messengers on the trains. (p. 62.)

CARRIERS—Liability to Postal Clerks or Mail Agents.—While postal clerks, or mail agents, cannot avail themselves of the contract between a railroad carrier and the government, and make it a foundation for recovery, they can rest upon the breach of the duty which the law imposes upon every person who undertakes to perform a service for another, whether gratuitously or not, to exercise that degree of care and skill in its performance which the nature of the undertaking requires. (p. 62.)

CARRIERS—Duty to Warm Cars—Postal Clerks.—It is the duty of a railroad company, as a common carrier, to warm its cars, including the one occupied by postal clerks, for the comfort and safety of passengers. (pp. 62, 64.)

CARRIERS—Failure to Heat Car—Contributory Negligence.—A passenger on a railroad who suffers injury from the car not being properly heated cannot recover therefor if guilty of contributory negligence in causing it; but the failure to protect himself from unnecessary cold, or to provide sufficient clothing, may or may not be contributory negligence, depending upon the peculiar facts of each particular case. (pp. 62, 63.)

CARRIERS—Personal Injuries—Proximate Cause.—The right to recover of a carrier for personal injuries depends upon whether they were occasioned entirely by the negligence of the defendant, or whether the negligence of the plaintiff contributed to his injury in such a way that, but for such negligence, the injury would not have happened. (pp. 62, 63.)

CARRIERS—Personal Injuries—Contributory Negligence.—In an action against a carrier for personal injuries, the defendant is liable, notwithstanding previous negligence of the plaintiff, if, when the injury was done, it might have been averted by the exercise of reasonable care and prudence on the part of the defendant. (p. 63.)

CARRIERS—Liability to Postal Clerks for Injuries.—A railroad company may be liable to a postal clerk on one of its cars for

injuries caused by the negligence of its employees. He is entitled to the same degree of care as a passenger, in the absence of an express agreement exempting the carrier from such liability; and the power to contract for carrying the mails does not give the right to contract for such exemption. (p. 63.)

CARRIERS.—Failure to Heat Car.—As a Postal Clerk on a railroad must remain in the car provided for him while on duty, under a penalty imposed by the federal statute, he is not *prima facie* guilty of contributory negligence, nor does he assume the risk, by remaining in the car, though it is insufficiently heated, after he knows of its uncomfortable condition. (p. 64.)

CARRIERS.—In an Action by a Postal Clerk against a railroad company for personal injuries sustained by reason of an improperly heated car, where the evidence shows defendant's negligence as alleged, the contributory negligence of the plaintiff in not wearing sufficient clothes, if relied upon, must be specially pleaded. (p. 65.)

CARRIERS.—In an Action by a Postal Clerk against a railroad company for personal injuries sustained by reason of an improperly heated car, it is competent for the plaintiff to testify concerning his duties as postal clerk, and how long he had to remain in the car; to prove that the car was wet and damp; and to show that he made complaint to the defendant's agents of the condition of the car. (p. 65.)

CARRIERS.—In an Action by a Postal Clerk against a railroad company for personal injuries by reason of an unheated car, it is not competent for the defendant to prove that the plaintiff was a "chronic kicker." (p. 65.)

CARRIERS.—In an Action by a Postal Clerk against a railroad company for damages for a sickness caused by an unheated car, it is not competent for the defendant to prove the temperature of an express car, where it appears that the express car and the mail car were heated differently, in some respects, though each had steam pipes from the engines, if it also appears that these pipes were not heating the mail car, and that it was cold while the express car was warm; and, where the action is to recover for sickness on designated days in one month, it is not competent for the defendant to show that the plaintiff brought another suit against it for sickness occurring during the next succeeding month. In each case the evidence is irrelevant. (p. 65.)

CARRIERS.—In an Action by a Postal Clerk against a railroad company for a sickness caused by an unheated car, an instruction directing a verdict for the defendant if it is found that the injuries of the plaintiff were proximately caused by insufficient clothing is properly refused where the question of adequate clothing has not been litigated. (p. 65.)

Action for damages against the railway company. The court refused to the defendant charges numbered 1, 9, 10, 11 and 12. Charges 9 and 10 were the affirmative charges as to the third and fourth counts. Charge 1 was: "The court charges you that if you are reasonably satisfied from the evidence that plaintiff's injuries were proximately caused by inadequate clothing worn by plaintiff, to meet the demands of the season and climate, you must find for the defendant." Charge 11 was: "The court charges you that if you believe from the evidence that the cold condition of the car, as complained of by the plaintiff, was due to unusual cold weather, and that plaintiff made no complaint to those

in charge of the train, and made no effort to remedy or have remedied the condition of the car, you must find for the defendant." Charge 12 was: "If you are reasonably satisfied from the evidence that the mail car was equipped with stoves sufficient to properly warm the car, and that sufficient fuel was placed in the car, the court charges you that it was the duty of the plaintiff, for his own protection, to start or cause to be started the fire in said stove." There was a judgment for the plaintiff and the defendant appealed.

Bankhead & Bankhead, for the appellant.

W. J. Martin and James A. Mitchell, for the appellee.

⁶³³ MAYFIELD, J. Appellee, a railway postal clerk, sues the defendant railroad company, a carrier of the United States mail, for failure to properly heat or warm ⁶³⁴ the car in which the mails were carried, and in which his duties required him to work and remain while on duty as such postal clerk, by reason of which failure on the part of the defendant he was unduly exposed to the cold, and was thereby made sick, had his feet frostbitten, contracted severe cold, bronchitis, etc. The defendant attempted to plead contributory negligence and assumption of risk as a defense to the action, together with the general issue. However, the defendant first interposed a plea in abatement, for that the wrongs and injuries complained of did not wholly occur within the county of Walker, in which the action was brought, that plaintiff did not reside in Walker county at the time of the injury, the run in which plaintiff was engaged being from Birmingham, Alabama, to Greenville, Mississippi, and that a part of the wrongs and injuries complained of were committed and suffered, if at all, outside of Walker county, that of the venue. This plea was filed under section 6112 of the Code of 1907. A demurrer to this plea in abatement was sustained, which is the first assignment insisted upon as error.

The plea was open to the demurrer leveled against it. It is not required by the statute (Code of 1907, section 6112) that the injury should have wholly occurred within the county in which suit is brought—partly therein is sufficient; nor is it necessary that plaintiff should have resided in the county at the time of the injury—at the time of bringing the suit is sufficient. The original complaint claimed damages in one count for wrongs and injuries suffered on three separate and distinct days, a demurrer being sustained to it for this reason. The complaint was amended by adding three counts, each claiming damages for the wrongs committed on one day only, though each count claimed as for

a different day. Demurrers were interposed to the amended ⁶³⁵ complaint and were overruled, and the only material difference in the counts was that, as amended, each claimed as for a different day. Only the rulings as to the first count as amended are insisted upon as error, and only such will be treated.

In order to determine the sufficiency of this court, or of any other in the complaint, or the correctness of the ruling upon the demurrer thereto, it becomes necessary to first determine the relation of the parties, and their respective rights and duties, one to the other. It has been generally, if not uniformly, held that the relation of carrier and passenger exists between railroads carrying United States mails, and the mail agents and postal clerks, and not that of master and servants. The same rule is declared as to express messengers: Elliott on Railroads, ed. 1897, sec. 1578; Hutchinson on Carriers, sec. 1017 (63). These authorities hold that while postal clerks or mail agents cannot avail themselves of the contract between the railroad carrier and the government, and make it a foundation for recovery, they can, however, rest upon the breach of the duty which the law imposes upon every person who undertakes to perform a service for another, whether gratuitously or not, to exercise the degree of care and skill in its performance which the nature of the undertaking requires; the obligation to carry, therefore, in such cases, may arise from duty as well as from contract.

It is indisputably the duty of railroads, as common carriers, to warm their cars for the comfort and safety of their passengers, and they are liable in damages for injuries suffered in consequence of failure to discharge such duty. The passenger, however, may, in such cases, be guilty of such contributory negligence as to cause the injury complained of, and if it is alleged and proven that such contributory negligence proximately caused ⁶³⁶ the injury complained of, on account of failure to heat the car, of course the passenger cannot recover. The failure of the passenger to protect himself from unnecessary cold, or to provide sufficient clothing, may or may not be contributory negligence, depending upon the peculiar facts of each particular case: Taylor v. Wabash R. R. Co. (Mo.), 38 S. W. 304, 42 L. R. A. 110, and note. The true rule is as stated by Chief Justice Smith, in the case of Turrentine v. Richmond & D. R. R. Co., 92 N. C. 638, in which he correctly quotes from an English case: "Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary and common care and caution, that but for such negligence

and want of ordinary care and caution on his part, the misfortune would not have happened. In the first place, the plaintiff would be entitled to recover—in the latter not; as but for his own fault the misfortune would not have happened.' And in explanation of the proposition he adds: 'Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such that but for that negligence or want of ordinary care and caution, the misfortune would not have happened; nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff': *Wightman, J., in Tuft v. Warman*, 94 Eng. Com. L. 573. The rule is thus so fully and definitely expressed as to require no further comments from us. The counterpart of this rule is declared in *Gunter v. Wicker*, 85 N. C. 310, *Owens v. Richmond etc. R. R.*, 88 N. C. 502; *Farmer v. Wilmington etc. Ry. Co.*, 88 N. C. 564, and in *Aycock v. Raleigh etc. Ry. Co.*, 89 N. C. 321, that the defendant will be liable, notwithstanding previous negligence of the plaintiff, ⁶³⁷ if, when the injury was done, it might have been averted by the exercise of reasonable care and prudence on the part of the defendant." This North Carolina case was a case on all-fours with the one at bar, except that the acts of negligence and contributory negligence were somewhat different.

Postal clerks while on duty are not employees of the railroad carrier, and the railroad company may be liable to them for injuries caused by the negligence of its employees; they are entitled to the same degree of care as passengers, in the absence of an express agreement exempting the carrier from such liability; and the power to contract for carrying the mails, under the United States Revised Statutes, sections 3997, 4007, has been held not to give the right to contract for such exemption: *Seybolt v. New York etc. Ry. Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Nolton v. Western R. Corp.*, 15 N. Y. 444, 69 Am. Dec. 623; *Mellor v. Missouri Pac. Ry. Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; *Cleveland etc. Ry. Co. v. Ketcham*, 133 Ind. 346, 36 Am. St. Rep. 550, and note, 33 N. E. 116, 19 L. R. A. 339.

The relation of carrier and passenger being shown to have existed between the parties, we hold that count 1 of the complaint as amended was, under our liberal rules of pleading, sufficient, and certainly not subject to the infirmities insisted upon by the appellant; that is, that the count did not show the duty to carry plaintiff and did not sufficiently show negligence to support the action.

As to the sufficiency of the pleas of contributory negligence and assumption of risk, to which demurrers were sustained, we find no reversible error.

It is true, as claimed by appellant, that it is common knowledge that postal clerks, with United States mail, are carried in separate cars and coaches and not with other passengers; that these cars are specially ⁶³⁸ equipped for the mail clerks and their particular work, and that passengers, as a rule, are not carried therein; but this does not, without a special contract, relieve the railroad company of the duty to properly heat these cars, for the comfort and health of the clerks and agents of the United States, who, by contract and by law, are required to remain at their posts while on duty. They cannot, like ordinary passengers, go to another car if theirs is uncomfortable, but must remain in it while on duty, under a penalty imposed by statute of Congress: Fed. Stats. Ann., sec. 5474. In the absence of a special contract it is the duty of the railroad company to provide and maintain these cars, and to maintain and keep them safe and comfortable for these agents of the government. It is certainly not primarily the duty of the agents to heat or to care for their cars otherwise than to protect the mails. Consequently, a postal clerk is not *prima facie* guilty of contributory negligence, nor does he assume the risk by remaining in the car and at his post of duty after he knows of the uncomfortable condition of the car. He may, under certain conditions, be chargeable with the duty of notifying the proper agents or servants of the railroad company of the improper condition of the car, and of thus attempting to have it remedied, so as to alleviate the pain, suffering or discomfort arising therefrom; but he is not guilty of contributory negligence or of assumption of risk by remaining in the car with knowledge of its condition, or by failing to warm or heat it himself. In the absence of contract, it is not his duty to heat it, but that of the railroad company; and it is also its duty to know, or at least to use due diligence to know, its condition, and to keep it reasonably safe and comfortable for the postal clerks and agents. None of these special pleas were sufficient as pleas of contributory negligence or assumption ⁶³⁹ of risk, and the demurrers were properly sustained thereto. The pleas are treated by appellant, in bulk or in sections, and we will so treat them; but all were clearly insufficient.

There is nothing in appellee's contention that the bill of exceptions should be stricken. There is no motion to strike it; but, even if there were, the bill appears to have been signed within the time and in the manner required by law.

It was clearly competent for plaintiff to prove that the car was wet and damp; this certainly tended to show that the car would be thereby rendered cold and uncomfortable.

It was also competent and proper for plaintiff to testify as to his duties as postal clerk, when he had to enter the car, and how long he had to remain therein.

It was also proper to allow plaintiff to show that he made complaint to defendant's agents of the condition of the car, to show that they had actual notice of its condition, and that it was the duty of such agents to heat the car.

The court properly limited the cross-examination as to the kind of bed plaintiff slept on in the car; there was no claim or contention that the car was cold, or that plaintiff suffered at that particular time. The court also properly declined to allow defendant to prove that plaintiff was a "chronic kicker." Anyone might "kick" rather than have his "kickers" frostbitten.

We cannot say that there was reversible error in declining to allow the questions propounded to the express messenger, as to the temperature of the express car; it was not sufficiently shown that such evidence would be relevant. It was not shown that the two cars were heated in all respects alike, but, on the contrary, it was shown that they were in some respects heated differently ⁶⁴⁰ and constructed differently. So far as the evidence did appear, one was warm and one was cold; and one might very easily be comfortable and the other not. While it was shown that each had heating pipes supplied with steam from the engine, they also had other means of heating, which were different. It was indisputably shown that these pipes in the mail car were not heating the car—that it was in fact very cold—and that they had been cold for a long time. The evidence could probably have been made relevant, but it was not.

The court properly declined to allow defendant to prove that plaintiff had brought another suit against the defendant, to recover damages for sickness which occurred after the date of the injuries complained of in this case, to wit, on the 24th of February. The dates of the injuries here sued for, being January 16th, 18th, and 20th, that issue could not, and should not, be litigated on this trial. It could neither prove nor disprove any material issue on this trial.

Charge 1 was properly refused. There was no issue of contributory negligence in that the injuries of plaintiff were proximately caused by his wearing insufficient clothing; nor do we think there was any proof tending to show that all his damages were the result of inadequate clothing. If defendant relied upon this as contributory negligence, it should have set it up. The evidence having indisputably shown negligence of defendant, as alleged, this could not be a bar to the entire right of recovery unless specially pleaded. The question of adequate clothing was not liti-

gated, and there was no evidence whatever to show that his clothing was not ample and sufficient if the car had been properly heated.

Charges 9 and 10 were properly refused. There was no evidence to show that the action was barred by the ⁶⁴¹ statute of limitations; the amendments clearly related back to the beginning of the suit, which was within a year from the date of the wrong complained of.

Charge 11 was improper, as has been heretofore stated as to the sufficiency of the pleas. There was no contributory negligence or assumption of risk on the part of the plaintiff in not quitting the car and his post of duty because the car was not heated.

Charge 12 was properly refused, because it does not assert a correct proposition of law. There was shown no duty on the part of the plaintiff to heat the car; that was defendant's duty.

There being no error, the judgment of the trial court must be affirmed.

Dowdell, C. J., and Simpson and McClellan, JJ., concur.

The Duty and Liability of a Railroad Company to a Postal Clerk on one of its trains is shown in Barker v. Chicago etc. Ry. Co., 243 Ill. 482, 134 Am. St. Rep. 382; Illinois Cent. Ry. Co. v. Houchins, 121 Ky. 526, 123 Am. St. Rep. 205. The rule is that a mail agent or postal clerk, riding on a railroad train in the discharge of his duties, under a contract between the government and the company, occupies the position of a passenger for hire with respect to the company's liability for its negligence: Note to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. St. Rep. 99.

As to the Care and Skill Due from a Carrier to Passengers, see Louisville etc. R. R. Co. v. Church, 155 Ala. 329, 130 Am. St. Rep. 29; Bonneau v. North Shore R. R. Co., 152 Cal. 406, 125 Am. St. Rep. 68; Birmingham Ry. etc. Co. v. Baird, 130 Ala. 334, 89 Am. St. Rep. 43; Chicago etc. R. R. Co. v. Pillsbury, 123 Ill. 9, 5 Am. St. Rep. 483; Notton v. Western R. R. Corp., 15 N. Y. 444, 69 Am. Dec. 623. A railroad owes the same duty to mail agents riding in postal cars that it owes to passengers: Seybolt v. New York etc. R. R. Co., 95 N. Y. 562, 47 Am. Rep. 75.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

GAY v. ENGBRETSSEN.

[158 Cal. 21, 109 Pac. 876.]

MUNICIPALITY—Street Work—Liability of Municipality.—Damage or loss to a property owner resulting from a street improvement as such, apart from that due to the fault of the contractor in prosecuting the work, is properly to be met by the municipality ordering the improvement to be made. (pp. 68, 69.)

MUNICIPALITY—Street Work—Liability of Contractor.—Damage or loss to a property owner due wholly to the fault of the contractor in the prosecution of street work is properly to be met by the contractor. (p. 69.)

MUNICIPALITY—Street Work—Assumption of Liability by Contractor.—The requiring by a municipality that a contractor for street work shall assume its liability, as well as his own, in that connection tends to increase the cost of the work, and so gives a property owner just cause to complain that his burden is added to without authority of law. (p. 69.)

MUNICIPALITY—Street Work—Expression of Contractor's Liability.—No tendency to increase a property owner's burden is to be imputed to a contract for street work specifically imposing upon the contractor a liability already his by law. (pp. 69, 70.)

MUNICIPALITY—Street Work—Assumption of Liability by Contractor.—In a contract for street work, the language of which as a whole imports no more than an intent to impose upon the contractor the liability already his, the mere presence of the words "loss or damage arising from the nature of the work to be done" does not effect an assumption by the contractor of loss or damage for which, but for it, the municipality would be liable. (pp. 69, 70.)

STATUTES—When in Effect.—It is the Ordinary Rule that legislative enactments become operative upon their passage, unless there is some express provision of law to the contrary. (p. 71.)

ORDINANCE—Publication.—When a Statute Requires that a municipal ordinance be published a stated number of times, the ordinance, in the absence of an express provision to the contrary, does not await the last publication in order to become operative. (p. 71.)

MUNICIPALITY—Street Work—Publication of the Resolution of Intention is a prerequisite to the council's power to order the

doing of street work and of the street superintendent's power to post notices of such work. (pp. 71, 72.)

MUNICIPALITY—Street Work—Bids.—Complete Publication of the passing of the council's resolution ordering that certain street work be done is not a prerequisite to a valid call for bids for the contract. (pp. 71, 72.)

L. L. Boone, for the appellant.

Haines & Haines, for the respondent.

SLOSS, J. Action for the cancellation of an assessment for street improvements and to enjoin the contractor from claiming any interest thereunder in the lands assessed. The defendant's demurrer to the complaint was sustained, and plaintiff declining to amend, judgment was entered in favor of the defendant. The plaintiff appeals.

The appellant makes two points against the validity of the assessment.

The work consisted of street grading in the city of San Diego. The resolution of intention referred to specifications contained in ordinance 2061 of said city entitled, "An ordinance providing specifications for the grading of streets in the city of San Diego, California." Section 19 of this ordinance ²³ reads as follows: "All loss or damage arising from the nature of the work to be done under these specifications, during the progress of the work, and before the acceptance thereof, or from any act or omission on the part of the contractor, or any agent or person employed by him, occurring in the course of the work not authorized by these specifications, shall be sustained and borne by the contractor. The contractor, shall keep good and sufficient guards around said improvement, by fence or otherwise, to prevent accident, and shall hang thereon lights, to burn from dusk to daylight, and the contractor shall hold the city harmless from any and all suits for damages arising from or out of and during the performance of the work, or any portion thereof, and before the same has been accepted."

The position of the appellant is that this clause is obnoxious to the rule declared in a line of cases commencing with *Blochman v. Spreckels*, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213; *Goldtree v. Spreckels*, 135 Cal. 666, 67 Pac. 1091; *Woollacott v. Meekin*, 151 Cal. 701, 91 Pac. 612; *Van Loenen v. Gillespie*, 152 Cal. 222, 96 Pac. 87; *Hatch v. Nevills* (Cal.), 95 Pac. 43; *Stansbury v. Poindexter*, 154 Cal. 709, 129 Am. St. Rep. 190, 99 Pac. 181. We are satisfied that there is a clear distinction between section 19 above quoted and the provision of the specifications construed in *Blochman v. Spreckels*, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213, which may be taken as a type of the cases dealing with this subject. The ordinance there construed contained the following

provision: "The contractor shall keep good and sufficient guards around said improvements by fence or otherwise, to prevent accidents, and shall hang thereon lights to burn from dusk to daylight; and the contractor shall hold the city harmless from any and all suits for damages arising out of the construction of said improvements. The contractor shall when required to do so by the superintendent of streets remove from the work any overseer, laborer or other person who shall refuse or neglect to obey the said superintendent in anything relating to the work, or who shall perform his work in a manner contrary to these specifications or be found incompetent or unfaithful. All loss or damage arising from the nature of the work to be done under these specifications shall be sustained by the contractor."

It was the last sentence of this clause that was regarded by the court as fatal to the validity of the specifications. This sentence, says the opinion, "looked to damage which might ²⁴ arise out of and subsequent to the completed work—practically any damage for which the city would be liable which might originate in the nature of the work to be done." The decision was that such a provision was unauthorized in that it sought to compel the contractor to assume an obligation properly resting upon the city, and thereby tended to increase the cost of the work and the consequent burden to the property owner. The court was distinguishing between two kinds of damage which might result from the doing of street work: 1. Such as might result from the making of the improvement, however carefully and properly the actual work of construction were done; 2. The damage which might accrue through negligence, or the failure to take proper precautions during the period of construction. The first is a damage to property resulting from the exercise of the governmental function of ordering the improvement. For it the person whose property has been injured may seek redress from the governmental agency which caused the work to be done. The second gives rise to the liability resting upon anyone who negligently performs a lawful act in such a manner as to injure another. There can be no impropriety in making the contractor liable for the consequences of his own negligence. Indeed, he would be so liable without any express provision in the contract: *James v. San Francisco*, 6 Cal. 528, 65 Am. Dec. 526; *Barton v. McDonald*, 81 Cal. 265, 22 Pac. 855. In all probability, paragraph 19 of the specifications in the case at bar was designedly framed to avoid the vice of the clause condemned in *Blochman v. Spreckels*, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213, and similar cases. It was, we think, intended to require the assumption by the contractor of such liability only as would accrue from his failure to exercise proper care in the doing of the work while the same was under his exclusive

control and management. This is the meaning naturally derived from the limitations expressed in the clause itself. The loss or damage to be sustained and borne by the contractor is only such as arose from the nature of the work to be done "during the progress of the work." His obligation to hold the city harmless from any and all suits for damages is limited to such suits as may arise from or out of and during the performance of the work, and before the same has been accepted. The damage which will accrue to property from the proper carrying out of a public improvement scheme ²⁵ is, ordinarily, permanent in character. Its effects, while having their inception during the progress of the work, continue thereafter. The limiting words placed in paragraph 19 of these specifications may well be construed as excluding this very element of damage. Indeed, such construction is necessary in order to give any substantial meaning to the restrictive language differentiating these specifications from those found in the Blochman case. A contrary ruling would require us to say that the clause was intended to impose upon the contractor a liability limited in time for a loss or damage which would in most cases be permanent and indivisible.

The rule of Blochman v. Spreckels has been considered a harsh one when applied to specifications identical with those there involved. Even in cases where the decision was clearly in point, this court has manifested reluctance in following it (see Woollacott v. Meekin, 151 Cal. 701, 91 Pac. 612), and has, in adhering to the doctrine, based its action in large part upon the principle of stare decisis. We are certainly not disposed to extend the application of the decision in question to facts which may so readily be distinguished from those which were thought to require a holding adverse to the validity of the assessment.

The second point relates to the publication of the resolution ordering the work done, and of the notice inviting proposals. The resolution was passed by the common council on the sixth day of November, 1905. It designated the San Diego "Union" and "Daily Bee" as the newspapers in which the resolution itself and the notice inviting sealed proposals for doing the work should be published. The resolution was published in said paper on the thirteenth and fourteenth days of November, 1905, and the notices inviting proposals were published therein on the same days, i. e., the thirteenth and fourteenth days of November. The contention is until that publication of the resolution had been completed, there was no jurisdiction to call for bids, and, in addition, that inasmuch as the only designation of a paper in which the notices should be published was in the resolution ordering the work done, there was, at the time the notices were published, no valid

designation of a paper in which said publication of notices should be made.

The argument necessarily underlying these claims is that a ²⁶ resolution ordering work done is not effective as a basis for further proceedings, or otherwise, until it has been published as required by law. Section 3 of the Vrooman act (Stats. 1885, p. 147; Stats. 1905, p. 63) provides that at the expiration of twenty days after the expiration of the time of publication by the street superintendent, and "at the expiration of twenty-five days after the advertising and posting, as aforesaid, of any resolution of intention" (in the absence of objection by property owners), "the city council shall be deemed to have acquired jurisdiction to order any of the work to be done or improvement to be made, which is authorized by this act; which order, when made, shall be published for two days the same as provided for the publication of intention." Section 5 provides that before the awarding of any contract, the city council shall cause notices inviting sealed proposals or bids to be posted for five days and to be published for two days in a newspaper designated by the council for that purpose. It will be observed that, while section 3 expressly makes the publication of the resolution of intention a condition precedent to the jurisdiction of the council to order the work done, the act contains no declaration that the publication of the resolution ordering the work done shall be made before any further steps can be taken. It is merely provided that the resolution shall be published for two days. We see no good reason for holding that the resolution ordering work done is ineffectual for any purpose until the completion of the publication. The ordinary rule is that legislative enactments become operative upon their passage, unless there is some express provision of law to the contrary: *People v. Clark*, 1 Cal. 406; *Davis v. Whidden*, 117 Cal. 618, 49 Pac. 766. This court has held that, under a city charter providing that a board of trustees should publish all ordinances for ten days, but containing no provision that an ordinance should not take effect until after its publication, an ordinance regulating liquor licenses took effect on its passage: *City of Sacramento v. Dillman*, 102 Cal. 107, 36 Pac. 385. The principle of this decision is applicable here. The appellant cites several cases in which the completion of publication was held to be essential to the effectiveness of an ordinance, but an examination of these cases shows that in each instance the charter or law authorizing the adoption of the ordinance expressly provided ²⁷ that the enactment should not be effective until published. Some of the authorities cited deal with proceedings under the street law. In each of them—*Porphyry Paving Co. v. Ancker*, 104 Cal. 340, 37 Pac. 1050; *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057; *California Improve-*

ment Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802; Greenwood v. Hassett (Cal.), 61 Pac. 173—the question was concerning the necessity of publishing the resolution of intention. It was held, following the plain language of section 3, a part of which we have quoted, that the publication of this resolution is by the statute made a prerequisite to the power of the council to order the work done, or of the street superintendent to post notices of street work. As we have seen, there is no such provision regarding the publication of the resolution ordering the work done. We hold, accordingly, that that ordinance became effective upon its passage, for the purpose of designating the newspaper in which it and the notice calling for bids should be published, as well as for the further purpose of authorizing the posting and publication of such notices. The passage of the resolution ordering the work done is, no doubt, a necessary preliminary to the right to award a contract, as is the posting and publishing of the notice inviting bids, but we fail to find in the statute any provision requiring the publication of the resolution ordering the work done to be fully made in advance of the call for bids. The judgment is affirmed.

Shaw, J., and Angellotti, J., concurred.

That the Incorporation in Contracts for Public Work of conditions which impose unusual burdens upon the contractor may invalidate the contract, see Stansbury v. Poindexter, 154 Cal. 709, 129 Am. St. Rep. 190, and cases cited in the cross-reference note thereto. Compare, however, Dillingham v. Spartanburg, 75 S. C. 549, 117 Am. St. Rep. 917.

In Engebretsen v. Gay, 158 Cal. 27, 109 Pac. 879, an agreement by a contractor for street work to bear loss or damage arising from the nature of the work to be done under the contract during the progress of the work and before acceptance thereof was held not to include damage resulting from raising the grade of the street. Liability for such damage rests upon the city by virtue of the constitutional provision prohibiting the taking or damaging of private property for public use without compensation. So, in an action to foreclose the lien of a street assessment, a cause of action against the contractor for a trespass in piling dirt upon abutting property is not a proper subject of cross-complaint.

In Engebretsen v. Gay, 158 Cal. 30, 109 Pac. 880, 28 L. R. A., N. S., 1062, relating to street improvements, it was declared that the obligation resting on the property assessed to answer for a local improvement thereon is as clear and positive as is the duty of a taxpayer to pay an ordinary tax; that the contractor may properly be regarded as the agent of the state in the matter of the enforcement of the tax against the assessed property; that the statutory provision for an attorney's fee in this class of cases is not in violation of any constitutional provision, federal or state; and that a judgment which does not include the allowance of such attorney's fee is erroneous.

In City Street Imp. Co. v. Kroh, 158 Cal. 303, 110 Pac. 933, a case involving a contract for the improvement of a road, under the "Good Roads Law," the court, per Shaw, J., says: "It is a general principle of law applying to the letting of contracts for public work

to the lowest bidder, upon plans and specifications previously adopted, that they must be sufficiently certain and definite, upon all the details of the work which materially affect its cost, to apprise bidders of all the essential and substantial parts of the work and enable them to know with reasonable accuracy the outlay they will have to make in performing the work to be contracted for. This is thoroughly established in the case of public improvements of streets, where the cost is raised by assessment upon the property of owners within the district specially benefited thereby. The reason for the rule, as applied to such work, is in part because such uncertainty deprives the property owners of the knowledge necessary to enable them to undertake the work themselves, as the statute provides they may, and in part because it deprives bidders of like knowledge and thereby tends to prevent the fair competition and resulting low cost of the work, which is the principal object of the provision. The latter reason is as persuasive as the first, it is sufficient to support the rule, and it applies as well where the cost is to be paid with money already raised by taxation or by the sale of bonds, as where it is to be raised after the work is done by assessment upon the benefited property."

HARDY v. MAYHEW.

[158 Cal. 95, 110 Pac. 113.]

WILL—Construction—Decree of Partial Distribution.—Where the superior court has had jurisdiction of an estate, its decree of partial distribution as modified by the district court of appeal is a conclusive adjudication as to the construction to be given a will produced in the proceedings, and the rights of the respective parties must be measured solely by that decree. (p. 76.)

WILL—Life Estate in Principal—Bequest Over.—A decree in distribution to a person of money "for his use during his natural life, and on his death the unused portion of said sum" to other persons named, creates a life estate in the first taker with power of disposing of the principal, even to the entire consuming of it, in such ways as might be consistent with his "use" of it, and a vested remainder in the other persons. (p. 76.)

WILL—Construction—Effect of Words—"Unused Portion."—In a decree of distribution the employment of the words "the unused portion" to express what is to go to the remainderman implies that the first taker may, during his lifetime, use the estate without limit, even to the consuming of it; otherwise the disposition to the first taker would be merely such a "use" of the estate as would not impair the principal. (p. 76.)

WILL—Life Estate in Principal—Rights to Alien.—Under a bequest for life with right to use the principal according to his discretion, a legatee may not cut off the remainderman either by a will or by a gift inter vivos. (p. 77.)

WILL—Bequest of Principal for Life—Power of Disposal.—The mere fact that the first taker under a will is invested with power to dispose of or consume the whole of the property for certain purposes does not invest him with the absolute ownership and render void the gift over when, taking the whole instrument together, it is to be concluded that the intent was to give only an estate for life with limited power of disposal and consumption. (p. 79.)

WILL—Death of First Taker—Proceedings on His Estate.—

In case of a bequest of the principal sum for life and a bequest over of what portion may remain unused by the first taker, no proceedings on the estate of the first taker need be taken, on his death, in order that the remainderman may come into the enjoyment of such unused portion. (p. 80.)

WILL—Death of First Taker—Further Proceedings on Estate.

Necessarily any interest in property created by a will is to be adjudicated and distributed by decree of distribution, and the fact that it is a future interest with respect to the time of enjoyment is immaterial; and the death of the first taker would not in such case entail the necessity of further proceedings in the matter of the estate of his testatrix to vest in the remainderman the right to immediate possession of such of the property as had not been appropriated by him to an authorized use. (p. 80.)

WILL—Life Tenant as Trustee for Remaindermen.—

In case of a bequest to a legatee of the principal for his use during life, with a gift over of the unused portion, the first taker is a trustee only in the sense that a duty rests on him as life tenant to have merely due regard for the remainderman, a duty giving him the character rather of a quasi trustee. (p. 80.)

WILL—Disposal by Life Tenant—Remedies of Remainderman.

Under a bequest of the principal to one for life and a bequest over of the unused portion to others, children of the first taker, the latter do not take by descent as heirs of the first taker but as remaindermen under the original will; and so these others can follow the estate in the hands of any invalid donees of the first taker without resort first to proceedings against the donor's estate, and his legal representatives are not necessary parties. (p. 80.)

L. T. Hatfield and W. T. Phipps, for the appellants.

George & Hinsdale and C. E. McLaughlin, for the respondent.

97 ANGELLOTTI, J. This is an appeal by defendants from a judgment given against them in an action brought by plaintiff to obtain a decree that she is the owner of an undivided one-fourth of a certain property, real and personal, possessed by them and of which they claim to be the absolute owners, and to obtain an accounting as to said property and a delivery to her of her share or the reasonable value thereof.

The defendants are Frank J. Mayhew and Charles P. Mayhew, sons, and Mary E. Phipps, daughter of Judge Horace Allen Mayhew, who died March 3, 1907, and of Mary Jane Mayhew, who died August 3, 1903, and W. T. Phipps, husband of said Mary E. Phipps. The plaintiff is the sole surviving child of George H. Mayhew, a deceased son of said Judge Mayhew and Mary Jane Mayhew. The property involved in this action is an undivided one-fourth of practically all the property delivered to Judge Mayhew under a decree of partial distribution in the matter of the estate of said Mary Jane Mayhew. Judge Mayhew claimed on his application for partial distribution that under the will of Mary Jane Mayhew he was entitled to have the property, a legacy of

\$40,000, distributed to him absolutely. His claim in his behalf was resisted by plaintiff. The superior court having jurisdiction of the estate construed the will as giving him only the use of this money with the right to the custody of the principal, for his life, with remainder over to the other parties named in its decree, and distributed to him the sum ⁸⁸ of \$40,000 of the moneys of said estate "for his use, during his natural life, and on his death said sum to Chas. P. Mayhew, Frank J. Mayhew, the sons, to Mary E. Phipps, the daughter, and to Florence A. Hardy, the granddaughter of said deceased, in equal shares, each one-fourth thereof," and directed the executors to pay said \$40,000 to him "for his use for the term of his natural life." Appeals were taken by both parties, and the district court of appeal, concluding that the will contemplated that the legatee might use the principal sum according to his discretion for his "comfort or pleasure" even to the extent of using it all, modified the decree by inserting the words "the unused portion of" before the words "said sum to Chas. P. Mayhew," etc., making the decree read: "For his use during his natural life, and on his death the unused portion of said sum to Chas. P. Mayhew," etc.: Estate of Mayhew, 4 Cal. App. 162, 87 Pac. 417.

The basic theory of plaintiff's case is that under this decree Judge Mayhew took only a life interest, with the power to use during his life as much of the principal as he deemed proper for his own use, and that the other distributees took the remainder, viz., the whole property subject only to such life interest in Judge Mayhew with such power on his part to use the principal, and that upon his death such distributees became entitled absolutely to the possession of all of said property that had not been so used—that Judge Mayhew had no right or power under such decree to dispose of any of the corpus of such property by gift, and that those so taking from him by gift took no more than he had the right to give, and must account to the distributees therefor. The case made by the complaint is, substantially, that a few months before his death, with the intent to deprive plaintiff of the share in said property that would otherwise come to her upon his death, Judge Mayhew gave practically all of the same to his three surviving children, the other distributees, and that they received the same with the same intent and hold the same. The trial court so found, finding further that the property so received by Mary E. Phipps was of the value of \$17,500, that received by Frank J. Mayhew, \$11,000, and that received by C. P. Mayhew, \$10,700. ⁸⁹ There were also allegations of conspiracy and undue influence on the part of defendants in this matter, but the evidence demonstrates and the trial court found that there was no basis for any such charge, and that the gifts so made by Judge Mayhew

were not solicited in any way by any of the defendants but were absolutely free and voluntary. On October 26, 1906, each of the three children, at the suggestion of Mr. Phipps, executed a writing reciting that in consideration of gifts made by Judge Mayhew he promised and agreed in future to pay to him the sum of \$50 per month, so long as he shall live. It very clearly appears from the evidence that all of the parties regarded the transfers by Judge Mayhew as gifts.

We are satisfied that plaintiff's theory stated above is correct. The decree of partial distribution in Mrs. Mayhew's estate as modified by the district court of appeal is, of course, a conclusive adjudication as to the construction to be given to Mrs. Mayhew's will in this regard, and the rights of the respective parties must be measured solely by that decree. Though entirely immaterial in view of the conclusiveness of this decree, it may be said in passing that we are satisfied that the decree as modified was certainly as favorable to Judge Mayhew as the will warranted. The decree distributed the property to him "for his use, during his natural life, and on his death the unused portion of said sum to" the three children and the grandchild in equal shares. Herein was clearly a distribution to Judge Mayhew of a life estate simply, an estate limited by express terms of his natural life, with the power of disposing of the principal, even to the extent of entirely consuming it, in such ways as might be consistent with his "use" thereof, and a distribution of the remainder to plaintiff and the three children in equal shares. This power of disposition and consumption in the life tenant is to be implied solely from the words "unused portion of" inserted in the decree by the district court of appeal, for without this addition the word "use" in the decree, applied as it was to the money distributed, would mean a use without impairment of the principal. The added words, however, necessarily give to the word "use" a different meaning, and make it include not only a mere appropriation of the profits or interest, but also an impairment or consumption by the distributee of a ¹⁰⁰ part or even all of the principal, to the extent that he might deem proper in his use of the same. But it appears very clear to us, and our conclusion is fully supported by the language of the opinion of the district court of appeal, which we have the right to consider in determining the sense in which the word was used by that court, that the "use" authorized was only such personal use as the distributee might desire to make of the money for himself, and that it did not include a disposition of practically the whole thereof either by will or by gift during his life, especially a gift made for the very purpose of excluding one of the remaindermen from participating in what otherwise would have been "unused" by him at the time of his death. If the district court of appeal

had concluded that such was the effect of the provisions of the will in this regard, it would necessarily have modified the decree of the superior court in accord with the contention of the petitioner, making it one whereby the \$40,000 was distributed to him absolutely and not merely for his life. As determined by the modified decree, the interest given to Judge Mayhew was the kind of interest referred to in 2 Underhill on Wills, at section 689, a life interest by its express terms, with the power of disposing of a part or all of the property itself for a particular purpose only, as for the support and maintenance of the life tenant, with a valid gift over to the other distributees which might be disappointed by the exercise of his power by the life tenant and the application of the principal to the purposes indicated. As to such a life tenant, Mr. Underhill says substantially in another section, he may not use the proceeds of a sale of the property for another purpose, he cannot give them away, nor can he devise the land, and also that those who take what remains unused, do not take by descent as heirs of the first taker, but as purchasers and remaindermen under the will of the testator (section 687). The author is here speaking of real property, but the rule declared is necessarily applicable to such personal property as money. Given a life interest therein, with the power to use the principal for certain purposes, the life tenant may not use it for any other purpose and may not give it away. The distinction between the case of an intended gift of an absolute title to one with an attempted gift over of simply "what remains unexpended" by the donee¹⁰¹ at the time of his death, where the gift over is void because in derogation of the absolute fee given the first taker, and the case of a gift of a life estate with a power of disposition for a particular purpose only, with an express gift over of what remains unused for such purpose, is recognized by all the authorities. The cases supporting our conclusion are numerous, and a few of these may properly be referred to. In *Downing v. Johnson*, 5 Cold. (45 Tenn.) 229, the gift by will was to the testator's wife of the whole estate "for and during her natural life, to be by her freely possessed and enjoyed," and "the balance . . . that may be on hand at the death of my wife, I dispose of in the following manner," etc. Personal property was involved. It was held that this created a life estate in the wife, with power to consume such as she may deem proper for her support and maintenance, and a remainder in the second takers. It was said that a court might restrain fraudulent and extravagant waste by the life tenant. In *Lewis v. Pitman*, 101 Mo. 281, 14 S. W. 52, it was held, personal property being involved, that where an express life estate is created, an added power of disposition does not convert the estate into a fee, and that there was no power to

dispose of the property by will. In *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23, the gift was of all the estate to the wife to her use and disposal during her natural life, and what is remaining at her decease, undisposed of by her to others named. It was held that the wife took only a life estate, with power to dispose of such of the property, even to the extent of the whole, as her needs, her comfort, or her gratification should demand, and that the provision as to a gift over created a vested remainder. The question whether she had power to dispose of the property by will was left undecided, the court concluding that her will did not affirmatively show any attempt to execute the power. In *Green v. Hewitt*, 97 Ill. 113, 37 Am. Rep. 102, a gift of real and personal property to the wife "as long as she remains my widow. At the expiration of that time the whole, or whatever remains, to descend to my daughters," was held to be one to the wife for widowhood only, with a vested remainder in the daughter. In *Eubank v. Smiley*, 130 Ind. 393, 29 N. E. 919, a gift to the wife of all the husband's property, "to do with and dispose of after my decease as she may think best," and at decease of the wife the ¹⁰² real estate to be equally divided among my heirs, was held to give only a life estate in the real estate. Here the wife had conveyed the real estate to a daughter for a nominal consideration, and the deed was held to convey only a life estate. In *Gadd v. Stoner*, 113 Mich. 689, 71 N. W. 1111, the husband's will gave all his property, real and personal, and including a farm, to his wife "to use the same as she may desire and wish for and during her natural life, with full power and authority to grant and convey, in her own name, any part or portion," etc., and gave the property remaining at her death to others. The wife conveyed the farm to a daughter, taking back an agreement for support during her life. It was held that the wife had a life estate only, and that the power of disposition was limited to specific purposes. The court held the conveyance to the daughter ineffectual to defeat the remaindermen, saying, among other things: "It is evident that the intent and purpose of the conveyance made to Mrs. Stover was to subvert the intent of the testator," and that the limitation of good faith will be affixed by the law in determining the effect of the conveyance. In *Goudie v. Johnston*, 109 Ind. 427, 10 N. E. 296, the gift was to the wife "for her use during her natural lifetime . . . she to have the control and management of the same, and at her death all of said personal estate remaining . . . shall go to," etc. Personal property only was involved in the case. It was held that the wife took only a life estate, with the power, perhaps, to consume such as was necessary for her support, but certainly without absolute power of disposition for any other purpose. In *Johnson v. Johnson*, 51 Ohio St. 446, 38 N. E. 61, the will

gave to the wife all property, real and personal, with full power to dispose of the same as she may think proper, but if, at the time of her decease, any of said property shall remain unconsumed, the same was to be equally divided among his brothers and sisters and their children. According to the allegations of the complaint, the wife during her lifetime had given all of the property to the defendant, and the suit was one by the remaindermen for an accounting, etc. The court held that the intention of the testator was to give his wife a life estate only, with power to consume so much thereof during her lifetime as she might deem necessary for her support and maintenance, and to give the property, subject to this estate and use, to his brothers and ¹⁰³sisters and their children; that the wife had no power to dispose of the fee by gift during her life or by will at her death; that the brothers and sisters and their children had a vested remainder in so much of the estate as should remain unconsumed at the wife's death, and that one coming into possession of the property with knowledge of the terms upon which it was held by the wife could be held accountable therefor to the remaindermen: See, also, *Giles v. Little*, 104 U. S. 291, 26 L. ed. 745; *Brant v. Virginia etc. Co.*, 93 U. S. 326, 23 L. ed. 927; *Mansfield v. Shelton*, 67 Conn. 390, 52 Am. St. Rep. 285, 35 Atl. 271; *Chase v. Ladd*, 153 Mass. 126, 25 Am. St. Rep. 614, 26 N. E. 429; *Smith v. Bell*, 6 Pet. (U. S.) 68, 8 L. ed. 322; *Wager v. Wager*, 96 N. Y. 164. It appears to be settled by the overwhelming weight of authority that the mere fact that the first taker is invested with the power to dispose of or consume the whole of the property for certain purposes does not invest him with the absolute ownership thereof and render the gift over void, where taking the whole instrument together it is concluded that the intent was to give only an estate for life, with limited power of disposal or consumption. As expressly indicated in some of the decisions referred to above, the interest of the remaindermen expressly designated, in this case Chas P. Mayhew, Frank J. Mayhew, Mary E. Phipps, and plaintiff, was a vested remainder. Neither the person in whom nor the event upon which it was limited to take effect was in any degree uncertain: Civ. Code, secs. 693-695.

The decree of distribution operated to remove all the property from the estate of Mary Jane Mayhew and to distribute to the remaindermen the interest which they were thereby determined to have under the will. The claim of defendants that distribution can be had only as to those persons who are entitled to immediate possession of the property distributed is not well founded, and is not supported by the decision cited—*Martinovitch v. Marsicano*, 137 Cal. 354, 70 Pac. 459. The court in that case was discussing the

question of the power of the court in probate on distribution in regard to one having a judgment lien on the property of an heir, devisee or legatee, and it was in regard to such a person that it said that distribution can be made to only these persons entitled to receive "immediate possession of the property distributed," meaning simply that the rights of third persons against those entitled to ¹⁰⁴ take directly from the deceased as heirs, devisees or legatees were not within the proper scope of distribution proceedings. Necessarily any interest in property created by a will is to be adjudicated and distributed by decree of distribution, and the fact that it is a future interest in respect to the time of enjoyment is immaterial. There was no trust created by the will of Mary Jane Mayhew within the meaning of section 1699 of the Code of Civil Procedure, providing for the settlement of the accounts of the trustee by the probate court. That section refers exclusively to express trusts created by will. Judge Mayhew was a trustee only in the sense that the duty rested on him, as a life tenant merely, to have due regard for the rights of those in remainder, a duty in the nature of a trust constituting him an implied or quasi trustee for the remaindermen: See Perry on Trusts, sec. 540; Johnson v. Johnson, 51 Ohio St. 446, 38 N. E. 61. There is therefore nothing in the claim that further proceedings were essential in the estate of Mary Jane Mayhew upon the death of Judge Mayhew to vest in the remaindermen the right to immediate possession of such of the property as had not been appropriated by him to an authorized use.

Nor was any proceeding in the estate of Judge Mayhew essential to the right of the remaindermen to recover the property to which they were entitled from those to whom it had been given by him without authority, and who had full notice of the limits of his authority in regard thereto. As we have seen, such remaindermen do not take by descent, as heirs of Judge Mayhew, but as remaindermen under the will of Mary Jane Mayhew. The property constituted no part of his estate. The remaindermen were not restricted to proceedings against his estate for any improper disposition of their property, but could recover the same in the hands of any person who had taken it by gift, and the legal representative of the estate of Judge Mayhew was not a necessary party to such an action.

In view of what we have said, it is clear to us that the complaint stated a good cause of action within the jurisdiction of the superior court of Sacramento county, and that the demurrer thereto was properly overruled. We have carefully examined the complaint with reference to the claim that the trial court erred in denying a motion to strike out portions ¹⁰⁵ thereof, and are entirely satisfied that if there

was any error at all in the ruling, it was entirely without prejudice to defendants.

The findings clearly sustain the judgment. It is claimed that the evidence is insufficient to support some of these findings. No attack is made in the briefs on finding 1, which is that paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 14, and 18 of the first cause of action set forth in the complaint are true. By these findings are established the death of Mary Jane Mayhew, the proceedings leading to the distribution of the property, the distribution of the same, the delivery of the possession of the property to Judge Mayhew under the modified decree, including in lieu of \$6,500 of the legacy of \$40,000 principal and \$1,863.38 interest thereon, a lot of land in the city of Sacramento, and in lieu of \$10,000 thereof, ten Realty Syndicate Investment certificates of the par value of \$1,000 each, and \$25,363.58 in cash, the death of Judge Mayhew on March 3, 1907, the demand of plaintiff on defendants for an accounting as to such of the property as they had received from Judge Mayhew and the delivery to her of her share and the refusal of defendants, together with the claim on their part that she had no interest therein. Finding 8 is in favor of defendants to the extent that it finds that neither of the defendants "by any act or words, conspired, persuaded, enticed or induced Horace Allen Mayhew to give . . . to the defendants or either or any of them, any property whatever." But it further finds that for the purpose and with the intent to deprive plaintiff of her share in the money and property elsewhere described in the findings, they received from Judge Mayhew gifts of the same, and hold and claim the same as their own. This property is described in findings 12, 13, 16, and 17, by which it is found that for the purpose of depriving plaintiff of her share, Judge Mayhew gave to Mrs. Phipps, Charles P. Mayhew, and Frank J. Mayhew property received by him under such decree, as follows: To Mary E. Phipps, the \$6,500 lot of land in Sacramento, nine of the Realty Syndicate certificates valued at \$9,000, and \$2,000 in cash; to Charles P. Mayhew certain notes and mortgages and money and property amounting to a total of \$10,700; ¹⁰⁶ to Frank J. Mayhew certain notes and mortgages, money, and property, aggregating in value \$11,000. It is claimed that these findings are not sustained by the evidence, in that there is no evidence to show that the property so received by the respondents was property received by Judge Mayhew under the decree of distribution. It is not claimed by the defendants that the evidence is insufficient to support the conclusion that property of the kind and to the value specified was given by Judge Mayhew to them. In addition to the fact that the evidence is suffi-

cient to support a conclusion that nearly all of the property given to defendants by Judge Mayhew was clearly identified as property received by him under the decree, a careful examination of the pleadings satisfies us that it must be held that it stands admitted thereby that such property as was so given to them was property so received by him under the decree. We are of the opinion also that the evidence was sufficient to support the conclusion of the trial court that the intent and purpose of Judge Mayhew and the defendants in the making and acceptance of these gifts was to subvert the intent of the decree of distribution to the extent of depriving plaintiff of any share in the property distributed thereby. Doubtless all felt that solely by reason of the death of her father, George H. Mayhew, plaintiff was given by the decree of distribution property that Mary Jane Mayhew had never contemplated that she would receive under her will, and it is not surprising that Judge Mayhew, in view of such a belief, and also in view of the opposition made by plaintiff to his petition for distribution, desired to exclude her from participation in the remainder. But the effect of the decree in her behalf could not legally be obviated in the manner attempted.

Most of the alleged errors of law in the matter of the reception of evidence are disposed of by what we have already said in discussing other points. We have considered such as are not so disposed of, and find in the rulings of the court thereon no error warranting reversal.

The judgment is affirmed.

Shaw, J., and Sloss, J., concurred.

Hearing in bank denied.

DEVISE OR BEQUEST FOR LIFE WITH POWER OF DISPOSAL.

I. Effect of Power upon the Estate.

- a. Restriction to Express Grant, 83.
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- a. Right to Convey the Fee, 114.
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I. Effect of Power upon the Estate.

a. **Restriction to Express Grant.**—A life estate expressly created by will is not converted into a fee merely because there is coupled with it a power of disposal: *Pendley v. Madison's Admr.*, 83 Ala. 484, 3 South. 318; *Douglass v. Sharp*, 52 Ark. 113, 12 S. W. 202; *Morffew v. San Francisco & S. R. R. Co.*, 107 Cal. 587, 40 Pac. 810; *Melton v. Camp*, 121 Ga. 693, 49 S. E. 690; *Skinner v. McDowell*, 169 Ill. 365, 61 Am. St. Rep. 183, 48 N. E. 310; *Rusk v. Zuck*, 147 Ind. 388, 45 N. E. 691, 46 N. E. 674; *Haviland v. Haviland*, 130 Iowa, 611, 105 N. W. 354, 5 L. R. A., N. S., 281; *Williams v. McKinney*, 34 Kan. 514, 9 Pac. 265; *Anderson v. Hall's Admr.*, 80 Ky. 91; *Stuart v. Walker*, 72 Me. 145, 39 Am. Rep. 311; *Benesch v. Clark*, 49 Md. 497; *Morse v. Inhabitants of Natick*, 176 Mass. 510, 57 N. E. 996; *Lewis v. Pitman*, 101 Mo. 281, 14 S. W. 52; *In re Oertle*, 34 Minn. 173, 57 Am. Rep. 48, 24 N. W. 924; *Dean v. Nunnally*, 36 Miss. 358; *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23; *Cory's Exr. v. Cory's Admr.*, 37 N. J. Eq. 198; *Tompkins v. Fanton*, 3 Dem. Sur. 4; *Troy v. Troy*, 60 N. C. 624; *James v. Pruden*, 14 Ohio St. 251; *Winchester v. Hoover*, 42 Or. 310, 70 Pac. 1035; *Appeal of Hinkle*, 116 Pa. 490, 9 Atl. 938; *Rhode Island Hospital Trust Co. v. Commercial Nat. Bank*, 14 R. I. 625; *Jennings v. Talbert*, 77 S. C. 454, 58 S. E. 420; *Pool v. Pool*, 78 Tenn. (10 Lea) 486; *Weir v. Smith*, 62 Tex. 1; *Smythe v. Smythe*, 90 Va. 638, 19 S. E. 175; *Park's Admr. v. American Home Missionary Soc.*, 62 Vt. 19, 20 Atl. 107; *Jones v. Jones*, 66 Wis. 310, 57 Am. Rep. 266, 28 N. W. 177; *Kennedy v. Alexander*, 21 App. D. C. 424; *Downie v. Downie*, 9 Biss. 353, 4 Fed. 55.

From the numerous authorities cited and examined on the hearing, the court in *Tompkins v. Fanton*, 3 Dem. Sur. 4, extracted the following rule: That, where property is willed without specifying the nature of the estate, and the donee is given the power of disposition, the latter takes the absolute title to the property, but where the donee takes an estate expressly for life, with a power of disposal, during life, he takes a life estate only, and whatever is left of that estate at the time of the death of the life tenant, passes to the remainderman.

Where a life estate is expressly limited in the first taker, a super-added power of disposal conferred by the will is a mere power or authority, and not a right of property: *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23; *Melton v. Camp*, 121 Ga. 693, 49 S. E. 690.

A study of some of the cases in which the principle stated has been applied will serve to illustrate the rule.

In *Farlin v. Sanborn*, 161 Mich. 615, 137 Am. St. Rep. 525, 126 N. W. 634, a man devised and bequeathed all his property to his wife "for and during her natural life, with full power and authority to use and dispose of the same for her use, support and comfort, as to her shall seem best. Also with full power and authority to sell and convey all or any of the real estate, of which I shall die seised, at her own option as fully as I myself could do." The will further provided that upon the death of the testator's wife all the property of the estate remaining should go to his heirs living at the time of his decease. The court construed this will as creating a life estate in the wife, with a vested remainder over to the heirs of the testator living at the time of his decease.

In *Mansfield v. Shelton*, 67 Conn. 390, 52 Am. St. Rep. 285, 35 Atl. 271, a devise by a man to his wife of the residue of his estate, "to be used and appropriated by her so much as she may wish for her happiness, without any restrictions, or limitations whatever," and upon her decease, the payment of her debts, and the settlement of her estate, the remainder to vest in a trustee in trust for the children of a third party during their lives—was construed to vest in the wife a life estate only, and the trust to take effect upon her death was valid.

The case of *Chase v. Ladd*, 153 Mass. 126, 25 Am. St. Rep. 614, 26 N. E. 429, involved the construction of a will by which the testator gave and devised all his property to his wife, "to her own use and behoof forever," but provided that if any of such property should not be expended for her support and maintenance during her lifetime, it should be disposed of in the manner designated in the will. It was held that the language used did not vest the property in the wife absolutely, but merely conferred upon her a right to use it for her support, and, if necessary for that purpose, to dispose of it during her life, leaving whatever she had not so disposed of to vest after her death in other persons as provided in the will.

In *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135, 34 N. E. 558, the language of a will was: "I give, bequeath and devise to my wife . . . the use of all the rest of my real and personal estate for and during her natural life, and I hereby give her full power and authority to sell, dispose of, and convey any and all of said real and personal estate, and to invest the proceeds thereof in any other form she deems advisable, and I give her full right and authority to use and exhaust such part of the principal of my estate, real and personal, as she may at any time think necessary for her support and maintenance." After the death of the wife the property then remaining was to be equally divided among the testator's children. It was held that a life estate was created, which was not raised to a fee by the added power of sale.

A devise and bequest to the testator's widow of all his estate, real and personal, to be the real owner thereof and for her proper use and benefit during her natural life, or so long as she remains his widow, with full permission to use therefrom as her necessities may require the same as the testator has had during his life, followed by a direction that, on her death, whatever remains is to be given his daughter, does not give the widow the fee: *Allen v. Hirlinger*, 219 Pa. 56, 123 Am. St. Rep. 617, 67 Atl. 907, 13 L. R. A., N. S., 458.

In *Cross v. Hendry*, 39 Ind. App. 246, 79 N. E. 531, the principal item of a will provided as follows: "I give and bequeath to my beloved wife . . . all my property, both personal and real, to be hers during her lifetime, and at her death I wish that what property is left to be applied toward building" a certain church. This item, the court said, gave the widow only an estate for life in the property of the deceased, and the power of disposition annexed did not operate to create a fee.

In *Reed v. Reed*, 194 Mass. 216, 80 N. E. 219, a testatrix gave all her real estate and personal property to her sister "for and during her natural life with the privilege of disposing of any or all of said real estate if she should at any time deem it expedient to do so."

At the decease of the sister the property was to be divided among certain relatives of the testatrix in certain proportions. In holding that the sister did not take the property absolutely, but only a life estate with a power of disposing of the real estate, the court said: "It would hardly be possible to conceive of more direct language to express her purpose than that chosen by the testatrix in the first sentence of the clause. The gift is of 'all my real estate and personal property,' and the tenure is 'for and during her natural life,' coupled with an unlimited power of disposal by deed if the devisee for any reason deemed it expedient to convert the real estate. A life interest in the estate as a whole having been given with a power to convey, the word 'property' in the second sentence, should be construed as including whatever might remain at the death of the tenant for life. Under this construction the limitation over is not repugnant, but consistent with the object of the testatrix, which evidently was to provide for the comfortable support of her sister, even if the whole of the property might be exhausted, but if a residue remained it was to go to her other relatives in the proportions named."

In *Howard v. Cole*, 124 Ky. 812, 100 S. W. 225, the first clause of the testator's will directed that the personal property should be sold and the proceeds applied to the discharge of his debts, and in the event that a sufficient sum of money was not realized by this sale, then the executrix (his wife) was directed to sell certain real estate. In the second clause of the will the rest and residue of the estate was given to his wife during her natural life "to own and do with as she pleases." In construing this will the court said that the second clause must be read in connection with the first clause; that a fair interpretation of the first clause was that the executrix was not empowered or authorized to sell any real estate whatever, except it should become necessary for the payment of the testator's debts. The wife, therefore, took only a life estate in the realty left by her husband.

In *Wardner v. Seventh Day Baptist Memorial Board*, 232 Ill. 606, 122 Am. St. Rep. 138, 83 N. E. 1077, it was decided that the words "use, dispose of and control according to her own judgment during her natural life," did not give the devisee the power to sell and dispose of the fee in the property, there being a limitation over after the death of the devisee. "It is a general rule in all cases," said the court, "where, by the terms of the will, there has been an express limitation of an estate to the first taker for life and a limitation over, with general expressions apparently giving the tenant for life an unlimited power over the estate, but which do not in express terms do so, that the power of disposal is only coextensive with the estate which the devisees take under the will, and means such a disposal as the tenant for life could make, unless there are other words clearly showing that a larger power was intended."

In *Harris v. Rhodes*, 130 Ill. App. 233, the testator bequeathed all his personal property to his wife absolutely, and devised his real estate to her for and during her natural life, with the provision that should she deem it necessary for her support and maintenance or for her general comfort or convenience to sell and convey absolutely and in fee any or all of the real estate, she might in her discretion do so, or she might, by mortgage or otherwise, encumber any portion

of the real estate for her support and maintenance. The power of sale thus granted was held not to be a general power to sell and convey the land, but a limited power, to be exercised only in the event that the wife should deem it necessary for her support, maintenance or general comfort and convenience and as she failed to exercise the power during her life, the fee at her death was freed therefrom.

In *Hamilton v. Hamilton*, 140 Iowa, 282, 115 N. W. 1012, 118 N. W. 375, it was held that a will giving the residue of the testatrix's estate to her husband for life, with full power to sell, transfer and dispose of the same or as much thereof as he might need for his support during his lifetime, created a life estate in the husband with power of alienation for specific purposes added.

In *Perkinson v. Clarke*, 135 Wis. 584, 116 N. W. 229, the will devised and bequeathed to the husband of the testatrix, without words of inheritance, all her estate both real and personal, with full power to sell the same, and to use and enjoy during his natural life, and, upon his decease, such of the estate as remained should descend to her children. It was decided that the will created a life estate in the husband, and vested the remainder, if any, of the property, or its proceeds in the children.

In *Paxton v. Paxton*, 141 Iowa, 96, 119 N. W. 284, it was held that a will giving the testator's widow all his real and personal property "to be by her used and enjoyed, as she may choose during her natural life and at her death if any property is remaining to be divided equally among my children," passed a life estate to the widow, and the devise in remainder vested at once in the devisees thereof a fee simple title to whatever might remain undisposed of by the widow under her power of disposal.

In *Smith v. Winsor*, 239 Ill. 567, 88 N. E. 482, a devise to testator's wife of all his real and personal property "for and during her natural life with full and complete power to sell and convey all or any part thereof, or to loan the same, or to use and employ the same, or any part thereof, in any other way she shall desire for her comfort or advantage," with remainder to his heirs at law, was held to give the widow only a life estate in the property of the deceased, with a limited power to dispose of the fee or corpus of the property.

In *Foudray v. Foudray* (Ind.), 89 N. E. 499, the first item of the testatrix's will gave certain real estate to her daughter "for and during her natural life with full power of disposition." A subsequent item provided that at the death of her daughter, "should any real or personal property hereinbefore by me devised or bequeathed to her as aforesaid, be left or remain, then such property so left or remaining I give, bequeath and devise to . . . my heirs at law living at the time of the death" of the daughter. It was held that a life estate having been given to the daughter by certain and express terms, she did not take a fee, notwithstanding the gift of the full power of disposition.

In *McCormick v. McCormick's Admr.* (Ky.), 121 S. W. 450, the testator gave the property to his wife during her natural life, and at her death to his children equally. He also gave her the right to sell any of the property at any time she thought best. The power

of sale, the court decided, in no wise enlarged the life estate expressly granted to the wife, and when she sold the land, she had only a life estate in the proceeds.

In *Pool v. Napier*, 145 Iowa, 699, 124 N. W. 755, a testatrix devised and bequeathed to her husband the "use and benefit" of all her real and personal property "with full power to use and transfer the same as if it belonged to him in fee simple." The succeeding paragraph of the will provided that on the death of her husband all the property remaining should go to her daughter and two children. It was held by a divided court that the words "use and benefit" had reference to a qualified estate, rather than to an absolute and unqualified one, and that nothing but a life estate passed by the first paragraph of the will.

In *re Nieman's Estate*, 229 Pa. 41, 77 Atl. 1095, the testator devised to his wife his entire residuary estate with full power and authority to apply such portion or portions of the estate, the principal as well as the income, to her own use during her life; and after her death such property of which she should die seised was to be applied as directed in the will. It was held that the estate was absolute in the wife to the extent that she saw fit to use or consume it; that there was no limitation upon her power to appropriate, during her life, for her own use. What she used was hers absolutely, and the remainder belonged to the testator's estate, and must pass by his will.

In *Murdoch v. Murdoch* (Miss.), 53 South. 684, the wife of the testator was given the "entire use and management" of both his real and personal property during her life. At her death the estate was to go to the living brothers and sisters of the testator, or their heirs. The will also authorized the wife to sell any of the estate as might "be for the best." The wife, it was held, did not take the fee to either the real or the personal property, although she had full authority to consume the whole estate.

In *Parker v. Travers*, 74 N. J. Eq. 812, 71 Atl. 612, the will devised and bequeathed to the wife of the testator, while she remained his widow, all of his property, "with full power of disposition and alienation," with the proviso that in case his daughter survived his wife, all the property not disposed of prior to the wife's decease should become the property of the daughter, and in the event of the wife's contracting another marriage, she should "possess and enjoy as of her own right only one-third of the property then remaining," and that the other two-thirds should be invested and held in trust for his daughter. The interest in the real and personal property of the testator which his widow acquired under this devise was held to be a life estate, determinable upon her remarriage, with the power of disposal and alienation during the continuance of the estate, subject to a gift over of what remained undisposed of at her death should she remain unmarried, and also subject to the condition that, in the event of her remarriage, she should take in her own right one-third of the property then remaining, and invest the residue for the benefit of the daughter. "The rule is well established in this state," said the court, "that, when to a life estate, with a remainder over of what may be undisposed of, there is added a power of disposition, the property right or interest of the life tenant is not thereby enlarged, but the devisee takes a life estate only, with a

power of disposal to be exercised by the devisee during the continuance of the estate, for his benefit."

Not to multiply cases in particular, the general principle established by the foregoing cases, and succinctly enunciated in the paragraph last quoted, will be found upheld in the following cases: *Denson v. Mitchell*, 26 Ala. 360; *Bristol v. Austin*, 40 Conn. 438; *Tolland County Mut. Fire Ins. Co. v. Underwood*, 50 Conn. 493; *Peckham v. Lego*, 57 Conn. 553, 14 Am. St. Rep. 130, 19 Atl. 392, 7 L. R. A. 419; *Little v. Geer*, 69 Conn. 411, 37 Atl. 1056; *Bartlett v. Buckland*, 78 Conn. 517, 63 Atl. 350; *Wetter v. Walker*, 62 Ga. 142; *Bull v. Walker*, 71 Ga. 195; *Welsch v. Belleville Sav. Bank*, 94 Ill. 191; *Mann v. Martin*, 172 Ill. 18, 49 N. E. 706; *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144, 64 N. E. 267; *Sayer v. Humphrey*, 216 Ill. 426, 75 N. E. 170; *Rapp v. Matthias*, 35 Ind. 332; *Frazier v. Hassey*, 43 Ind. 310; *Eltzroth v. Binford*, 71 Ind. 455; *Wood v. Robertson*, 113 Ind. 323, 15 N. E. 457; *Jenkins v. Compton*, 123 Ind. 117, 23 N. E. 1091; *Levengood v. Hooper*, 124 Ind. 27, 24 N. E. 373; *Neely v. Boyce*, 128 Ind. 1, 27 N. E. 169; *Bowser v. Mattler*, 137 Ind. 649, 35 N. E. 701, 36 N. E. 714; *Rowley v. Sanns*, 141 Ind. 179, 40 N. E. 674; *Nelson v. Nelson*, 36 Ind. App. 331, 75 N. E. 679; *Greve v. Camery*, 69 Iowa, 220, 28 N. W. 564; *In re Foster's Will*, 76 Iowa, 364, 33 N. W. 135, 41 N. W. 43; *In re Proctor's Estate*, 95 Iowa, 172, 63 N. W. 670; *In re Stumpenhousen's Estate*, 108 Iowa, 555, 79 N. W. 376; *Baldwin v. Morford*, 117 Iowa, 72, 90 N. W. 487; *Rowe v. Rowe*, 120 Iowa, 17, 94 N. W. 258; *Steiff v. Seibert*, 128 Iowa, 746, 105 N. W. 328, 6 L. R. A., N. S., 1186; *Collins v. Carlisle's Heirs*, 46 Ky. (7 B. Mon.) 13; *Carroll's Heirs v. Carroll's Heirs*, 51 Ky. (12 B. Mon.) 637; *Henderson v. Hayne*, 59 Ky. (2 Met.) 342; *Holsen v. Rockhouse*, 83 Ky. 233; *Koenig v. Kraft*, 87 Ky. 95, 12 Am. St. Rep. 463, 7 S. W. 622; *Coats' Exr. v. Louisville & N. R. Co.*, 92 Ky. 263, 17 S. W. 564; *Jones v. Jones*, 93 Ky. 532, 20 S. W. 604; *Payne v. Johnson's Exrs.*, 95 Ky. 175, 24 S. W. 238, 609; *Martin v. Barnhill*, 21 Ky. Law Rep. 1666, 56 S. W. 160; *Pedigo's Ex. v. Botts*, 28 Ky. Law Rep. 196, 89 S. W. 164; *Hall v. Otis*, 71 Me. 326; *Stuart v. Walker*, 72 Me. 145, 39 Am. Rep. 311; *Nash v. Simpson*, 78 Me. 142, 3 Atl. 53; *Whittimore v. Russell*, 80 Me. 297, 6 Am. St. Rep. 200, 14 Atl. 197; *Hatch v. Caine*, 86 Me. 282, 26 Atl. 1076; *McGuire v. Gallagher*, 99 Me. 334, 59 Atl. 445; *Brady v. Brady*, 78 Md. 461, 28 Atl. 515; *Conner v. Waring*, 52 Md. 724; *Russell v. Werntz*, 88 Md. 210, 44 Atl. 219; *Mills v. Bailey*, 88 Md. 320, 41 Atl. 780; *Stevens v. Winship*, 18 Mass. (1 Pick.) 318, 11 Am. Dec. 178; *Larned v. Bridge*, 34 Mass. (17 Pick.) 339; *Whitcomb v. Taylor*, 122 Mass. 243; *Smith v. Snow*, 123 Mass. 323; *Baker v. Thompson*, 162 Mass. 40, 37 N. E. 751; *Lewis v. Shattuck*, 173 Mass. 486, 53 N. E. 912; *Morford v. Dffenbacher*, 54 Mich. 593, 20 N. W. 600; *Glover v. Reid*, 80 Mich. 228, 45 N. W. 91; *McCarty v. Fish*, 87 Mich. 48, 49 N. W. 513; *Jones v. Deming*, 91 Mich. 481, 51 N. W. 1119; *Gadd v. Stoner*, 113 Mich. 689, 71 N. W. 1111; *Burns v. Burns*, 132 Mich. 441, 93 N. W. 1077; *Andrews v. Brumfield*, 32 Miss. 107; *Rubey v. Barnett*, 12 Mo. 3, 49 Am. Dec. 112; *Bryant v. Christian*, 58 Mo. 98; *Carr v. Dings*, 58 Mo. 400; *Gregory v. Cowgill*, 19 Mo. 415; *Russell v. Eubanks*, 84 Mo. 82; *Harbison v. James*, 90 Mo. 411, 2 S. W. 292; *Redman v. Barger*, 118 Mo. 568, 24 S. W. 177; *Lewis v. Pitman*, 101 Mo. 281, 14 S. W. 52; *Evans v. Folks*, 135

Mo. 397, 37 S. W. 126; *Bramill v. Cole*, 136 Mo. 201, 58 Am. St. Rep. 619, 37 S. W. 924; *Grace v. Perry*, 197 Mo. 550, 95 S. W. 875, 7 Ann. Cas. 948; *Worden v. Perry*, 197 Mo. 569, 95 S. W. 880; *Loosing v. Loosing*, 85 Neb. 66, 122 N. W. 707, 25 L. R. A., N. S., 820; *Paul v. Dole*, 70 N. H. 593, 49 Atl. 572; *Pratt v. Douglas*, 38 N. J. Eq. (11 Stew.) 516; *Lienan v. Summerfield*, 41 N. J. Eq. 381, 4 Atl. 660; *Robeson v. Shotwell*, 55 N. J. Eq. 318, 36 Atl. 780; *Chambers v. Sharp*, 61 N. J. Eq. 253, 48 Atl. 222; *Bryan v. Bryan*, 61 N. J. Eq. 45, 48 Atl. 341; *Bradway v. Holmes*, 50 N. J. Eq. 311, 25 Atl. 196; *Stevens v. Flower*, 46 N. J. Eq. 340, 19 Atl. 777; *Carter v. Hunt*, 40 Barb. 89; *Weed v. Aldrich*, 2 Hun, 531; *Wells v. Seeley*, 47 Hun, 109; *Thomas v. Wolford*, 49 Hun, 145, 1 N. Y. Supp. 610; *McKeown v. Officer*, 53 Hun, 634, 6 N. Y. Supp. 201; *Kibler v. Miller*, 57 Hun, 14, 10 N. Y. Supp. 375; *In re Cager's Will*, 111 N. Y. 343, 18 N. E. 866; *In re Skinner*, 180 N. Y. 515, 72 N. E. 1151; *Owens v. Owens*, 64 App. Div. 212, 71 N. Y. Supp. 1108; *In re Blauvelt*, 60 Hun, 394, 15 N. Y. Supp. 586; *Leggett v. Firth*, 132 N. Y. 7, 29 N. E. 950; *Baumgras v. Baumgras*, 5 Misc. Rep. 8, 24 N. Y. Supp. 767; *Kendall v. Case*, 84 Hun, 124, 32 N. Y. Supp. 553; *In re Hunt's Estate*, 38 Misc. Rep. 30, 76 N. Y. Supp. 968; *Swarthout v. Ranier*, 143 N. Y. 499, 38 N. E. 726; *Phifer v. Phifer*, 41 N. C. 155; *Sawyer v. Dozier*, 52 N. C. 7; *Huston v. Craighead*, 23 Ohio St. 198; *Cowles v. Cowles*, 53 Pa. 175; *Russell v. Kennedy*, 66 Pa. 248; *Kennedy v. Kennedy*, 159 Pa. 327, 28 Atl. 241; *Gross v. Strominger*, 178 Pa. 64, 35 Atl. 852; *In re Tilton*, 21 R. I. 426, 44 Atl. 223; *Fiske v. Fiske's Heirs*, 26 R. I. 509, 59 Atl. 740; *McCreary v. Burns*, 17 S. C. 45; *Dye v. Beaver Creek Church*, 48 S. C. 444, 59 Am. St. Rep. 724, 26 S. E. 717; *McGavock v. Pugsley*, 1 Tenn. Ch. 410; *Waller v. Martin*, 106 Tenn. 341, 82 Am. St. Rep. 882, 61 S. W. 73; *Davis v. Kirksey*, 14 Tex. Civ. App. 380, 37 S. W. 994; *McCloskey v. Gleason*, 56 Vt. 264, 48 Am. Rep. 770; *Milhollen's Admr. v. Rice*, 13 W. Va. 510; *John v. Barnes*, 21 W. Va. 498; *Jones v. Jones*, 66 Wis. 310, 57 Am. Rep. 266, 28 N. W. 177; *Schneider v. Schneider*, 124 Wis. 111, 102 N. W. 232; *Giles v. Little*, 104 U. S. 291, 26 L. ed. 745.

b. Enlargement of Life Estate to Fee.—While the rule is thus firmly established that where a life estate is clearly given to the first taker, with an express power in a certain event or for a certain purpose to dispose of the property, the life estate is not enlarged to a fee, and the devise over will be good; on the other hand, the rule is equally well established that where the devisee or legatee has an absolute right to dispose of the property at pleasure, he takes the fee, and a devise over is inoperative: *Bolman v. Lohman*, 79 Ala. 63; *Ironside v. Ironside* (Iowa), 130 N. W. 414; *Graham v. Botner*, 18 Ky. Law Rep. 637, 37 S. W. 583; *Bradley v. Warren*, 104 Me. 423, 72 Atl. 173; *Jones v. Jones*, 25 Mich. 401; *Dills v. La Tour*, 136 Mich. 243, 98 N. W. 1004; *Goetz v. Ballou*, 64 Hun, 490, 19 N. Y. Supp. 433; *Smith v. Fulkinson*, 25 Pa. 109; *Boyle v. Boyle*, 152 Pa. 108, 34 Am. St. Rep. 629, 25 Atl. 494; *Breeden v. Welker*, 2 Tenn. Ch. App. 109; *Hair v. Caldwell*, 109 Tenn. 148, 70 S. W. 610; *May v. Joynes*, 20 Gratt. 692; *Judevine's Exrs. v. Judevine*, 61 Vt. 587, 18 Atl. 778, 19 Atl. 572, 7 L. R. A. 517; *Montgomery v. Brown*, 25 App. D. C. 490.

In *Ramsdell v. Ramsdell*, 21 Me. 288, the court in applying the rule said: "The intention of the testator is to have a controlling influence in the interpretation of the language used in his will. If he would have that intention, when discovered, fully carried into effect, he must be expected to conform to the reasonable rules for the regulation of the practical affairs of life, and to the fundamental laws, which establish and secure the rights of property. When an intention is discovered to accomplish two purposes so inconsistent that both cannot be accomplished in accordance with those rules and laws, there must be a failure as to one of them. If estates be devised or property bequeathed to a person with or without words of inheritance, and with an absolute right to sell and appropriate the proceeds at pleasure to his own use, it is not perceived how there can be at the same time a vested interest imparted to another in the same estate or property. Such full dominion in the devisee or legatee is inconsistent with and destructive of all other rights. For one cannot, according to the rules of sound reasoning, have any rights in that which another can at the same time appropriate at his own pleasure entirely and exclusively to himself."

In the case of *In re Will of Burbank*, 69 Iowa, 378, 28 N. W. 648, the language of the will was: "I give to my wife, Silenda Burbank . . . the entire control and use of my property of every nature, during her life, to be by her controlled, used and disposed of as she may think best, as fully as I could do the same were I living." "The power of disposal conferred by this language," said the court, "clearly relates to the property of which, by the preceding words of the bequest, the control and use is given to the devisee. The language cannot, under any of the settled rules of construction, be made to relate to anything else. The power conferred, then, upon the legatee, was to dispose of the property as she might think best, and as fully as the testator might do if he were living. She was empowered to sell it, to donate it by way of gift during her life, or by bequest at her death. The grant of a power and dominion over the property so absolute necessarily carried with it the absolute ownership of it."

In construing the will in *Farish v. Wayman*, 91 Va. 430, 21 S. E. 810, the court said: "It cannot be longer doubted that the law is settled by courts and text-writers everywhere, of the highest authority, that an estate for life, coupled with the absolute power of alienation, either express or implied, comprehends everything, and the devisee takes the fee. So firmly fixed is this principle of law that it may now be regarded as a canon of property."

In *May v. Joy nes*, 20 Gratt. 692, the testator gave his whole estate, real and personal, to his wife, for life, with full power to dispose of it, and use the purchase money for investment, or any purpose that she pleased, with this restriction: that whatever remained at her death should be divided among his children and grandchildren. Though the gift was to the wife expressly for life, it was held that she took a fee simple in the real estate, and an absolute estate in the personalty, and that the gift over was void for repugnancy and uncertainty.

It was said in *Giles v. Anslow*, 128 Ill. 187, 21 N. E. 225: "It is the disposition of courts to adopt such a construction as will give an estate of inheritance to the first donee. When, therefore, the fee is

devised by a clause or clauses of a will, and other portions or clauses are relied on as limiting or qualifying the estate thus given, they should be such as show a clear intention on the part of the testator to thus limit or qualify the estate granted. Such an intent should clearly and unequivocally appear." And in *Bowen v. John*, 201 Ill. 292, 66 N. E. 357, it was said: "The intention to confer a fee having been clearly expressed by the testator, the estate is not to be cut down by dubious, vague and ambiguous expressions which follow the explicit devise of the fee. Neither could the testator, after having devised an estate in fee, take from such estate the quality of inheritance, or the right of the owner to alien the estate, for that would be to grant an estate in fee simple, and then prevent the consequences of ownership in fee from attaching thereto, which the law will not permit to be done."

In *Dills v. Adams* (Ky.), 43 S. W. 680, the devise was to the wife of the testator to have and to hold the estate during her natural life "for her support and maintenance, and to be disposed of at her pleasure," with "full control and charge of, and the liberty and power . . . to sell and convey . . . and to dispose of the proceeds as she may deem best or desire, as I have full confidence in her wisdom, justice and motives"; and again declaring that "the property is entirely hers, and at her disposal." It was held that the wife took a fee in the land thus devised.

In *Bean v. Myers*, 41 Tenn. (1 Cold.) 226, a bequest to the testator's wife of all his property "during her natural life, with full privilege to sell and use the same, to pay any debts that may be owing, or for her support, and all other legal purposes," with a subsequent provision for an equal division among the testator's children of anything that might remain after his wife's death, was held to vest the wife with the absolute interest.

In *Flinn v. Davis*, 18 Ala. 132, it was decided that when by the terms of a will the first devisee is given the absolute right to dispose of the property, a devise over of so much as he may leave undisposed of at his death is repugnant to the first devise, and void.

In *Randall v. Harrison's Exr.*, 109 Va. 686, 64 S. E. 992, it was held that the wife took the fee simple estate in the lands and an absolute estate in the personal property where the will gave her for life all the real and personal estate of her husband that should be left after paying his debts, with power to use any and all the principal, as well as the interest of the amount that might be left after settling up the estate, if needed to supply her necessities, and provided that if anything was left after the wife's death, it should go to certain others.

The fact that there is no devise over of the remainder after the termination of the life estate is a consideration tending to the conclusion that a testator intends to give a fee to the devisee to whom he has given a plenary power of disposal: In *re Weien's Will*, 139 Iowa, 657, 116 N. W. 791, 18 L. R. A., N. S., 463; *Gleason v. Fayerweather*, 70 Mass. (4 Gray) 348.

When the words of the will at the outset clearly indicate a disposition to give the entire estate absolutely to the first donee, the estate will not be cut down to a less estate by subsequent or ambiguous words inferential in their intent: *Gannon v. Albright*, 183 Mo. 238, 105 Am. St. Rep. 471, 81 S. W. 1162, 67 L. R. A. 97. So,

where an estate is devised to one and his heirs and assigns forever, and there is added, either by express words or by plain implication, an absolute power of alienation, the limitation over is void: *Jackson v. Littell*, 213 Mo. 589, 127 Am. St. Rep. 620, 112 S. W. 53.

In *Galligan v. McDonald*, 200 Mass. 299, 128 Am. St. Rep. 421, 86 N. E. 304, where the devise was to the son of the testator, with a provision that what remained at the son's death should go to other specified persons, it was held that by "estate remaining at the death" of the son was meant estate that should not have been disposed of by the son during his life, and not a remainder in the technical sense of that word; that it was upon such undisposed of estate, if any, that the proviso was to take effect, and not upon all of the real estate devised; that the limitation over must take effect, if at all, as an executory devise; that it could not take effect as such, because by necessary implication the son was to have the power to dispose of any or all of the estate devised to him, and such a power was inconsistent with an executory devise. The limitation over was therefore void, and the son took an estate in fee simple absolute. This case is not distinguishable from the earlier Massachusetts cases—*Kelley v. Meins*, 135 Mass. 231, and *Ide v. Ide*, 5 Mass. 500. In the former case there was first a devise to the son by the testatrix of all of her estate, real and personal, "To have and to hold the same to him . . . his heirs, executors, administrators and assigns, forever." Then it was provided by a second codicil that the son should not come into possession till he reached the age of twenty-five; and by the first codicil that if he "shall die without having living issue, then any portion of my said estate and property which may remain shall be equally divided among my sisters and nieces and their female heirs and assigns." The son arrived at the age of twenty-five and died shortly after, intestate and without issue, the trustee under the mother's will having in the meantime conveyed to him certain real estate which had come to him by the foreclosure of the mortgage and which the court treated as if the testatrix had been seised thereof at her death. Thereupon the sisters and nieces of the testatrix brought a writ of entry against the heirs at law of the son to recover the premises which had thus been conveyed by the trustee to him. It was held that by the portion which should remain was meant the portion which should remain at the death of the son, and that the construction to be given to the will and the first codicil was that the son should have during his life the absolute power of disposition of all the property given to him; that this power of disposal was inconsistent with an executory devise, and that the limitation over was therefore void.

In *Ide v. Ide*, 5 Mass. 500, the devise was to a son and "his heirs and assigns forever," with a limitation over if the son should die and leave no lawful heirs of "what estate he shall leave, to be equally divided between my son J. and my grandson N. to them and their heirs forever." It was held that the limitation over was only of such estate as the son should leave at his death; that by necessary implication the testator intended that the son should have the power to dispose of any or all of the estate devised; and that that was inconsistent with the limitation over, and the limitation was therefore void, and the son took an absolute estate.

Similarly, in *Moran v. Moran*, 143 Mich. 322, 114 Am. St. Rep. 648, 106 N. W. 206, 5 L. R. A., N. S., 323, it was held that a will bequeathing and devising to his wife all of the testator's property "to be hers absolutely," gives her an absolute estate in fee, and a succeeding repugnant provision in the will "that if at her death any of said property is still hers then the residue still hers shall go to my, not her, nearest heirs," must fall, and fail of effect. So, where a will provides, "All the rest, residue and remainder of my estate, either real, personal or mixed I give to my dear husband, Henry P. Wood, he to have the full use and benefit thereof unconditionally. After him, should any remain, I give the same to my sister, Clara N. Crombe, one-half, and to my sisters Hannah N. Partelo and Phoebe B. Partelo, the balance, share and share alike," the first sentence gives the husband the rest of the estate in fee simple absolute, and the limitation over in the second sentence is void for repugnancy: *In re Wood*, 28 R. I. 290, 125 Am. St. Rep. 738, 67 Atl. 8.

c. Power of Appointment.

1. *In General.*—The devise of an estate for life, with authority in the devisee to dispose of the same by last will, does not convey absolute ownership. The right of testamentary disposition is a mere power, and nothing passes under the clause of the will conferring the power unless it is exercised: *Denson v. Mitchell*, 26 Ala. 360; *Appeal of Maltby*, 47 Conn. 349; *Haralson v. Redd*, 15 Ga. 148; *Porter v. Thomas*, 23 Ga. 467; *Fairman v. Beal*, 14 Ill. 244; *Keays v. Blinn*, 234 Ill. 121, 84 N. E. 628, 14 Ann. Cas. 37; *Powers v. Wells*, 244 Ill. 558, 91 N. E. 717; *Dunning v. Vanderveen*, 47 Ind. 423, 17 Am. Rep. 709; *McGaughey's Admr. v. Henry*, 54 Ky. (15 B. Mon.) 383; *Payne v. Johnson's Exrs.*, 95 Ky. 175, 24 S. W. 238, 609; *Lee v. Fidelity Trust & Safety Vault Co. (Ky.)*, 57 S. W. 239; *Benesch v. Clark*, 49 Md. 497; *Albert v. Albert*, 68 Md. 352, 12 Atl. 11; *Mines v. Gambrill*, 71 Md. 30, 18 Atl. 43; *Collins v. Wickwire*, 162 Mass. 143, 38 N. E. 365; *Ware v. Minot*, 202 Mass. 512, 88 N. E. 1091; *Bail v. Dotson*, 22 Miss. (14 Smedes & M.) 176; *Tatum v. McClellan*, 50 Miss. 1; *Bryant v. Christian*, 58 Mo. 98; *Armor v. Frey*, 226 Mo. 646, 126 S. W. 483; *Hensler v. Seufert*, 52 N. J. Eq. (7 Dick.) 754, 29 Atl. 202; *Taggart v. Murray*, 53 N. Y. 233; *Livingston v. Murray*, 68 N. Y. 485; *Long v. Waldraven*, 113 N. C. 337, 18 S. E. 251; *Boyd's Heirs v. Bigham*, 4 Pa. 102; *Springer v. Arundel*, 64 Pa. 218; *Achoyer v. Kay*, 217 Pa. 32, 66 Atl. 141; *Pulliam v. Byrd*, 2 Strob. Eq. 134; *Scott v. Burt*, 9 Rich. Eq. 358; *Wilson v. Gaines*, 9 Rich. Eq. 420; *Sires v. Sires*, 43 S. C. 266, 21 S. E. 115; *Cockrill v. Maney*, 2 Tenn. Ch. 49; *Cruse v. McKee*, 39 Tenn. (2 Head) 1, 73 Am. Dec. 186; *Derse v. Derse*, 103 Wis. 113, 79 N. W. 44.

Where the power of appointment is not exercised, or is defectively executed, no change is wrought in the character of the estate, and the reversion, there being no gift or devise over, goes to the heir or next of kin of the testator, according to the nature of the property: *Denson v. Mitchell*, 26 Ala. 360; *McGaughey's Admr. v. Henry*, 54 Ky. (15 B. Mon.) 383; *Benesch v. Clark*, 49 Md. 497; *Mines v. Gambrill*, 71 Md. 30, 18 Atl. 43; *Rail v. Dotson*, 22 Miss. (14 Smedes & M.) 176; *Cruse v. McKee*, 39 Tenn. (2 Head) 1, 73 Am. Dec. 186.

In *Milhollen's Admr. v. Rice*, 13 W. Va. 510, there was an apparent departure from the rule last stated, for in this case it was affirmed that if the devisee of a life estate is simply authorized to dispose of the property at his death among a certain definite class, as he may think proper, this will be held to be a power in the nature of a trust, unless it otherwise appears from the will that the duty to execute such a power, to be inferred from its being granted, was designed by the testator to be left to be performed or left unperformed at the option of the party on whom such power was conferred. The rule being that when there appears a general intention in favor of a class, and a particular intention in favor of individuals of the class, and the particular intention fails, from the fact that selection is not made, the court will carry into effect the general intention in favor of the class. The will in this case provided that all the lands belonging to the testator should belong to his wife during her natural life, to use in any way she might think proper during her life; and at her death the land was to be sold, and one-half of the proceeds was to go to the testator's heirs, and the other half was to be at his wife's disposal, "to whom she thinks proper of her heirs." It was decided that this power of disposal, conferred on the wife, was a power in the nature of a trust; and she having died without executing it, a moiety of the proceeds from the sale of the land should go to her heirs.

The rule, however, as established by the great weight of authority, is that the power of appointment is a mere naked power, which does not enlarge or add anything to the life estate, nor place any obligation upon the life tenant as to its exercise, unless, of course, there is an express direction in the testator's will as to the method of its exercise; in which event it becomes a limited, and not a general, power of appointment, as was the case in *Milhollen's Admr. v. Rice*, 13 W. Va. 510, to which special reference has been made.

In *Keays v. Blinn*, 234 Ill. 121, 84 N. E. 628, 14 Ann. Cas. 37, the testator devised a life estate in certain farm lands to his son, and also vested in him the power to appoint the fee of the lands, the power to be exercised by his last will. If not exercised, the lands would, upon the death of the son, pass under the residuary clause of the will of the father. The son died testate, and the principal question in the case being whether the persons appointed by his will to take the fee were entitled to the corn which was growing on the lands, or whether the corn was personal property which passed to his legal representative, the court said: "The power of appointment which John P. Gillett possessed did not enlarge or add anything to his life estate: *Collins v. Wickwire*, 162 Mass. 143, 38 N. E. 365. Had he died without exercising that power, the real estate in which he held a life estate would have passed under the residuary clause in the will of his father. Plainly, by the authorities first above referred to, had the power of appointment not been exercised, the crops would have passed, not to those entitled to the realty under the residuary clause of the will of the father, but to the executor or administrator of the son. We think no distinction arises from the fact that the takers were the appointees of the life tenant, instead of the residuary devisees of the first testator. It is the uncertainty of the duration of the tenancy of John P. Gillett which brings the case within the rule invoked by the appellee, and that uncertainty was precisely the same,

whether he did or did not seek to exercise the power of appointment. It is to be observed that the land would pass under the original will, whether or not the power of appointment was exercised. The only effect of the exercise of the power was to designate the person or persons in whom the fee devised by the father should vest. The exercise of the power of appointment by the son is thus distinguished from the devise by him of the fee of land of which he held the fee simple title."

"The well-established principle," said the court in *Collins v. Wickwire*, 162 Mass. 143, 38 N. E. 365, "that where a will gives an absolute ownership of property, with full power of disposition, a limitation over is void, because it is inconsistent with the absolute title given to the first devisee . . . is held not to be applicable where the will purports to give only a life estate to the first taker, with merely a power of disposition of the remainder as a separate interest. In such a case, if the power is executed, the property passes under the original will, through the execution of the power, to the person designated; and, if it is not executed, it remains to be affected by the other provisions of the will, or to pass as undeviseed estate of the testator."

To the same effect is the case of *Long v. Waldraven*, 113 N. C. 337, 18 S. E. 251, in which it was held that where the testator's will gave to his wife an estate for life in all his property, and the power to dispose of one-third of it by will, and she failed to exercise that power, her heirs and next of kin were not entitled to a third interest in the testator's property, as the power of disposition by will did not in any way enlarge the widow's life estate, or enhance her rights in the property while she lived.

2. *Rule in Shelley's Case.*—The rule that where a life estate is devised, with an unlimited power of appointment superadded, the life estate is not enlarged to a fee, was subject to one exception while the rule in *Shelley's Case* was in full operation. By the rule in *Shelley's Case*, whenever the ancestor, by any gift or conveyance, takes an estate of freehold in lands or tenements, and in the same gift or conveyance an estate is afterward limited, by way of remainder, to his heirs, the words "his heirs" are words of limitation of the estate, carrying the inheritance to the ancestor, and not words of purchase, creating a contingent remainder in the heirs: 1 Coke, 104. Under this rule, if the devise or bequest was to one for life with the superadded power of appointing to his heirs in fee simple or absolute property, the life estate would be enlarged into a fee simple, or absolute property, though the power was never executed. For if the devisee or legatee exercises the power of appointment given him by the will, by appointing the inheritance or absolute property to his heirs, it operates precisely as if by the will a life estate had been given to the devisee or legatee, remainder in fee or absolute property to his heirs; and the rule in *Shelley's Case* therefore applying, the estate of the first taker at once becomes a fee simple, if the gift was real property, or absolute property if the gift was personal property, although the will expressly gives such first taker only a life estate: *Milhollen's Admr. v. Rice*, 13 W. Va. 510.

Thus in *Shermer v. Shermer's Exr.*, 1 Wash. (Va.) 266, 1 Am. Dec. 460, the will gave to the testator's wife the use and profits of his

whole estate, both real and personal, during her natural life; and after that was ended, the estate was to be equally divided between whomsoever his wife should think proper to make her heir or heirs, and the testator's brother. The wife died without executing this power, and the court held that she took a fee simple in a moiety of the land, which descended to her heir at law.

A similar ruling was made in *Goodwyn v. Taylor*, 4 Call, 305. In this case the testator bequeathed the interest on four thousand pounds in government funds to his four grandchildren, at their decease the principal and interest to be disposed of by them to their heirs in such proportion as they by their wills should respectively direct. The court, basing its decision on *Shermer v. Shermer's Exr.*, 1 Wash. 266, held that a granddaughter took, not a life estate, but an absolute property in one-fourth of the four thousand pounds, she having died intestate. Upon her death she must be regarded, by her intestacy, as having disposed of the property to her heirs, under the power conferred on her by the will.

In *Milhollen v. Rice*, 13 W. Va. 510, the court, in discussing the two last cited cases, said: "The case of *Shermer v. Shermer's Exr.*, 1 Wash. (Va.) 266, 1 Am. Dec. 460, and *Goodwyn v. Taylor*, 4 Call, 305, were, as we have seen, probably decided on the ground that the life tenant, by suffering herself to die intestate, had constructively executed the power of attorney by disposing of the property to her heirs, and she thus having a life estate with remainder to her heirs under the will, the rule in *Shelley's Case* applied, and her life estate was enlarged to a fee simple. But it may be, these cases were decided on the ground, that the powers given were powers in the nature of a trust, and being unexecuted, the court would enforce the trust, and give the property to her heirs; and thus taking it under the wills respectively, she having a life estate, and her heirs a remainder in fee, under the wills respectively, the rule in *Shelley's Case* applied, and her life estate was enlarged to a fee simple. If these cases were decided on this principle, they are strong cases to give the real estate in the case before us to her heirs, under the will of William Milhollen; for we have seen the rule in *Shelley's Case* can have no application in this case."

The rule in *Shelley's Case*, adopted as a part of the common law of this country, has now been abolished by statute in most if not all of the states. Many of the earlier cases, however, involving questions relating to devises and powers, were decided at a time when the rule was in full force and this fact is sufficient to explain the want of harmony between some of the earlier and later cases on these questions.

3. Power as Incident to Absolute Ownership.—Frequently the power of appointment appears in a devise as a mere incident of the absolute ownership conferred upon the devisee, and as evidencing the intent of the testator to give such an estate to the devisee. In such cases there is seldom any devise over. Thus, in *Hollingshed v. Alston*, 13 Ga. 277, the will provided as follows: "I bequeath and will unto my dear wife, after the payment of all my just debts, all my estate both real and personal, consisting in part as follows [describing the property], all which lands and negro slaves I do will unto my dear

wife, during her natural life, and at her death to dispose of the same in any manner she may think proper. And I further will and bequeath unto my said wife my entire stock of every description and kind whatsoever, together with all my household and kitchen furniture, and farming tools and implements, and all other species of property, rights and credits, which may not be herein enumerated, I do most willingly, and of my own free will, bequeath unto my dear wife, by her to be used and disposed of as she may think proper for and to her own use and benefit forever." "Taking the whole of the testator's will together in this case," said the court, "we are of the opinion, that it was his intention, that his wife should take an absolute estate in the land and negroes, restraining her power of alienation thereof, during her life. There is no other person, or class of persons, designated by the testator as the objects of his bounty; consequently he cannot be supposed to have intended that the legatees named in his will should hold the property in trust for anybody. The testator by his will intended to say, 'I give my land and negroes to my wife absolutely, but she shall not dispose of the same during her lifetime; at her death, she may dispose of the same in any manner she may think proper.'" The restraint of alienation during life, which the court sanctions, or reads into the will in this case, was, in *Fristoe v. Latham* (Ky.), 36 S. W. 920, considered inconsistent with the absolute ownership given to the devisees, and therefore where the testator devised land to his children for life with full power to dispose of it at their death, but not before, the restriction upon their power of alienation was held to be ineffectual.

In *Constantine v. Moore* (Ky.), 62 S. W. 1016, the testator devised and bequeathed all his property to his wife "to have the same for her benefit, to control the same during her life as she may see proper, free from the claim of every person or persons, and to dispose of the same as she may see proper at her death." It was held that the expression "to control the same during her life, etc.," was not a qualification of the fee already given, but was added to make sure that the meaning of the preceding clause should not be misunderstood.

In *Hardaker's Estate*, 204 Pa. 181, 53 Atl. 761, the will gave to the wife of the testator all the remainder of his estate of which he might die seised, for her natural life, with power to appoint any person to assist her in settling the estate that she might think proper; "and further, my wish and desire is that if it is my fortune to accumulate any more property, real, personal or mixed, shall fall wholly to my wife, Lizzie Hardaker, immediately after my decease, to have and to hold during her natural life, with power to will and bequeath to whom she may prefer to be transferred according to her desire after her decease." It was held that the widow was entitled to the whole of the estate absolutely.

In *Byrne v. Weller*, 61 Ark. 366, 33 S. W. 421, the testator in one clause of his will devised all of his land to his wife for life, and in a subsequent clause, after devising certain portions of the land to relatives, to take effect on the wife's death, he devised the remainder of the land to his wife "to dispose of as she may choose and desire at her death." "Our conclusion is," said the court, "that the devise of the whole estate for life, in the second clause of the

will, was merely for convenience in effecting the more readily the special legacies; and that the meaning and extent of the disposition of the residue of the estate must be found solely in the language of the devise contained in the fifth clause of the will; and, since this language is without words expressly limiting the devise to a less estate than the fee, that the same carries the fee, and the words of disposition therein contained, to take effect after the death of the wife, are surplusage, as the owner of the fee already had the right there attempted to be conferred."

In *Musselman's Case*, 39 Pa. 469, a testator devised his real and personal property to his wife, "so long as she lives, for her maintenance," adding: "She shall have her choice to sell it or not, as she believes best for her." And in a subsequent clause, this: "It is my will that my beloved wife, with the third part of my estate, can do and bequeath to whom she pleases." It was held that the wife's interest in the whole estate was a freehold for life, and, in the one-third thereof, absolute.

In *Troup v. Hart*, 66 Tenn. (7 Baxt.) 188, it was held by a divided court that a will devising and bequeathing all of the testator's estate to his wife "to have and to hold during her life, and to make whatever disposition she may see proper at her death" vests the absolute title to the property devised. This case, in holding the fee to vest solely by reason of the unlimited power of disposition at death, is opposed to the great weight of authority (see ante, p. 93), that where a life estate is given with power of appointment, the estate is not enlarged to a fee, and will go to the next of kin of the testator, if the devisee for life fails to exercise the power. The case, however, follows a previous case in the same court—*David v. Bridgman*, 2 Yerg. (10 Tenn.) 557—where the will read: "1st. It is my will that my beloved wife, Martha David, have all my estate both real and personal, during her life. 2d. It is my will that my wife Martha, at her death, may have full power and authority to dispose of all my personal property in any manner she may think proper." The court held that the widow took the absolute title to the personal property, because the will vested her with the unlimited power of disposal at her death. In its opinion the court says: "That Martha David had the right to use the property, without any right on the part of the distributees of Sampson David to impound it during her lifetime, is, we think, incontrovertible; that she should sell, give away or destroy it, without legal restraint or molestation by complainants, follows; and that a sale or gift of the property, at any period during her life, would have been in effect a disposition at her death (because then, as well as previously, a subsisting alienation), we have no doubt." And later in the opinion: "If Martha David, as devisee of her husband, could lawfully part with the property bequeathed at any period after S. David's death, and communicate a good title to the purchaser, it follows that she had the power as effectually to defeat the remainder, as if the words 'at her death,' had not been inserted in the will."

In *Turner v. Durham*, 80 Tenn. (12 Lea) 316, a will authorizing the wife to dispose of one-half of the estate at her death, there being

no devise over of such one-half in case the power was not exercised, was held to give to the wife the absolute title thereto.

The case of *Luckey v. McCray*, 125 Iowa, 691, 101 N. W. 516, went even further than the Tennessee cases last cited. For the second clause of the will in this case provided that if any of the estate should remain undisposed of by the testator's wife at the time of her death, the residue should go to certain relatives of the testator. The first clause of the will, however, bequeathed the estate to the wife to be used by her and disposed of during her natural life precisely the same as the testator might do if living, and gave her full power to sell, exchange, invest and reinvest the same, and to distribute the same by gift or otherwise as she saw fit, at any time during her life, and to appoint the same by will to whomsoever she wished, according to her own judgment and discretion. The language of this clause of the will did not, in the opinion of the court, indicate an intention to give the wife a life estate with the power of disposal, leaving the remainder, so far as undisposed of during her lifetime, to pass under the second paragraph of the will, to the persons named therein, but, on the contrary, evinced an intention that the property should pass absolutely to the widow, with all the rights and powers involved in fee-simple ownership. Therefore, there was no remainder on which the second paragraph of the will could operate.

4. **Precatory Trusts.**—Mere words of trust and confidence employed by the testator as to the manner in which the power of appointment is to be exercised will not operate to reduce a fee, expressly given, to a life estate, nor turn a devisee into a trustee: *Boyle v. Boyle*, 152 Pa. 108, 34 Am. St. Rep. 629, 25 Atl. 494. In this case a provision in a will that "I give and bequeath to my wife all my property real and personal, for her support during her natural lifetime; any remainder at her decease to be disposed of by her as she may think just and right among my children," was held to import a gift, and gave to the wife upon the death of the testator a fee in the property with all its incidents, including the power to sell and to devise; that the words referring to any remainder did not limit the wife's estate or the preceding words of gift, but were precatory, and did not create a trust in favor of the children. "The history of the rise, decline, and fall in this state of the doctrine that words of confidence import a trust," said the court, "is illustrated in the several cases arising under *Pennock's* will. The doctrine was borrowed several centuries ago by the English courts from the Roman law, and was first recognized and applied in this state in *Coates' Appeal*, 2 Pa. 129, which arose upon *Pennock's* will. A bequest of personal estate was made by the testator to his wife, absolutely, followed by these words: 'Having full confidence that she will leave the surplus to be divided at her decease justly among my children.' Upon these words it was held that the widow became a trustee for the children, so that she could not use the corpus of the gift to her, but only the income derived therefrom. A few years later the same bequest came under consideration in *McKonkey's Appeal*, 13 Pa. 253, and it was then held that the widow was not restricted in the use of the bequest to her by the words of confidence, but

only in the disposition of the surplus remaining at her death. The conclusion then reached was that, as to such surplus, the will of her husband clothed her with a power in the nature of a trust, so that all the children were beneficiaries and entitled to share to some, though not necessarily to the same, extent in the unconsumed surplus of the gift to her. Finally, in *Pennock's Appeal*, 20 Pa. 268, 59 Am. Dec. 718, the same bequest was before this court for the third time, and the doctrine of a power in the nature of a trust, arising from the words of confidence, was repudiated. The last vestige of the Roman doctrine on the subject was discarded, and in a well-reasoned opinion it was held that the gift to the widow was absolute. The words of confidence were precatory; and, both as to the income and the corpus, the power of the widow as owner was without limitation."

Later Pennsylvania cases have unvaryingly followed that of *Pennock's Appeal*. In *Kinter v. Jenks*, 43 Pa. 445, the testator gave the residue of his estate to his wife for her use and comfort, to be disposed of as she pleased at her death, "when no doubt she will make distribution of the same among our children." These words were held to give the wife an estate in fee simple. In *Jauritch v. Proctor*, 48 Pa. 466, the testator gave certain real and personal estate to his wife absolutely, but added, "she not to devert herself of what I may leave her until after her death"; and directing that she should divide what then remained "in equal shares among my children." It was contended that under the terms of this will the widow took a life estate only; but the court held that she took a fee, and sustained her deed made some time before her death.

In *Second Reformed Presbyterian Church v. Disbrow*, 52 Pa. 219, the testator gave real estate to his wife by his will with words of habendum, "to have and to hold and enjoy during her lifetime, and dispose of the same as shall seem best unto her." In the following clause he added: "It is my wish and desire that my wife will leave at her death the property, or any part that may be then remaining in her hands, for the benefit of young men studying for the ministry." It was held that the wife took a fee simple and that the words of confidence, expressive also of his desire, did not limit her estate in any particular. In *Bowlby v. Thunder*, 105 Pa. 173, the testator gave his estate to his wife absolutely. Then followed words of trust and confidence that she would divide the estate at her decease among their children and grandchildren. These words were held to be precatory, and the estate of the wife was declared a fee.

In *Hopkins v. Glunt*, 111 Pa. 287, 2 Atl. 183, the second paragraph of the testator's will declared: "I give, devise and bequeath to my beloved wife, Margaret Hopkins, her heirs and assigns forever, all my property, real, personal and mixed, of what nature or kind soever, and whosoever the same shall be at the time of my death." In the third paragraph the testator declared, "My wish is, that after the sale of my real estate by my wife, Margaret aforesaid, without charging my said real estate, that she will, if she has a sufficient sum of money to do so, to give to my daughter Mary's children as follows." The following and concluding paragraph read: "My further request is that at the death of my wife Margaret aforesaid, that she will so divide what she may have among our daughters,

Martha and Eliza's children, share and share alike." "It is unquestionably conceded," said the court, "that the second paragraph of the will standing alone would give a fee to Margaret. On behalf of the plaintiff in error, it is claimed that the estate thus given is changed by subsequent language in the will, so that in lieu of an absolute devise to her, the last paragraph created a trust in her for the benefit of the persons therein named. It is undoubtedly true the intent of the testator, as gathered from the whole will, furnishes the cardinal rule of construction. When that intent is manifested with sufficient certainty and is not in conflict with established rules of law, it must govern. . . . In this state the rule is well settled that words in a will merely expressive of desire, recommendation, and confidence, are not sufficient to convert a devise or bequest into a trust. . . . Expressions of a desire or a wish of the testator as to a specific disposition of his property, standing by themselves alone, may constitute a valid devise or bequest thereof. The rule is different when such expressions are used after an absolute disposition of the property has been made. After an unqualified devise by the testator of his property, no precatory words to his devisee can defeat the estate previously granted. . . . The language in the third paragraph of the will appears to assume that Margaret will sell the real estate, yet there is no direction that she shall do so, and the testator did not appoint any executor. Whether she had a 'sufficient sum of money' to comply with his wish appears to have been left to her to decide. . . . In the last (paragraph) the word 'request' is used as synonymous with 'wish' in the former. The language is 'my further' request, thus continuing the use of a word merely precatory. The testator makes no reference to his property nor to the proceeds of property which he has devised to her. His wish or request is that she will divide 'what she may have' at her death, among the persons named. This language is sufficiently broad to apply to all her property however acquired. Nothing less than her will duly executed could give effect to the request of David Hopkins. This was an act purely optional with her. We are clearly of the opinion that no subsequent language in the will converted into a trust the property which had previously been devised to her absolutely in fee."

In *McIntyre v. McIntyre*, 123 Pa. 323, 10 Am. St. Rep. 529, 16 Atl. 783, a devise was: "I will and bequeath to my daughter, Mary McIntyre, the one-half of the land that I possess above the road, that is, the north end. She will not have power to sell, but may leave the same to her children." It was held that the first sentence passed a fee, which was unaffected by the attempted restraint upon alienation contained in the second sentence; that the words, "but may leave the same to her children," were precatory only, and not obligatory, and therefore could not defeat the otherwise operative effect of the devise.

The conclusions reached in the foregoing Pennsylvania cases are supported by the great weight of authority in this country. In New York the principle was applied in the case of *Foose v. Whitmore*, 82 N. Y. 405, 37 Am. Rep. 572, where a testator gave and bequeathed all his property to his wife, "only requesting her, at the close of her life, to make such disposition of the same among my children and

grandchildren as shall seem to her good." It was held that the gift to the wife was absolute; that the words quoted did not cut down the fee to a life estate, and create a trust as to the remainder in favor of the testator's children and grandchildren. Said the court: "This conclusion is warranted by the words used. They are not words of obligation, and impose none. They are mere words of suggestion, involving no direction or command. By executing the alleged trust, she would defeat the gift. . . . The provision is at most a mere recommendation of the children and grandchildren to the favorable consideration of the devisee, and does not create a legal obligation of any kind upon her in their favor. Indeed, the peculiar and qualified language used, 'only requesting,' etc., seems also to indicate that the omission to provide for them was deliberate and intentional, and that they may have been so referred to under an impression of the testator, or the writer of the will, that unless in some manner they appeared to be in the mind of the testator at the time of its execution, the will would, as against them, be invalid. Such an impression would be justified by the statutes of some of the states of the Union, . . . and from some of these, the testator or his scrivener may have gathered it. But for whatever reason inserted, they do not, in our opinion, create a trust."

In Maryland the principle is illustrated in the case of *Williams v. Worthington*, 49 Md. 572, 33 Am. Rep. 286. In that case a testator provided as follows: "It is my will and desire, and I hereby devise and bequeath all my property, real, personal and mixed, to my dear wife E. A., and her heirs and assigns forever, and it is my request and desire that my said wife E. A. should by last will and testament devise and bequeath all of said property at her death remaining in her possession to my friend B. W., and to E. W., their heirs and assigns forever, share and share alike." It was held that this did not create a trust, but that the wife's estate was absolute. "We have found no well-considered case," said the court, "in which a trust of this kind has been supported, where the gift to the first devisee was absolute in its terms, followed by precatory words, indicating the disposition to be made of what might be left, or what might remain of the property, at the death of the first devisee. In such case the attempt to establish the trust has failed, first, for the reason that such expressions in the will can properly be construed only as conferring on the first devisee unlimited discretion and power of disposition, and, secondly, because in such case the subject of the supposed trust is altogether indefinite and uncertain."

In *Davis v. Mailey*, 134 Mass. 583, a testator gave his wife all his real and personal estate, "to her sole use, benefit and disposal," and provided that "whatever may be left of my estate, if any, she may, by will or otherwise, give to those of my heirs that she may think best, she knowing my mind upon that subject. I am willing to leave the matter entirely with her, feeling satisfied that she will do as I have requested her to in the matter." It was held that the wife took the whole estate, unfettered by any legal obligation on her part to dispose of it to any particular persons or in any particular way.

In *Colton v. Colton*, 21 Fed. 594, the testator left all of his property to his wife, with full power of disposition, adding to such absolute gift the following provisions: "I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as, in her judgment, will be best. I also request my dear wife to make such provision for my daughters Helen and Carrie as she may, in her love for them, choose to exercise." It was held that no precatory trust was created by the use of the words of recommendation and request. In the course of the opinion in this case, Sawyer, J., said: "It is urged on the part of the claimant, that in this class of cases a wish expressed or a simple request to the devoted and obedient wife is equivalent to a command. This, when voluntarily recognized as an obligation by the wife in the affairs of married life, may be a very proper and salutary principle and practice in marital polity and domestic etiquette; but it is too romantic, too largely deficient in the sanctions of the obligations of positive law, too loose and uncertain, to be adopted by the courts as a rule of law by which large estates are to be distributed, in opposition to the plain, ordinary, actual, matter of fact sense of the words of a will. As to myself, I fully concur with Vice-Chancellor Hart in his observations in *Sale v. Moore*, 1 Sim. 540, 'that the first case that construed words of recommendation into a command made a will for the testator, for everyone knows the distinction between them.' He further adds that 'the current of authorities of late years has been against converting the legatee into a trustee': See 44 Am. Dec. 378, note. In my judgment, to hold that the precatory words and words of recommendation found in the will of the late General Colton creates an indefinite trust in an unascertained and uncertain quantum of the estate of the deceased in the hands of Mrs. Colton, for the benefit of the mother and sister of the testator, would be to make a will for the deceased, and not to execute the will made by him."

In *Van Duyne v. Van Duyne*, 14 N. J. Eq. (1 McCart.) 397, the court says: "A strong disposition has been manifested by the courts to limit rather than extend the doctrine of raising trusts upon words of recommendation, and as far as the authorities will allow, to give the words their natural and ordinary effect, unless it be clear that they are intended to be used in a peremptory sense." In that case the testator devised his whole estate to his son and daughter equally, "hoping and believing that they will hereafter do justice to my grandson H. V. D., to the amount of one-half of the said homestead," and it was held that no trust was created.

The later English cases are in line with the cases we have cited, on the subject of precatory trusts. For example, in *Mussoorie Bank v. Raynor*, L. R. 7 App. Cas. 321 (Privy Council), where a testator gave to his widow the whole of his real and personal property, "feeling confident that she will act justly to our children in dividing the same when no longer required by her," it was held that the widow took an absolute interest, and that the doctrine of precatory trusts did not apply. The court said: "Now, these rules are clear with respect to the doctrine of precatory trusts, that the words of gift used by the testator must be such that the court finds them to be imperative on the first taker of the property, and that the subject of the gift over must be

well defined and certain. If there is uncertainty as to the amount or nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust because the court does not know upon what property to lay its hands, but the uncertainty in the subject of the gift has a reflex action upon the previous words, and throws doubt upon the intention of the testator, and seems to show that he could not possibly have intended his words of confidence, hope, or whatever they may be—his appeal to the conscience of the first taker—to be imperative words. In this case nothing is given over to the children of the testator except by an expression of confidence in his wife that she will deal justly in dividing the property among them, and that she will do it when the property is no longer required by her. If the testator had given to his children such property as was not required by his wife, or if he had given over his property if it was not required by his wife, the gift over would, according to a very well-known and well-established class of cases, have been void, because of the uncertainty. It would have been void, not merely because the words of gift over were precatory only, but it would have been void notwithstanding that the most direct and precise words of gift over might be used. Their lordships think that substantially the words 'when no longer required by her' must in this will be taken to have the same meaning as if he had said, 'I give to my children so much as is not required by her.' Considering the nature of the property, which includes a number of articles as to some of which the use is equivalent to the consumption; to the nature of the first gift, which, although not expressed in terms to be an absolute gift, is quite unlimited, and is legally an absolute gift; and to the fact that the first gift is only cut down by words which do not constitute a direct gift, but are to operate through an influence upon the conscience and feelings of the wife, their lordships cannot come to any other conclusion than that the testator intended his wife to use the property according to her requirements. That is equivalent to an absolute gift to the wife."

The early English authorities, adopting the principles of the Roman law, establish a rule contrary to that laid down in the last cited case. They consistently hold that words expressing hope, wish, expectation, confidence, or recommendation will create a trust as against a devisee or legatee. The early American cases are in line with them. These cases will be found collected in the note to *Harrison v. Harrison's Admx.*, 44 Am. Dec. 365. They are of historic interest, but of little practical value, for of late years the current of authority has steadily set in the opposite direction. The emphatic language of Mr. Justice Story in regard to the principle of construction adopted in the earlier English decisions may be quoted as defining the present well-established rule on this question. "This doctrine," he says (2 Story's *Equity Jurisprudence*, section 1063), "of thus construing expressions of recommendation, confidence, hope, wish and desire into positive and peremptory commands is not a little difficult to be maintained upon sound principles of interpretation of the actual intention of the testator. It can scarcely be presumed that every testator should not clearly understand the difference between such expressions and words of positive direction and command, and that in using the one, and omitting the other, he should not have a determinate end in view. It will be agreed on all sides, that where the intention of the testator

is to leave the whole subject as a pure matter of discretion to the goodwill and pleasure of the party enjoying his confidence and favor, and where his expressions of desire are intended as mere moral suggestions to excite and aid that discretion, but not absolutely to control or govern it, there the language cannot, and ought not, to be held to create a trust. Now, words of recommendation and other words precatory in their nature imply that very discretion, as contra-distinguished from peremptory orders, and therefore ought to be so construed unless a different sense is irresistibly forced upon them by the context."

Precatory trusts will be found discussed at length in the note to *Post v. Moore*, 106 Am. St. Rep. 499.

d. Money and Personal Property.

1. **Absolute Title by Power of Disposal.**—A bequest of personal property for life, with an unlimited power of disposition superadded, vests in the legatee the absolute property: *Sheets v. Wetsel*, 39 Ill. App. 600; *Martz v. Sedam*, 67 Ind. 216; *Martin v. Foskett*, 189 Mass. 368, 75 N. E. 709; *Kendall v. Kendall*, 36 N. J. Eq. (9 Stew.) 91; *Floyd v. Fitcher*, 38 Barb. 409; *In re Heppenstall's Estate*, 144 Pa. 259, 22 Atl. 860; *In re Mercur's Estate*, 151 Pa. 49, 24 Atl. 1094; *David v. Bridgman*, 10 Tenn. (2 Yerg.) 557; *Davis v. Richardson*, 18 Tenn. (10 Yerg.) 290, 31 Am. Dec. 581; *Burwell's Exrs. v. Anderson*, 3 Leigh, 348; *Robertson v. Hardy's Admr. (Va.)* 23 S. E. 766; *Bowen v. Bowen*, 87 Va. 438, 24 Am. St. Rep. 664, 12 S. E. 885; *Smith v. Beardsley*, 51 Fed. 122, 2 C. C. A. 118.

It follows from the above rule that an estate in remainder in the personal property that shall be left at the determination of a life estate, the tenant of which enjoys an absolute power of disposal, is void for repugnancy: *Wilson v. Turner*, 164 Ill. 398, 45 N. E. 820; *Martin v. Foskett*, 189 Mass. 368, 75 N. E. 709; *Floyd v. Fitcher*, 38 Barb. 409; *Cole v. Cole*, 79 Va. 251; *Bowen v. Bowen*, 87 Va. 438, 24 Am. St. Rep. 664, 12 S. E. 885.

2. **Personalty and Realty as Regards Effect of Power.**—Personal property being more fluid than real estate, and the grant of a right to use the former being in most cases equivalent to the grant of a right to consume it, a distinction is frequently made between the two species of property where both are bequeathed to the same person for life, with a superadded power of disposal. Thus, in *Follweiler's Appeal*, 102 Pa. 581, where a testator devised and bequeathed all his property, real and personal, to his widow, "to keep and enjoy during her lifetime, and after her death what shall be left shall be divided equally among my heirs and her heirs share and share alike," it was held that the widow took the personalty absolutely, but took a life estate only in the realty. And in *Cox v. Sims*, 125 Pa. 522, 17 Atl. 465, where the testator gave certain real and personal estate to his wife, "to have and to hold the same for and during the whole period of her natural life," and then devised the remainder to his children, share and share alike, it was held that the power of disposal over the personal estate resulted from the gift of it for life, and that while the devise over was good as to the real estate and took effect upon the termination of the wife's life, it was bad as to the personal estate, since an absolute gift of personalty for life clothes the donee with all the attributes of ownership.

In Fox's Appeal, 99 Pa. 282, a provision in a will giving "what remained" after the termination of a life estate in real and personal property to nephews and nieces of the testator, was held to relate to the personal property only, and to have no effect upon the life estate in realty given to his widow under the same provision of the will.

In *Patty v. Goolsby*, 51 Ark. 61, 9 S. W. 846, the testator gave all of his property to his wife during her natural life, or until she should marry, with full power to sell and dispose of the property as she in her judgment might think best, and directed that at her death the entire estate should be divided among his children, or in case of her marriage, between his wife and children. It was held that the wife took the personal property absolutely, and a life estate in the realty. Said the court: "The authorities seem to be a unit that where a remainder over is limited upon a devise of lands, to take effect upon the death or marriage of the devisee, the first taker has but a life estate, though the language of the will does not in terms create a life estate; and that the power of disposal of the property in the tenant for life will be limited by his own interest in the lands. . . . The law as to personalty is very different. A bequest of a life estate in personal property, with remainder over, gives the first taker, without any express power for that purpose, the absolute right to all perishable articles, or those like corn, wine, and other articles of food or drink, whose use consists in their consumption, and he may dispose of them at pleasure, unless restrained by other provisions, in the will: See *Schouler on Wills*, sec. 558. But a power of disposal, as in this case, is not limited to perishable articles, or such as are consumed in the using, but gives to the life tenant the absolute interest in all personalty, and leaves the subsequent limitation void. Under this will the widow, by virtue of the powers which it contains, had unlimited control over the whole personal estate, and might dispose of any part of it as she pleased."

In *Cole v. Cole*, 75 Va. 251, the testator's will read: "I give to my wife all my estate during her lifetime, and at her death half of the real estate and half of the personal property that may be on hands to do with and as she may see proper, and the other half of my real estate and personal property, to go to the heirs of my brother." The widow making claim only to the personalty in absolute right, it was held that the words "that may be on hands," fairly construed, impliedly gave to the wife the absolute disposal of the personalty at least, and that the limitation over to the heirs of the brother was repugnant and void.

In New Jersey the courts do not seem to recognize the distinction made in the cases we have cited, in regard to the two species of property. For in *Pratt v. Douglas*, 38 N. J. Eq. 516, it was held that where the testator devised and bequeathed all his real and personal estate to his wife, "for her sole use and benefit, for and during the period of her natural life, to be under her control and used by her as she may see fit to use the same," the widow took only a life estate in his estate, real and personal, and that the power of disposal did not enlarge that estate or enable her to dispose of the property and take proceeds to her own use absolutely. And in *Wooster v. Cooper*, 54 N. J. Eq. 682, 33 Atl. 1050, it is held that where a testator gives an estate for life only, by express words, and annexes to it an absolute power of disposal, the devisee takes a life estate only, and

not a fee; and that this rule is applicable to bequests of personality as well as to devises of realty. To the same effect are *Stevens v. Flower*, 46 N. J. Eq. 340, 19 Atl. 777, and *Robeson v. Shotwell*, 55 N. J. Eq. 318, 36 Atl. 780.

3. Limited Power of Disposal.—The great weight of authority supports the rule laid down in the principal case (*Hardy v. Mayhew*, 158 Cal. 95, ante, p. 73, 110 Pac. 113), that the mere fact that the first taker is invested with the power to dispose of or consume the whole of the property for certain purposes does not invest him with the absolute ownership thereof and render the gift over void, when taking the whole instrument together it is concluded that the intent was to give only an estate for life, with limited power of disposal or consumption: *Weathers v. Patterson*, 30 Ala. 404; *In re Cashman's Estate*, 28 Ill. App. 346; *Goudie v. Johnston*, 109 Ind. 427, 10 N. E. 296; *Webb v. Webb*, 130 Iowa, 457, 104 N. W. 438; *Richards v. Morrison*, 101 Me. 424, 64 Atl. 768; *Godshalk v. Akey*, 109 Mich. 350, 67 N. W. 336; *Lewis v. Pitman*, 101 Mo. 281, 14 S. W. 52; *Hunt v. Smith*, 58 N. J. Eq. 25, 43 Atl. 428; *Tooker v. Tooker*, 71 N. J. Eq. 513, 64 Atl. 806; *Bradway v. Holmes*, 50 N. J. Eq. 311, 25 Atl. 106; *Seaward v. Davis*, 198 N. Y. 415, 91 N. E. 1107; *In re Wyatt's Estate*, 6 Misc. Rep. 285, 30 N. Y. Supp. 275; *In re Williamson*, 9 N. Y. Supp. 476; *Stone v. Hinton*, 36 N. C. 15; *Appeal of Messenger*, 133 Pa. 495, 19 Atl. 485; *In re Minton's Trust*, 160 Pa. 506, 28 Atl. 847; *Rhode Island Hospital Trust Co. v. Commercial National Bank*, 14 R. I. 625; *King v. Sharp*, 25 Tenn. (6 Humph.) 55; *Downing v. Johnson*, 5 Cold. (45 Tenn.) 229; *Madden v. Madden's Exrs.*, 2 Leigh, 377; *Cresap v. Cresap*, 34 W. Va. 310, 12 S. E. 527; *Smith v. Bell*, 6 Peters, 68, 8 L. ed. 322.

In the case of *In re Minton's Trust*, 160 Pa. 506, 28 Atl. 847, there was a bequest of a fund to a trustee to invest and pay the interest to the beneficiary during his life, with the right in the trustee to pay such portion of the principal as might be necessary in case, from sickness or misfortune, the interest should be insufficient to supply the wants or needs of the cestui que trust. There was a limitation over of the fund, or the remainder of it, to the brothers and sisters of the testatrix. Said the court: "Some contention is made that the legacy of the trust is to be treated as an absolute gift of the whole fund. But this position is entirely untenable. The legacy is not a gift of the fund for life, directly to the legatee, with the right to use the same, or to dispose of it, but a legacy expressly to a trustee, who is to invest the same, and pay over the interest to the legatee during his life, with a right in the trustee to pay such portion of the principal as may be necessary in case, from sickness or misfortune, the interest should be insufficient to supply the wants or needs of the cestui que trust. There is no power of appointment or disposition conferred either upon the beneficiary or the trustee, but an express limitation over of the principal of the fund on the death of the beneficiary to other persons specifically named. There is no question that the interest of John Minton was merely a life interest in the income of the fund, and of so much of the principal as might be necessary for his support."

In the case of *In re Wyatt's Estate*, 6 Misc. Rep. 285, 30 N. Y. Supp. 275, the testator gave and bequeathed to his wife for life the residue of his estate, "to have, hold, use and enjoy the rents, issues and in-

comes thereof, and if she shall need the personal property for her comfort, maintenance and support, she may use the whole or any part of it therefor." "It is well settled," said the court, "that where an absolute power of disposal is given to the first legatee a remainder over is void for repugnancy, yet if the right of disposition by the first legatee is conditional the remainder is not repugnant. . . . In the wording of this will there is no absolute power of disposition of the personal estate given to testator's wife. 'If she shall need the personal property of which I may die seised for her comfort, maintenance and support, she may use the whole or any part of it (not absolutely, but) therefor.' That sentence expresses to my mind a condition which must first be shown to exist before she is entitled to any part of the corpus of testator's personal property absolutely. If she needs it for her comfort, her maintenance, her support, or either of them, the wife of testator is then authorized to use the whole or any part of testator's personal property therefor. This must certainly limit the use of the corpus of testator's personal property by his wife, if any weight whatever is to be given to the words the testator uses as showing the state of affairs—the condition—that must exist before the right to use his personal property is to be exercised." And further: "While it is true that the widow is the one to determine primarily whether she needs any part of the corpus of this estate for her comfort, maintenance, and support, yet I think that, where a husband leaves his estate in this manner—practically under the control and enjoyment of his wife, if her necessities require it—to entitle the wife to the use of any part of the corpus of testator's personal property there must be something substantial in her needs; that the word 'comfort' should not be construed to mean 'luxury,' or the words 'maintenance and support' coupled with any possibility of doubt but what the circumstances of the beneficiary are such that a part of the fund or corpus of the estate is needed for that purpose. Such interpretation should only be given as the words, in their ordinary meaning, imply—the words 'comfort, maintenance, and support' meaning, in each particular case, that degree of comfort, maintenance, or support which the testator in his lifetime bestowed upon his wife; and I think it incumbent on the part of the first beneficiary, whoever it may be, to show that the actual condition exists whereby the right to use, and thus lessen, the residuary estate may be exercised. My conclusions, therefore, are that this testator gave his wife the use and income of his estate, real and personal, for her natural life, with the further right to use any part of his personal property, even to exhaustion, if she should need the same for her comfort, maintenance, and support; that the balance of testator's personal property remaining at the death of his wife (and in this case the whole of it), subject to the expenses of administration and the costs of this accounting, is to be distributed, under a decree to be entered herein in pursuance to the foregoing, to those entitled as residuary legatees under the fifth clause of testator's will, and hereinafter determined."

In the case of *In re Estate of Cashman*, 28 Ill. App. 346, where a fund was given to testator's wife for life with remainder, "or so much as may remain unexpended," to testator's children, it was held that the words of devise over imparted a power of disposition in the widow and created a limitation of the remainder after the termination of the life estate.

Similarly, in *Tooker v. Tooker*, 71 N. J. Eq. 513, 64 Atl. 806, it was held that the words "what remains," in a limitation over after the termination of a life estate did not show an unlimited power of disposition given to the life tenant, creating an absolute estate inconsistent with the gift over.

In *Seaward v. Davis*, 198 N. Y. 415, 91 N. E. 1107, where all the testator's personal estate was bequeathed to his wife, with a provision in the will that whatever personal property might remain at her death should go to certain other persons, it was held that the widow took a life estate with absolute power of disposition, with remainder over of such part as she might not dispose of to the persons named in the will.

In *Hunt v. Smith*, 58 N. J. Eq. 25, 43 Atl. 428, the will gave to the wife of the testator all of his personal estate "for and during her natural life, and, if needed by her for her comfort and maintenance, she shall use the principal as well as the interest." It was held that the widow took but a life estate in the personalty, with the right to use only so much of it as was necessary for her comfort and maintenance.

In *Bradway v. Holmes*, 50 N. J. Eq. 311, 25 Atl. 196, the will gave to the wife of the testator the residue of his personal estate for her maintenance so long as she should live, with power to sell so much of it as in her judgment might be necessary for her comfort, support and maintenance, bequeathing what remained in her hands undisposed of at her death to certain others. It was held that the gift over on the wife's death was not void as being limited on a fee.

In *Godshalk v. Akey*, 109 Mich. 350, 67 N. W. 336, the testator bequeathed to his wife a certain sum of money, the interest to be paid to her annually during her life; and in case the annual payment should not be sufficient for her comfortable support and maintenance, or if, in case of sickness or feebleness of health, she should need more than the interest on the fund, then she should use so much of the principal as was necessary for her support and maintenance, and the payment of her needed medical attendance and funeral expenses. It was held that the bequest was for the use of the wife during her life only, and that on her death, such part of the fund as remained became a part of the residuary estate of the testator, and did not belong to the estate of the widow.

In *Rhode Island Hospital Trust Co. v. Commercial Nat. Bank*, 14 R. I. 625, it was held that when a testamentary gift is expressly limited to the donee for life, a superadded power given to the donee to sell and appropriate the proceeds will not enlarge his interest into an absolute estate, nor enable him to mortgage more than his life interest.

The case of *Smith v. Bell*, 6 Pet. 68, 8 L. ed. 322, is a leading one on the subject we are considering, both on account of the point decided, and on account of the eminent judge who delivered the opinion. The devise there was in this language: "I give to my wife, Elizabeth Goodwin, all my personal estate whatsoever and wheresoever, and of what nature, kind and quality soever, after payment of my debts, legacies and funeral expenses, . . . to and for her own use and benefit and disposal absolutely; the remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin." It was held that the wife took only a life estate and that the remainder

comes thereof, and if she shall need the personal property for her comfort, maintenance and support, she may use the whole or any part of it therefor." "It is well settled," said the court, "that where an absolute power of disposal is given to the first legatee a remainder over is void for repugnancy, yet if the right of disposition by the first legatee is conditional the remainder is not repugnant. . . . In the wording of this will there is no absolute power of disposition of the personal estate given to testator's wife. 'If she shall need the personal property of which I may die seised for her comfort, maintenance and support, she may use the whole or any part of it (not absolutely, but) therefor.' That sentence expresses to my mind a condition which must first be shown to exist before she is entitled to any part of the corpus of testator's personal property absolutely. If she needs it for her comfort, her maintenance, her support, or either of them, the wife of testator is then authorized to use the whole or any part of testator's personal property therefor. This must certainly limit the use of the corpus of testator's personal property by his wife, if any weight whatever is to be given to the words the testator uses as showing the state of affairs—the condition—that must exist before the right to use his personal property is to be exercised." And further: "While it is true that the widow is the one to determine primarily whether she needs any part of the corpus of this estate for her comfort, maintenance, and support, yet I think that, where a husband leaves his estate in this manner—practically under the control and enjoyment of his wife, if her necessities require it—to entitle the wife to the use of any part of the corpus of testator's personal property there must be something substantial in her needs; that the word 'comfort' should not be construed to mean 'luxury,' or the words 'maintenance and support' coupled with any possibility of doubt but what the circumstances of the beneficiary are such that a part of the fund or corpus of the estate is needed for that purpose. Such interpretation should only be given as the words, in their ordinary meaning, imply—the words 'comfort, maintenance, and support' meaning, in each particular case, that degree of comfort, maintenance, or support which the testator in his lifetime bestowed upon his wife; and I think it incumbent on the part of the first beneficiary, whoever it may be, to show that the actual condition exists whereby the right to use, and thus lessen, the residuary estate may be exercised. My conclusions, therefore, are that this testator gave his wife the use and income of his estate, real and personal, for her natural life, with the further right to use any part of his personal property, even to exhaustion, if she should need the same for her comfort, maintenance, and support; that the balance of testator's personal property remaining at the death of his wife (and in this case the whole of it), subject to the expenses of administration and the costs of this accounting, is to be distributed, under a decree to be entered herein in pursuance to the foregoing, to those entitled as residuary legatees under the fifth clause of testator's will, and hereinafter determined."

In the case of *In re Estate of Cashman*, 28 Ill. App. 346, where a fund was given to testator's wife for life with remainder, "or so much as may remain unexpended," to testator's children, it was held that the words of devise over imparted a power of disposition in the widow and created a limitation of the remainder after the termination of the life estate.

Similarly, in *Tooker v. Tooker*, 71 N. J. Eq. 513, 64 Atl. 806, it was held that the words "what remains," in a limitation over after the termination of a life estate did not show an unlimited power of disposition given to the life tenant, creating an absolute estate inconsistent with the gift over.

In *Seaward v. Davis*, 193 N. Y. 415, 91 N. E. 1107, where all the testator's personal estate was bequeathed to his wife, with a provision in the will that whatever personal property might remain at her death should go to certain other persons, it was held that the widow took a life estate with absolute power of disposition, with remainder over of such part as she might not dispose of to the persons named in the will.

In *Hunt v. Smith*, 58 N. J. Eq. 25, 43 Atl. 428, the will gave to the wife of the testator all of his personal estate "for and during her natural life, and, if needed by her for her comfort and maintenance, she shall use the principal as well as the interest." It was held that the widow took but a life estate in the personalty, with the right to use only so much of it as was necessary for her comfort and maintenance.

In *Bradway v. Holmes*, 50 N. J. Eq. 311, 25 Atl. 196, the will gave to the wife of the testator the residue of his personal estate for her maintenance so long as she should live, with power to sell so much of it as in her judgment might be necessary for her comfort, support and maintenance, bequeathing what remained in her hands undisposed of at her death to certain others. It was held that the gift over on the wife's death was not void as being limited on a fee.

In *Godshalk v. Akey*, 109 Mich. 350, 67 N. W. 336, the testator bequeathed to his wife a certain sum of money, the interest to be paid to her annually during her life; and in case the annual payment should not be sufficient for her comfortable support and maintenance, or if, in case of sickness or feebleness of health, she should need more than the interest on the fund, then she should use so much of the principal as was necessary for her support and maintenance, and the payment of her needed medical attendance and funeral expenses. It was held that the bequest was for the use of the wife during her life only, and that on her death, such part of the fund as remained became a part of the residuary estate of the testator, and did not belong to the estate of the widow.

In *Rhode Island Hospital Trust Co. v. Commercial Nat. Bank*, 14 R. I. 625, it was held that when a testamentary gift is expressly limited to the donee for life, a superadded power given to the donee to sell and appropriate the proceeds will not enlarge his interest into an absolute estate, nor enable him to mortgage more than his life interest.

The case of *Smith v. Bell*, 6 Pet. 68, 8 L. ed. 322, is a leading one on the subject we are considering, both on account of the point decided, and on account of the eminent judge who delivered the opinion. The devise there was in this language: "I give to my wife, Elizabeth Goodwin, all my personal estate whatsoever and wheresoever, and of what nature, kind and quality soever, after payment of my debts, legacies and funeral expenses, . . . to and for her own use and benefit and disposal absolutely; the remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin." It was held that the wife took only a life estate and that the remainder

to Jesse Goodwin (the testator's son) was valid. Chief Justice Marshall says: "The rule that a remainder may be limited, after a life estate in personal property, is as well settled as any other principle of our law. The attempt to create such limitation is not opposed by the policy of the law, or by any of its rules. If the intention to create such limitation is manifested in a will, the courts will sustain it. . . . In the case before the court, it is, we think, impossible to mistake the intent. The testator unquestionably intended to make a present provision for his wife, and a future provision for his son. This intention can be defeated only by expunging, or rendering totally inoperative, the last clause of the will. In doing so we must disregard a long series of opinions, making the intention of the testator the polar star to guide us in the construction of wills, because we find words which indicate an intention to permit the first taker to use part of the estate bequeathed. This suit is brought for slaves—a species of property not consumed by the use, and in which a remainder may be limited after a life estate. They composed a part, and probably the most important part, of the personal estate given to the wife 'to and for her own use and benefit and disposal absolutely.' But in this personal estate, according to the usual condition of persons in the situation of the testator, there were trifling and perishable articles, such as the stock on a farm, household furniture, and the crop of the year, which would be consumed in the use; and over which the exercise of absolute ownership was necessary to a full enjoyment. These may have been in the mind of the testator when he employed the strong words of the bequest to her. But be this as it may, we think the limitation to the son on the death of the wife restrains and limits the preceding words so as to confine the power of absolute disposition, which they purport to confer of the slaves, to such a disposition of them as may be made by a person having only a life estate in them."

II. Statutory Provisions.

Legislative enactments have, in a number of the states, modified the rules laid down in the cases, relating to life estates with super-added power of disposal. These enactments are substantially alike, their essential provisions being adopted from the New York statute, the provisions of which are as follows:

"Section 129 (General Laws and Revised Statutes of New York, pp. 3820, 3821). Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers and encumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts.

"Section 130. Where a like power of disposition is given to a person to whom no particular estate is limited, such person also takes a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors, purchasers and encumbrancers.

"Section 131. Where such a power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee is entitled to an absolute fee.

"Section 132. Where a general and beneficial power to devise the inheritance is given to a tenant for life, or for years, such tenant is

deemed to possess an absolute power of disposition within the meaning of and subject to the provisions of the last three sections.

"Section 133. Every power of disposition by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit, is deemed absolute."

See similar provisions: Ala. Code 1907, secs. 3423-3426; Mich. Comp. Laws, c. 239, secs. 9-13; Minn. Stats. 1894, secs. 4309-4313; Okl. Comp. Laws, secs. 7324-7328; S. D. Rev. Code 1903, secs. 359-362; Wis. Stats. 1898, secs. 2108-2112.

These statutory provisions have been the subject of consideration in a number of cases. In *Waring v. Waring*, 17 Barb. 552, a will giving a life estate to testator's wife, with authority to sell and convey any and every part and parcel of the estate given to her, for her life, and "to dispose of the proceeds thereof as she shall find necessary and proper, the power of disposal being unaccompanied by any trust, was held, under the statute, to confer upon the wife an absolute fee.

In *Blauvelt's Estate*, 20 N. Y. Supp. 119, the testator by his will gave to his wife, during her widowhood, the use of all his real and personal estate, authorizing her to sell and dispose of any of the real estate as to her should "seem just," and to give deeds therefor. After the death of the wife, the property, under the will, was to be divided equally between the two children of the testator. It was held that the widow took simply a life interest, and was entitled only to the use or income of the testator's property, and that the proceeds of realty sold by her under the power of sale in the will did not vest absolutely in her, under the statute, but passed to the children on the determination of the widow's estate. Said the court: "The widow contends that by virtue of 1 Revised Statutes, page 732 (eighth edition, page 2446), section 81, upon the execution of such power of sale she became the absolute owner of the proceeds. That section provides that, 'where an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate for life or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon in case the power shall not be executed or the lands shall not be sold for the satisfaction of debts.' I do not understand the power of sale conferred upon the widow under this will to be an absolute one, such as is contemplated by this statute. . . . 'Every power of disposition shall be deemed absolute by means of which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit': 1 Rev. Stats., p. 733 (8th ed., p. 2447), sec. 85. The will, when considered in all its parts, does not indicate that the power was conferred to dispose of the entire fee for the widow's own benefit. It must rather be construed as for the benefit of all, to realize a greater income, to facilitate distribution, to save partition. . . . To sell or dispose of the real estate as to her shall 'seem just' must mean just to all interested in such estate. It is very clear from the whole instrument that the testator did not intend to confer such an absolute power of sale as would destroy the devises over of his estate. The provisions disposing of his property after the death of the widow are specifically set forth, and he thereby bequeaths and devises 'all my real and personal estate.' If the widow is given by virtue of the power an absolute title to the

real estate, then the testator had no real estate to devise after his widow's death. To warrant such a construction of this devise to the widow as would nullify express subsequent provisions of his will, specific terms having that effect must appear in the instrument. The testator in exact words limited the estate of his wife to the use of all his real and personal estate during her widowhood, and to enlarge this into a fee as to the realty, it must appear in clear terms where such enlargement would have the effect of nullifying devises of such realty after the death of the widow. Of course, in the consideration of the question of the effect of this power of sale conferred upon the widow, the distinction must be kept in mind as to whether the question is raised by a purchaser as to his title acquired by virtue of a sale under this power, or whether, as here, it is raised by one claiming under the will an estate or interest in the proceeds. It is doubtful whether the testator intended conferring other than such power as a life tenant may exercise. Even the words 'disposal absolutely' may have their absolute character qualified by restraining words connected with and limiting them to mean such absolute disposal as a tenant for life may make: *Smith v. Bell*, 6 Pet. 68, 8 L. ed. 322. . . . But even if the power of sale intended to be given to the widow was to sell the realty with the full title of the testator, if she saw proper to exercise the same to enable her to realize a larger income therefrom for herself, yet it did not confer upon her an absolute title to the proceeds of the sale so as to cut off the other devisees from all interest therein. A sale under this power would not have the effect of destroying the devise to the testator's daughters and their respective heirs, as the testator had not such an intention. At most, it would cut off their interests in the particular real property sold. In other words, the purchaser from the widow might acquire a title in fee relieved from the claim or estate of such devisees in the realty conveyed, but the proceeds would yet remain as real estate or become personalty, and to be thereafter still held by her subject to the use and disposition of the real estate according to the provisions of the will."

In *Deagan v. Von Glahn*, 26 N. Y. Supp. 989, it was held that a devise to one for the term of his natural life, with full power to devise, but with no power to grant or convey, the same, and, if he should die intestate, then with remainder over to his heirs, vests a fee simple title in the devisee, under 1 Revised Statutes, page 733, section 84, providing that "Where a general and beneficial power to devise the inheritance, shall be given to a tenant for life or for years, such tenant shall be deemed to possess an absolute power of disposition, within the meaning and subject to the provisions of the three last preceding sections."

"By her will," said the court in *Re Moehring*, 154 N. Y. 423, 48 N. E. 818, "Sophie Moehring bequeathed to the appellant, for life, the residue of her estate, with power to dispose of it at her death as she might deem fit. The power thus conferred was a general and beneficial one. It was an absolute power of disposition, and, as no remainder was limited upon the property, the grantee took an absolute title: *Hume v. Randall*, 141 N. Y. 499, 36 N. E. 402; *Degan v. Wade*, 144 N. Y. 573, 39 N. E. 692. The cases cited related to real estate, and were based upon the provisions of the Revised Statutes as to powers. But the same principle applies to a grant or bequest of personal property. The rule of the common law was abrogated by the statute

which abolished powers as they then existed. When the legislature adopted the Revised Statutes, it intended to make the article with regard to powers a complete and exclusive code upon the subject, and that article is applicable as well to powers concerning personal property as to those affecting real estate."

In Alabama the statute on this subject—similar in its provisions to the New York statute—came before the supreme court in *Alford's Admr. v. Alford's Admr.*, 56 Ala. 350, and in *Hood v. Bramlett*, 105 Ala. 660, 17 South. 105. In the former case it was held that where a life estate is created, and an absolute power of disposition conferred on the life tenant, this enlarges the life estate into a fee; not absolutely, but in favor, and only in favor, of the creditors of and purchasers from the life tenant, and in case the power is not executed, nor the lands sold for the satisfaction of debts, during the continuance of the particular estate, the property remains subject to any future estate limited thereon. The statute, the court thought, was intended to confirm the Alabama decisions, so far as they affect creditors and purchasers; and also to protect the estates of those in remainder, in cases where there had been no sale or other execution of the power. "Thus construed," said the court, "the statute meets our hearty approbation; for it cannot be controverted, that the principle on which our former decisions have been made to rest has never given satisfaction. The public mind, professional as well as nonprofessional, has all the while felt that the wish and will of testators have been thereby defeated, rather than carried out." This case also decided that although the statute speaks only of lands, the same rule of construction must be applied to both real and personal property, when given by the same words, and in the same clause of the will.

In *Hood v. Bramlett*, 105 Ala. 660, 17 South. 105, it was held that the ulterior estates protected by the statute must rest upon express limitations and not upon mere implication, confining the protection of future estates provided by the statute to estates in remainder limited upon the particular estate, and leaving mere reversions and remainders by implication—the antithesis of express limitation—exposed to the operation of the common-law doctrine.

Under a like statute in Minnesota, it was held in *Hershey v. Meeker County Bank*, 71 Minn. 255, 73 N. W. 967, that a devise of lands to one for life, with remainder to such persons as the devisee might by his last will and testament direct, invested the devisee with the absolute fee in the lands, in respect to the rights of creditors and purchasers. And in the later case of *Ashton v. Great Northern Ry. Co.*, 73 Minn. 201, 80 N. W. 963, where the testator devised and bequeathed all his estate to his wife during her natural life, with full authority and power to sell and dispose of it, or any part of it, and give good and absolute title thereto, by deed or otherwise, whenever, in her judgment, it is expedient to dispose of the same; and purchasers of said property are not required to look after the application of the proceeds thereof; the will further providing that at the death of the wife all of the estate that "may remain unsold and undisposed of by her" should go to the three children of the testator, it was held that the power granted to the testator's wife was a beneficial power, and not a power in trust, and the widow's estate was by means of the statute changed into a fee absolute in respect to the rights of creditors and purchasers.

III. Powers and Duties of the Life Tenant.

a. **Right to Convey the Fee.**—The rights and duties of the life tenant in relation to the property devised depend, of course, upon the character and extent of the power of disposal given to him by the will, and the quality of the power—whether it be absolute or limited—must be determined from a consideration of the whole will. For, as said by Sharswood, J., in *Fox's Appeal*, 99 Pa. 282, "Every will is to be construed from its four corners to arrive at the true intention of the testator. Decisions upon other wills may assist, but cannot control the construction."

That power to convey a fee may be given to the holder of a life estate is not open to discussion: *Foudray v. Foudray* (Ind.), 89 N. E. 499. While such a power seems repugnant to the life estate granted, it must be borne in mind, as has already been pointed out, that such a power is not property—it is a separate gift in addition to the life estate. It does not enlarge the life estate, and if such power is not executed, the remainder in fee after the termination of the life estate is a part of the estate of the testator, and will pass under the will of the testator, or if there are no provisions in the will affecting it, will descend as the estate of the testator: *Kent v. Morrison*, 153 Mass. 137, 25 Am. St. Rep. 616, 26 N. E. 427, 10 L. R. A. 756.

We are not now considering cases where it appears that the testator intended to give to the devisee absolutely a fee simple in real property or the absolute ownership of personal property. In such cases the devisee has, of course, an unlimited power of disposition, and not even the testator himself can attach to such a devise or bequest a quality or condition or any restraint upon alienation which in law is inconsistent with such an estate. Our subject relates solely to cases where the estate given to the devisee is only for life, although coupled with a power of disposal which may be broad enough to empower the life tenant to dispose of the fee.

It is consistently held by the authorities that a devise for life, coupled with the right to consume the principal of both the real and personal estate, empowers the devisee to convey the real estate in fee, and thereby cut off the right of remaindermen in the realty conveyed: *Glover v. Stillson*, 56 Conn. 316, 15 Atl. 752; *Markillie v. Ragland*, 77 Ill. 98; *Walker v. Pritchard*, 121 Ill. 221, 12 N. E. 336; *Hamlin v. United States Express Co.*, 107 Ill. 443; *Skinner v. McDowell*, 169 Ill. 365, 61 Am. St. Rep. 183, 48 N. E. 310; *Clark v. Middlesworth*, 82 Ind. 240; *South v. South*, 91 Ind. 221, 46 Am. Rep. 591; *Wiley v. Gregory*, 135 Ind. 647, 35 N. E. 507; *Foudray v. Foudray* (Ind.), 89 N. E. 499; *Paxton v. Paxton*, 141 Iowa, 96, 119 N. W. 284; *Ernst v. Foster*, 58 Kan. 438, 49 Pac. 527; *Greenwalt v. Keller*, 75 Kan. 578, 90 Pac. 233; *Martin v. Barnhill* (Ky.), 77 S. W. 1097; *Hosman v. Millett* (Ky.), 107 S. W. 334; *Sutton v. Johnson* (Ky.), 127 S. W. 747; *Kuhn v. Webster*, 78 Mass. (12 Gray) 3; *Cummings v. Shaw*, 108 Mass. 159; *Lyon v. Marsh*, 116 Mass. 232; *Johnson v. Battelle*, 125 Mass. 453; *Gibbons v. Shepard*, 125 Mass. 541; *Kent v. Morrison*, 153 Mass. 137, 25 Am. St. Rep. 616, 26 N. E. 427, 10 L. R. A. 756; *Lemper v. Coates*, 93 Minn. 76, 100 N. W. 662; *Warren in Ingram* (Miss.), 51 South. 888; *Barker v. Clark*, 72 N. H. 334, 56 Atl. 747; *Kennedy v. Pittsburg & L. E. R. Co.*, 216 Pa. 575, 65 Atl. 1102; *Allen v. Hirlinger*, 219 Pa. 56, 123 Am. St. Rep. 617, 67 Atl. 907, 13 L. R. A., N. S., 458;

Orr v. O'Brien, 55 Tex. 149; Larsen v. Johnson, 78 Wis. 300, 23 Am. St. Rep. 404, 47 N. W. 615; Downie v. Downie, 9 Biss. 353, 4 Fed. 55.

The case of Brant v. Virginia Coal & Iron Co., 93 U. S. 326, 23 L. ed. 927, seems to conflict with the cases above cited. In that case the words of the will were: "I give and bequeath to my beloved wife, Nancy Sinclair, all my estate, both real and personal, that is to say, all my lands, cattle, horses, sheep, farming utensils, household and kitchen furniture, with everything that I possess, to have and to hold during her life, and to do with as she sees proper before her death." By virtue of this power, the widow undertook to convey the fee of the land. But the supreme court, speaking by Mr. Justice Field, said: "The interest conveyed by the devise to the widow was only a life estate. The language used admits of no other conclusion; and the accompanying words, 'to do with as she sees proper before her death,' only conferred power to deal with the property in such manner as she might choose, consistently with that estate, and, perhaps, without liability for waste committed. These words, used in connection with a conveyance of a leasehold estate, would never be understood as conferring a power to sell the property so as to pass a greater estate. Whatever power of disposal the words confer is limited by the estate with which they are connected."

So in Giles v. Little, 104 U. S. 291, 26 L. ed. 745, under a will by which the testator gave his real and personal property to his wife, "with full power, right, and authority to dispose of the same as to her shall seem meet and proper so long as she shall remain my widow; upon the express condition that, if she shall marry again, then it is my will that all the estate herein bequeathed, or whatever may remain, should go to my surviving children," etc., it was held that the widow took a life estate only, with power to dispose of that estate, but not the fee, in the realty. A similar ruling was made in Patty v. Goolsby, 51 Ark. 61, 9 S. W. 846.

The supreme court, however, in Roberts v. Lewis, 153 U. S. 367, 14 Sup. Ct. Rep. 945, 38 L. ed. 747, overruled the case of Giles v. Little, 104 U. S. 291, 26 L. ed. 745. In construing the same will in a suit between other parties, the court, speaking by Mr. Justice Gray, said: "The testator's primary object manifestly was to provide for his widow. He begins by giving her 'all my estate, real and personal,' which of itself would carry a fee, unless restricted by other words: Lambert v. Paine, 7 U. S. (3 Cranch.) 96, 2 L. ed. 377. He then says, 'to be and remain hers,' which, upon any possible construction, secures to her the full use and enjoyment of the estate, while she holds it. She is also vested, in the most comprehensive terms, 'with full power, right and authority to dispose of the same' (which, as no less title has yet been mentioned, naturally means the whole estate) 'as to her shall seem most meet and proper, so long as she shall remain my widow.' This last clause, so far as it controls the previous words, has full effect if construed as limiting the time during which the widow may have the use and enjoyment of the estate, and the power to dispose of it, and not restricting the subject to be disposed of. The power thus conferred, therefore, in its own terms as well as by the general intent of the testator, gives her during widowhood the right to sell and convey an absolute title in any part of the estate; for it would be difficult, if not impossible, to obtain an adequate price for a title liable to be defeated in the hands of the purchaser by the widow's marrying again. That the power was intended to be un-

limited in this respect appears, even more distinctly, by the terms of the next clause, by which, if she should marry again, the testator declares it to be his will that 'all of the estate herein bequeathed, or whatever may remain, should go' to his surviving children. By not using the technical word 'remainder,' or making the devise over in clude the entire estate at all events, but carefully adding, after the words 'all the estate herein bequeathed,' the alternative 'or whatever may remain' (which would otherwise have no meaning), he clearly manifests his intention to restrict the estate given to the children to whatever has not been disposed of by the widow; and there is nothing upon the face of the will, nor are there any extrinsic facts in this record, having any tendency to show that the power of the widow is less absolute over the real estate than over the personal property."

The learned justice did not overlook the case of *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326, 23 L. ed. 327, but did not consider the decision in that case as opposed to the views expressed in the case at bar.

b. Right to Mortgage.—The right of the life tenant to mortgage the fee in the estate devised depends, as does the right to convey the fee, upon the character of the power of disposal given to him in the will. A power to sell does not necessarily imply a power to mortgage: *Bloomer v. Waldron*, 3 Hill, 361. When the intention in giving the power is that real estate may be converted out-and-out into money, such a power does not authorize a mortgage: *Hoyt v. Jaques*, 129 Mass. 286. In the last case a life estate was given for maintenance, with a power "to sell and convey any and all of my real estate, if necessary, to secure such maintenance." "This language," said the court, "does not in its terms import a power to mortgage; and we find in the will no decisive indications that the testatrix intended to use it in any other than its natural and obvious meaning. Thus used, it gives the husband the power to sell and convey for a fair price any or all of the real estate, if necessary for his comfortable support, but it does not give the right to mortgage the estate for a part only of its value. The intention appears from her language to have been that her husband, if it became necessary for his support, might sell the real estate and convert it 'out-and-out,' and not that he might at his discretion charge it with encumbrances and liens."

In *Rhode Island Hospital Trust Co. v. Commercial National Bank*, 14 R. I. 625, it was held that a testamentary gift for life, with added power in the donee of sale and appropriation of proceeds, will not enable the donee to mortgage more than his life interest.

Where, however, the power authorizes the life tenant to sell for any purpose, and to use the proceeds in any manner he may think proper, whether necessary for his support or not, such a power is as ample as that of an owner. It is an absolute and unrestricted power to sell for the benefit and in the discretion of the devisee of the power, and includes a power to mortgage: *Kent v. Morrison*, 153 Mass. 137, 25 Am. St. Rep. 616, 26 N. E. 427, 10 L. R. A. 756; *Tisdale v. Prather*, 210 Mo. 402, 109 S. W. 41.

By the terms of the will in *Swarthout v. Ranier*, 143 N. Y. 499, 38 N. E. 726, the wife of the testator was given all his property, real and personal, the scope and character of the gift being expressed in these words: "To have and to hold for her comfort and support all of the above-named property if she needs the same during her natural life-

time," with a provision for a legacy "if there is enough of my property left at the death of my wife." It was held that the interest vested in the wife was a life estate with power to take so much of the corpus as should be needed for her comfort and support, and that a mortgage for such purpose was valid.

In *Loebenthal v. Raleigh*, 36 N. J. Eq. 169, it was said: "Where power of sale is given to raise a particular charge only, and the purpose can be answered better by mortgage than by sale, and that method is not violative of the intention of the grantor of the power, the former mode of raising the money should be preferred to the latter, for the obvious and sufficient reason that it is for the advantage of the estate that it should be adopted, and it is within the limits of the power intended to be conferred. It would be absurd, to say the least of it, to adhere so closely to the literal terms of the grant of power as to necessitate a sacrifice of the property, when by a reasonable construction that result could be avoided."

c. **Disposal by Will and Gift Inter Vivos.**—Unless the life tenant is given the power of appointment by the will, any power of disposal, short of an absolute and unrestricted one, will not empower him to devise or bequeath the estate granted: *Rapp v. Matthias*, 35 Ind. 332; *Farlin v. Sanborn*, 161 Mich. 615, 137 Am. St. Rep. 525, 126 N. W. 634; *Tompkins v. Fanton*, 3 Dem. Sur. 4.

In *Crew v. Dixon*, 129 Ind. 85, 27 N. E. 728, a will giving to the testator's wife his entire estate for life with the privilege of using the principal of the personal estate for her support, contained also this provision: "But before her death I desire her to provide, by will or otherwise, for a distribution of whatever of my estate may remain in her hands, among her and my children." It was held that the wife had no power to devise the land to one of the children.

In *Phifer v. Phifer*, 41 N. C. 155, a testator devised as follows: "I will and bequeath the residue of my estate of every kind and description to my dearly beloved wife, to manage the same as she may think most advisable, for her own support and for the support and education of our children, as long as she remains a widow, and should she again marry, it is my will, that my property should be divided between her and her children. . . . And should she not marry until my children become of lawful age, I hereby invest her with full and ample authority to divide my property among them, as she may deem most expedient." It was held that the widow, remaining unmarried until her death, had no right to dispose of the property, at her discretion, by will, but that, in such an event, she had a life estate, and the property, after her death, was to be divided among the children of the testator, as it would be divided if he had died intestate.

In the case of *In re French*, 52 Hun, 303, 5 N. Y. Supp. 249, a testatrix gave to her husband all her personal property, with a power of disposal in the words: "and wish my said husband to do with said property as he shall think best during his lifetime"; and gave to her daughter the sum of eight thousand dollars, to be paid out of her estate at her husband's death. It was held that as to the personal property to the extent of eight thousand dollars, the husband had only a power of sale, and could not dispose of it by will.

The case of *Kleber v. Kleber* (Ky.), 67 S. W. 838, illustrates the absolute power of disposal which empowers the life tenant to dispose of the property by will. There the testator devised his estate to his wife, "to do with as she pleases, provided she does not marry again," and provided that after her death any of his estate remaining "undisposed of" should be equally divided among his children. It was held that the widow had power to dispose of the estate by her will, and thus to defeat the devise to the children.

The same principle that prevents the life tenant, in the absence of an unlimited power of disposal, from disposing of the estate by will, applies to prevent him from making a gift of it *inter vivos*: *Farlin v. Sanborn*, 161 Mich. 615, 137 Am. St. Rep. 525, 126 N. W. 634; *Huston v. Craighead*, 23 Ohio St. 198; *Johnson v. Johnson*, 51 Ohio St. 446, 38 N. E. 61; *Perkinson v. Clarke*, 135 Wis. 584, 116 N. W. 229. And he cannot make such a gift of the estate even though he has, under the will, a general power of appointment, where there is a limitation over in case the power of appointment is unexecuted: *Sires v. Sires*, 43 S. C. 266, 21 S. E. 115.

d. Rights and Obligations in the Use.

1. **In General.**—The duties of the tenant for life to the remainderman and reversioner are considered in the note to *Peak v. Peak*, 137 Am. St. Rep. 651. Generally speaking, it may be said that the life tenant having the right of use only, in either real or personal property, is a trustee to preserve the principal for the remaindermen to whom it is to pass on his death: *Hardy v. Mayhew*, 158 Cal. 95, ante, p. 73, 110 Pac. 113; *Goudie v. Johnston*, 109 Ind. 427, 10 N. E. 296; *Hunt v. Smith*, 58 N. J. Eq. 25, 43 Atl. 428. It has also been held that the owner of the life interest may be compelled to make a permanent and secure investment for the protection of those whose interest is in remainder: *Covenhoven v. Shuler*, 2 Paige, 122, 21 Am. Dec. 73. "It is a very old equity doctrine," said the court in *Goudie v. Johnston*, 109 Ind. 427, 10 N. E. 296, "that courts will award relief to one holding an interest in remainder against the wrongs of an owner of a life interest. Anciently the rule seems to have been that the owner of the life interest would not be required to give security, but would be required to file an inventory of the property: *Foley v. Burnell*, 1 Brown Ch. 274; *Slanning v. Style*, 3 P. Wms. 336. Chancellor Kent says: 'Lord Thurlow said that the party entitled in remainder could call for the exhibition of an inventory of the property, which must be signed by the legatee for life, and deposited in court, and that is all he is ordinarily entitled to. But it is admitted that security may still be required in case of a real danger that the property may be wasted, secreted or removed': 2 Kent's Commentaries, 12th ed., 354, and authorities cited in note."

This right of the life tenant in personal property to use it even to the extent of consuming it, and the right of the remaindermen to demand security for the preservation of the property, will be found discussed in *Underwood v. Underwood*, 162 Ala. 553, 136 Am. St. Rep. 61, 50 South. 305; *Scott v. Scott*, 137 Iowa, 239, 126 Am. St. Rep. 277, 114 N. W. 881, 23 L. R. A., N. S., 716; *Whittemore v. Russell*, 80 Me. 297, 6 Am. St. Rep. 200, 14 Atl. 197.

Waste is not a legitimate enjoyment of a life estate, said the court in *Cross v. Hendry*, 39 Ind. App. 246, 79 N. E. 531; and in a proper case the court will restrain waste by the life tenant: *Downing v. Johnson*, 5 Cold. (45 Tenn.) 229. The facts in the last-named case, however, did not disclose a situation calling for the interposition of the court to protect the remaindermen; and the court animadverted rather severely upon the proceeding of the complaining executor who sought to interfere with what appeared to be a perfectly legitimate use of the property by the life tenant, the widow of the testator. So, in *Copeland v. Barron*, 72 Mo. 206, where a testator bequeathed to his father and mother, and the survivor of them, a sum of money for their use and support, during the term of their lives, any part thereof remaining unexpended after their death to go to the testator's son, it was held that while the legatees took but a life estate, and not an absolute property in the money, they were entitled to the custody and control of it during their lifetime, or until used and expended for their support; and that the court could not interfere with their possession of it, unless in an extreme case of unfitness of the legatees to exercise the discretion committed to them, or in the case of a threatened wanton ill-use of the fund intrusted to their care.

In the case of *In re Moore's Estate*, 163 Mich. 353, 128 N. W. 198, it was held that the word "use," in the phrase "she shall only have the use and interest of the same during her life," should not be interpreted as granting the power of consumption; that the word clearly does not, in its ordinary acceptance, impart the power to dissipate, destroy, or consume. So, the word "comfort," it was held in *Wyatt's Estate*, 6 Misc. Rep. 285, 30 N. Y. Supp. 275, should not be construed to mean "luxury," or the words "maintenance and support" coupled with any possibility of doubt but that the circumstances of the life tenant are such that a part of the fund or corpus of the estate is needed for that purpose.

In *Estate of Cashman*, 28 Ill. App. 346, it was said to be clear as a principle of law, *ex necessitate rei*, that a life estate in personal property gives the donee the right to consume such articles as cannot be enjoyed without consumption, and to wear out by use, such as cannot be used without wearing out. But even where the life tenant has the right and power to dispose absolutely of the property, a trust obligation rests upon him to use the proceeds for the declared purposes of the will: *Patty v. Goolsby*, 51 Ark. 61, 9 S. W. 846.

2. *Care of the Estate.*—Where the life tenant's power of alienation is a limited one, as where he may sell, etc., as "needed for his support or maintenance," it is his duty to preserve the property by making ordinary repairs; and there is no rule on which he can predicate a demand that improvements shall be placed upon the property at the expense of the remaindermen for his benefit: *Hamilton v. Hamilton*, 140 Iowa, 282, 115 N. W. 1012, 118 N. W. 375. A tenant for life is obliged to pay the ordinary annual taxes, but assessments laid upon the property by the municipal authorities for permanent improvements are to be apportioned equitably between the life tenant and the interests in remainder: *Pratt v. Douglas*, 38 N. J. Eq. 516. And see note to *First Congregational Church v. Terry*, 114

Am. St. Rep. 448, on the respective duties of life tenants and remaindermen or reversioners to pay taxes. Similarly, where the executor of a will, a few months before the life tenant's death, pays the full premium for three years' insurance upon the building in possession of the life tenant, the latter's estate is chargeable only with a proportionate part of the amount paid: *In re Wyatt's Estate*, 6 Misc. Rep. 285, 30 N. Y. Supp. 275.

THOMAS v. WENTWORTH HOTEL COMPANY.

[158 Cal. 275, 110 Pac. 942.]

CORPORATION — Stockholder's Liability — Pleading.—The measure of the liability of a stockholder is the proportion his stock bears to all the stock subscribed. Hence in an action against him for his proportionate part of an indebtedness of the corporation, the complaint should aver the total number of shares subscribed. (p. 121.)

CORPORATION — Stockholder's Liability—Pleading.—Where, in an action against a stockholder, the complaint should aver the total number of shares of stock of the corporation subscribed, the use of "outstanding" instead of "subscribed" may subject the averment to objection as being, at most, imperfect or ambiguous, which objection, to be good, must be raised before trial and judgment. (p. 122.)

CORPORATION—Place of Business in Sister State.—The naming, in articles of incorporation, of a locality outside of the state as one of the corporation's principal places of doing business is equivalent to declaring that the corporation is to do business in part in the state in which that locality is. (p. 122.)

CORPORATION—Stockholder's Liability—Conflict of Laws.—A member of an extrastate corporation which has duly filed certified copies of its articles in California and done business there accordingly cannot, as to such business, escape liability properly his under the laws of California, on the ground of the contrary effect of the laws of the state of the incorporation. (p. 123.)

CORPORATION—Stockholder's Liability—What Law Enters into.—It is true that the liability of a stockholder rests upon contract and that the terms of the contract between incorporators are to be ascertained from the articles of incorporation read in the light of the statute which authorized the creation of the corporate body; but when a contract is made with reference to a jurisdiction other than that of the place of contracting, the parties will be deemed to have inserted in their agreement the law of that other jurisdiction, and it is so with members of a corporation whose articles contemplate doing business in a sister state. (pp. 123, 124.)

CORPORATION—Incorporation Under Laws of Another State. The fact that a corporation is formed in one state with the declared purpose of doing business partly in another state justifies the assumption that with regard to the business to be done in that other state the incorporators agree to be bound by its laws, and it matters not

whether it is all or only a part of their business that they intend to do there. (pp. 123, 124.)

CORPORATION—Stockholder's Liability—Conflict of Laws.—The filing in due form in California of certified copies of articles of an extrastate corporation, by which articles a stockholder is expressly exempt from liability for corporate debts—all in conformity with the laws of the state of the incorporation—does not, as to business done by the company in California, estop a creditor in the latter state to sue a member of such corporation, in the face of the laws of California which expressly withhold such exemption. (p. 125.)

W. S. Wright, for the appellant.

Porter, Sutton & Cruickshank and J. R. Scott, *amicus curiae*, for the respondent.

²⁷⁷ SLOSS, J. The defendant Warner, a stockholder of the Wentworth Hotel Company, a corporation, appeals from a judgment against him for his proportionate share of the indebtedness of the corporation evidenced by two promissory notes executed, and by their terms payable, in this state. The appeal is on the judgment-roll alone.

The appellant contends that each of the two counts is defective in failing to allege the number of shares of stock of the corporation which had been subscribed. Since the liability of each stockholder is measured by the proportion which his stock bears to the "whole of the subscribed capital stock or shares of the corporation" (Civ. Code, sec. 322), it is plain that an averment of the amount of such subscribed stock is an essential part of the cause of action. Without it there is no showing of one of the elements necessary for the computation of the "proportion" of the debt for which the defendant is liable: *Bidwell v. Babcock*, 87 Cal. 29, 25 Pac. 752; *Roebeling's Sons Co. v. Butler*, 112 Cal. 677, 45 Pac. 6.

The allegation of the complaint before us is that, at the time the indebtedness was incurred, "the total number of shares of the capital stock of the said defendant, Wentworth Hotel Company, then outstanding was thirty-five hundred." The word "outstanding" can hardly be said to be the exact equivalent of "subscribed," and its use in a pleading of this character is not to be commended. At the same time it is no stretch of construction to say that, in view of the purpose of the action, the pleader was endeavoring, by means of the allegation quoted, to set forth the amount of the total subscribed stock. In one of our own decisions (*Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047), the word "outstanding" was used in the sense here indicated. In speaking of an action to enforce the liability of stockholders, the court, per Temple, J., stated that "it was incumbent upon the plaintiff to prove the whole amount of stock outstanding to

enable the court to determine the liability." That this mode of expression is found in the course of the argument in an opinion is, ²⁷⁸ of course, no ground for saying that it is sufficient for the purposes of a pleading. We may, however, take it as furnishing some basis for the contention that the word "outstanding," as applied to shares of stock, may bear the meaning of "subscribed." If this be so, there is not a total failure to allege the necessary fact, but rather an imperfect or ambiguous averment. Such defect should be reached by a demurrer pointing out the special objection: *Ryan v. Jacques*, 103 Cal. 280, 37 Pac. 186. No demurrer, general or special, was interposed here, and we think that, after trial and judgment, this should be treated as "a case of defective pleading which may be waived, and not an entire omission to plead a material fact which is fatal": *Kimball v. Richardson-Kimball Co.*, 111 Cal. 386, 43 Pac. 1111.

The appellant makes the further point that, under the facts shown by the pleadings and the findings, there is no liability on his part. The *Wentworth Hotel Company* was incorporated under the laws of the territory of Arizona. The complaint alleges that it was organized for the purpose, among other things, of transacting business in the county of Los Angeles, state of California. The answer does not undertake to deny this otherwise than by the averment that "the only words in the articles of incorporation of said defendant company which concern its possible purpose of doing business outside of the territory of Arizona are as follows," quoting provisions of the articles to the effect that the principal place of business in Arizona is Tucson, and the principal place of business outside of Arizona shall be in the city of Los Angeles, or, at the option of the board of directors, the city of Pasadena, California, at which place meetings of stockholders or directors shall be held, and quoting, further, provisions of the articles describing the business to be transacted in very comprehensive terms. The findings follow the averment of the complaint that the corporation was organized for the purpose, in part, of doing business in Los Angeles county, but state, further, that the articles of incorporation contain nothing concerning the intent to do business outside of Arizona, beyond the matter quoted in defendant's answer. This last finding does not, however, modify the finding that the purpose was, in part, to transact business in Los Angeles. The answer raised no substantial issue in this regard. The articles, so far ²⁷⁹ as set forth in the defendant's pleading, plainly declared the purpose of transacting some, if not the principal part, of the corporate business in Los Angeles county. The court found, further, that at the time the liabilities upon which the action is based

were incurred, the corporation was actually doing business in said county and the appellant was a resident of this state.

The appellant's claim of exemption is based upon the following allegations of his answer, which were found by the court to be true. The laws of Arizona, under which the Wentworth Hotel Company was incorporated, provide for the formation of corporations for the transaction of any lawful business, and that such corporations shall have power, among other things, "to exempt the private property of members from liability for corporate debts." The articles of incorporation are required to state whether private property is to be exempt from corporate debts. If not so exempted, stockholders are liable for the debts of the corporation in the proportion which their stock bears to the whole capital stock. The articles of incorporation of the Wentworth Hotel Company expressly declare that the stock shall be nonassessable, and that "the private property of the stockholders of this corporation shall be and is hereby made forever exempt from all liability for its debts or obligations." Certified copies of these articles were filed with the Secretary of State of California and with the clerk of the county of Los Angeles.

The facts so set up and found do not constitute any defense to the action—a conclusion which requires no support further than that afforded by a citation of the cases of *Pinney v. Nelson*, 183 U. S. 144, 22 Sup. Ct. Rep. 52, 46 L. ed. 125, and *Peck v. Noe*, 154 Cal. 351, 97 Pac. 865. In the first of these cases it was held that stockholders of a Colorado corporation, whose articles of incorporation declared its purpose of doing part of its business in the state of California, were liable according to the provisions of section 322 of the Civil Code for liabilities incurred by the corporation in the latter state, notwithstanding the fact that under the laws of Colorado a stockholder is not liable for any portion of the corporate debt. In *Peck v. Noe*, the rule was applied to a case of a corporation organized under the laws of Nevada, whose constitution provided that "corporators of corporations formed under the laws of this ²⁸⁰ state shall not be individually liable for the debts or liabilities of such corporations." The appellant has not succeeded in distinguishing the case at bar from those cited. It is true, as contended, that the liability of stockholders rests upon contract, and that the terms of the contract between the incorporators are ordinarily to be ascertained from the articles of incorporation, read in the light of the statute which authorizes the creation of the corporate body. But, as is pointed out by the supreme court of the United States in *Pinney v. Nelson*, 183 U. S. 144, 22 Sup. Ct. Rep. 52, 46 L. ed. 125, when a contract is made with reference to the laws of a jurisdiction other than that of the place of contracting, the parties will

be deemed to have incorporated into their agreement the law of the jurisdiction with reference to which they were contracting. Accordingly, says the court, "when a corporation is formed in one state, and by the express terms of its charter it is created for doing business in another state, and business is done in that state, it must be assumed that the charter contract was made with reference to its laws; and the liabilities which those laws impose will attend the transaction of such business." It can make no difference that in *Pinney v. Nelson* and *Peck v. Noee*, the freedom from individual liability was declared by statute or constitution, whereas here it was, under the authority of the statute, declared in the articles. The provision of the articles can have no greater force than is to be attributed to the express law of the state creating the corporation. Such law is, for most purposes, imported into the contract of association and forms a part of it, whether stated in the charter or not. But, in so far as the charter or articles declare an intent to do business in another state, the law of that state becomes, so far as concerns business there done, a part of the contract. The articles, like the law itself, are not to be read as providing for exemption from stockholders' liability for debts to be incurred in a state which permits foreign corporations to come in only upon condition that the stockholders shall be liable for the corporate debts. And here is the answer to the suggestion that the filing, in this state, of certified copies of the articles conveyed to creditors constructive notice of the fact that the contract of the incorporators exempted them from liability and estopped the creditors from claiming such liability. The contract, properly construed, does not ²⁸¹ purport to apply such exemption to business done in California, and there is no ground, therefore, for the operation of an estoppel.

The appellant argues, in his brief, that in both of the cases relied on by the plaintiff the articles showed an intent to do the entire corporate business in California, whereas here the articles indicate an intent to do a part of the business of the corporation in other places. The supposed distinction does not really exist. The articles of incorporation in the *Pinney* case declared, merely, a purpose of carrying on part of the business beyond the limits of Colorado, the state of incorporation, and provided for an office and place of business in Colorado. In this respect the articles are very similar to those of the corporation here involved. But if the fact were as suggested, it would present no valid ground of discrimination. The fact that a corporation is formed in one state with the declared purpose of doing business in another justifies, as we have seen, the assumption that, with regard to the business to be done in such other state,

the corporators agree to be bound by its laws. It can make no difference whether they intend to do all or only a part of their business in such state. Their relations to the state into which they come, with regard to business there done cannot be affected by the circumstance that they also intend to, or do, transact some business elsewhere.

There is no injustice or hardship in this result. The law of this state declares in express terms that "the liability of each stockholder of a corporation formed under the laws of any other state or territory of the United States, or of any foreign country, and doing business within this state, is the same as the liability of a stockholder of a corporation created under the constitution and laws of this state": Civ. Code, sec. 322. This statute carries out the constitutional mandate that foreign corporations shall not be "allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state": Cal. Const., art. 12, sec. 15. These provisions existed when this corporation was formed for the express purpose of doing business in California. The stockholders, seeking to avail themselves of the permission granted by this state to foreign corporations to do business here, knew, or should have known, the terms upon which this privilege ²⁸² was tendered. They should not be allowed to take advantage of the benefits afforded by our law, at the same time repudiating the accompanying burdens.

The judgment is affirmed.

Shaw, J., and Angellotti, J., concurred.

In Consenting to Allow Foreign Corporations to Carry on Business within the state, the state has the right to attach any kind of conditions to such consent: Metropolitan Life Ins. Co. v. Board of Assessors, 115 La. 698, 116 Am. St. Rep. 179; provided matters of a federal nature are not affected thereby: Cook v. Howland, 74 Vt. 393, 93 Am. St. Rep. 912. In California the restrictions are, as shown in the principal case, that foreign corporations shall not be "allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state," and that "the liability of each stockholder of a corporation formed under the laws of any other state or territory of the United States, or of any foreign country, and doing business within this state, is the same as the liability of a stockholder of a corporation created under the constitution and laws of this state."

BOONE v. TEMPLEMAN.

[158 Cal. 290, 110 Pac. 947.]

VENDOR AND VENDEE—Waiver of Vendee's Default.—Acceptance by a vendor, without objection, of money past due as part of the price, payable under the contract in installments on specified days, time being of the essence of the contract, is a waiver of all breaches past and present and avoids a forfeiture. (pp. 129, 130.)

VENDOR AND VENDEE—Waiver of Vendee's Default.—Acceptance by a vendor, without objection, of one payment long after maturity is no waiver of his right to declare a forfeiture for installments becoming delinquent on some future day. (pp. 130, 131.)

VENDOR AND VENDEE.—Although Forbearance by the Vendor to declare a forfeiture for one overdue payment does not waive his right to declare such for a subsequent delinquency of the sort, still, after a long course of such indulgence and the suffering of the vendee to remain in possession meantime, equity would require the vendor to give definite and specific notice before being allowed to act on the right. (p. 130, 131.)

VENDOR AND VENDEE—Default in Payments—Remedies.—When a contract for the sale of land calls for payment of the price by the vendee at different times in installments, and the delivery of a deed by the vendor upon the final payment, the vendor may sue for any installment immediately upon its becoming delinquent; but if he fails to do this and waits until the time specified for the final payment, he must tender a deed before demanding payment, and without such tender he cannot declare a forfeiture or maintain a suit for either the whole price or an intermediate installment. (pp. 131, 132.)

VENDOR AND VENDEE—Time Material—Vendee's Right.—When time is material to the contract, rather than of its essence, and the vendee is in possession with the vendor's consent, the vendee's mere delay in either bringing suit or paying will not prevent his compelling a conveyance when at last he does pay or tender the amount due. His right to relief endures until the vendor shall have duly demanded payment within some named period with rescission as the alternative, and the vendee shall have thereupon defaulted. (pp. 132, 133.)

VENDOR AND VENDEE—Time as Essence.—When under a contract for the sale of land time was originally essential, but for sufficient cause a forfeiture for default has been waived, time ceases to be essential and becomes only material thereafter until the vendor makes it essential again by proper notice and demand. (p. 133.)

VENDOR AND VENDEE—Waiver of Vendee's Delinquency.—Where a vendee, under a written contract for the sale of land which provided for payment of the deferred part of the price in installments on a named day of each month from the date onward, and the execution of a deed to him at last upon full payment—time being of the essence—the vendor having the right meanwhile to declare a forfeiture upon an installment being in arrears for sixty days, paid installments now and then for a time with indifference to the days named, sometimes with intervals of more than sixty days, the vendor not objecting, and then suspended payments, and the vendor never notified him of the delinquency until more than three years from the last actual payment, but served him then with a writing, in form a rescission, and thereupon he, the vendee, demanded

a statement of the amount due and offered to pay up, which offer was rejected, a forfeiture had been waived and thereafter time was not essential, but its efflux was a material fact bearing upon the right of the vendee to enforce performance by suit. (p. 133.)

VENDOR AND VENDEE.—The Defense of Laches may be Made when the lapse of time is less than the statutory period of limitation, but in such cases it can be maintained only when from the delay and circumstances there appears either actual or presumptive injury or prejudice to the other party. (p. 133.)

VENDOR AND VENDEE.—Delay in Payments—Interest.—The fact that the agreed price under a contract for the sale of land draws eight per cent annual interest and up to the becoming due of the final installment of such price is payable monthly and compounded monthly is to be regarded, in the lack of a showing to the contrary, as indicating that the vendor is sufficiently compensated for delay in the payment of the principal and that he is not prejudiced by such delay. (p. 133.)

A. E. Shaw, Leon E. Martin and Keyes & Martin, for the appellant.

Chickering & Gregory, for the respondents.

²⁹² **SHAW, J.** Appeal by plaintiff from a judgment in favor of the defendants, given after a ruling sustaining a general demurrer to the complaint. The sole question presented is the sufficiency of the facts stated in the complaint to constitute a cause of action.

The plaintiff sued to enforce specific performance of a contract for the sale of land, executed by him, as purchaser, and by Templeman as vendor. Mayer is a subsequent purchaser from Templeman, with notice of plaintiff's rights. The contract of sale was in writing, and was executed on October 17, 1901. The price fixed for the land was \$2,750, of which \$600 was paid at the time of the execution of the contract. The remainder, \$2,150, was to be paid thereafter in monthly installments of \$50 each, with interest at the rate of eight per cent per annum, said installments and interest to be paid in advance on the fifth day of each month, beginning on November 5, 1901. The interest was to be compounded if not paid as it fell due. If any ²⁹³ installment of principal and interest was not paid within sixty days after it became due, the whole of the unpaid portion of the price should, at the election of the vendor, forthwith become due, in which event the vendor was given power to sell the land to pay the sum unpaid and all previous payments were thereupon to become forfeited. The title to the land remained in the vendor, and he was to convey the same to Boone when the price was fully paid. Boone was to have immediate possession, and he was to pay all taxes and assessments on the land. He received immediate possession, and has ever since retained possession of the land, occupying and

using it, but making no improvements. Time was declared to be of the essence of the contract.

In addition to the \$600 paid when the contract was executed, Boone paid \$50 on November 2, 1901; \$50 on December 12, 1901; \$150 on March 27, 1902; \$100 on June 8, 1902; \$150 on September 8, 1902, and \$250 on April 24, 1903. He has made no other payments of principal or interest. Nothing is averred concerning taxes and assessments. The amended complaint was filed on July 19, 1907. The date of filing the original complaint is not shown in the record on appeal. Counsel for respondents in their brief say the action was begun on March 18, 1907, and this is not controverted.

The contention of the respondents is that, by his failure to make the payments of the contract price as they fell due, the plaintiff has forfeited his rights to a conveyance under the contract, and that, by reason of his delay and laches in beginning the action, it has become barred. Anticipating these assertions, the plaintiff alleges certain facts which he claims excuses the failure and delay and prevents the forfeiture of his rights.

It will be observed that only one payment was made when due, that of November 2, 1901, which was three days in advance of the time specified. The others were all made after the time fixed. The installments due in January, February, and March, 1902, respectively, were paid in a lump sum of \$150 on March 27th. Those for April 5 and May 5, 1902, were not paid until June 8th. Those for June, July, and August, 1902, were not paid until September ²⁹~~20~~ 8th. The next and last payment, \$250, was on April 24, 1903, and this would pay up for only five additional months, including the \$50 falling due February 5, 1903. We have not included the accruing interest in this computation. It is alleged that each of these payments was accepted by Templeman "without objecting thereto on the ground that plaintiff was not complying with his contract," Templeman never demanded any payments whatever, and never, until July, 1906, notified plaintiff that he was delinquent in making payments on the price, and he has never tendered a deed or demanded the balance of the price. So far as appears, he never demanded possession. In July, 1906, Templeman, without any previous demand for performance, gave Boone a written statement purporting to rescind said contract. Boone immediately offered to pay Templeman \$1,000 upon the price, asked a statement of the exact balance due, and offered to pay the whole thereof as soon as it was ascertained. Templeman refused to accept the \$1,000, or to give a statement of the balance due, but said he would consider and let Boone know in a few days what he would do about it. Templeman did

not make any further communication to Boone on the subject. On December 3, 1906, Boone made an offer in writing to Templeman to pay all sums of money due under the contract and to fully perform the same upon the condition that Templeman should perform on his part by executing the necessary deed. Boone was then, and ever since has been, ready, willing and able to perform. Templeman made no objection to the sufficiency of Boone's offer, nor any objection thereto whatever, but referred Boone to his attorneys. His attorneys were forthwith seen, and they said Templeman would at once begin suit against Boone about the matter. No suit was begun by Templeman, however, and after learning from Templeman's attorneys that such suit would not be instituted, Boone began the present action.

The plaintiff contends that the conduct of Templeman in the matter amounts to a waiver of the condition that time should be of the essence of the contract and of his right to declare a forfeiture for nonpayment.

The general rule on the subject is thus stated by Mr. Pomeroy: "A condition that the title shall be made, or the price shall be paid, on or before a day named, may be waived by the ²⁹⁵ party entitled to performance; and if such party thus waives the exact performance at the day, or if he goes on treating the agreement as still binding after default has been made, he cannot afterward turn around and set up the delay or default as creating a forfeiture, and therefore a defense": Pomeroy on Contracts, sec. 337. "The one entitled to insist upon a punctual performance by the other or else that the agreement be ended, may waive his right and the benefit of any objection which he might raise to a performance after the prescribed time, either expressly or by his conduct; and his conduct will operate as a waiver when it is consistent only with a purpose on his part to regard the contract as still subsisting, and not ended by the other party's default": Pomeroy on Contracts, sec. 294. Mr. Sugden says: "Although time be made of the essence of the contract, yet the condition may be waived, just as in an ordinary case; but if the purchase money is to be paid by installments, each breach in nonpayment is a new breach of the agreement, and gives the seller a right to rescind the contract, but that right should be asserted the moment the breach occurs": 1 Sugden on Vendors, c. 6, secs. 3-20, *p. 271. To this point are cited *Hunter v. Daniel*, 4 Hare, 432; *Linscott v. Buck*, 33 Me. 530, and *Grigg v. Landis*, 21 N. J. Eq. 494, which fully support the text. Mr. Warvelle says: "Where a forfeiture has been practically waived by partial payments by the vendee after the time prescribed, the vendee cannot then suddenly stop short and insist upon a for-

feiture for the nonpayment of the arrears remaining unpaid, without any previous notice of the intention to do so if the arrears are not paid"; citing *Harris v. Troup*, 8 Paige (N. Y.), 423, to the same effect; 2 Warvelle on Vendors, sec. 820, p. 962.

These authorities make it clear that the acceptance of payments of installments on the price by Templeman, without objection long after they had become due, was a waiver of all breaches which had occurred at or prior to the time such payments were actually made, and that he could not afterward insist upon a forfeiture on account thereof. On April 24, 1903, when the last payment was made, after crediting that payment, there still remained due and unpaid the two installments for March and April of that year, and all the interest accrued to that date. As to these breaches the forfeiture was waived. The respondent does not seriously dispute ²⁹⁶ this. But \$1,200 of the price becomes due after April, 1903, and there was a new breach of the agreement on the fifth day of May and on the fifth day of each month thereafter, until May 5, 1905. The controlling question in the case, therefore, is whether or not the conduct of Templeman, as averred in the complaint, constituted a waiver of the condition that time was of the essence of the contract, as applied to the payments falling due after April 24, 1903, when the last sum paid was accepted.

The decisions are not entirely harmonious on this point. We find none that goes so far as to hold that the mere acceptance of one payment after its maturity will waive the right to declare a forfeiture if default occurs in subsequent installments. In *Lent v. Burlington etc. Co.*, 11 Neb. 201, 8 N. W. 431, the court on this point says: "The simple act of receiving a payment after the date when the payee was bound to accept it, without more, is no excuse for laches as to future payments. The effect of the acceptance is exhausted upon the payment made, and as to those following, the provisions of the contract are left to operate with unimpaired force." To the same effect are *Phelps v. Illinois Cent. R. Co.*, 63 Ill. 468; *Stow v. Russell*, 36 Ill. 18; *Keefe v. Fairfield*, 184 Mass. 334, 68 N. E. 342, and *Cash v. Meisenheimer*, 53 Wash. 576, 102 Pac. 429. But in the present case we have much more than this. Boone was in the possession and in actual use of the land during the whole period. A payment of \$50 was due on the price on the fifth day of every month after November, 1901. Not one of these payments had been made on the day they were due, nor, except the first, until months afterward. Fourteen payments in succession had been accepted after maturity and without objection or protest of any kind. Interest fell due each month, but nothing was paid as interest, and none was de-

manded, nor were any objections raised on that score. After the acceptance of the last sum paid, twenty-four additional payments of principal and interest fell due and were not paid, Boone remaining in possession and Templeman apparently acquiescing in the continuance of the contract, giving no notice to the contrary, nor doing anything inconsistent therewith for still another period of fourteen months. We think from these facts a court might infer a waiver of the conditions regarding forfeiture and time, and ²⁹⁷ that they supported the general allegation of the complaint that Templeman had waived those conditions. The authorities with practical unanimity so hold. In *Monson v. Bragdon*, 159 Ill. 61, 42 N. E. 383, the court, upon similar facts, says: "While not necessarily an absolute permanent waiver, yet in a court of equity there was at least such a temporary suspension of the right (of forfeiture) as could only be restored by his giving a definite and specific notice of an intention to that effect." Similar rulings were made in *Steele v. Branch*, 40 Cal. 13; *Hudson v. Duke*, 21 Ga. 403; *Kansas L. Co. v. Harrigan*, 36 Kan. 387, 13 Pac. 564; *Pier v. Lee*, 14 S. D. 600, 86 N. W. 642; *Timmins v. Russell*, 13 N. D. 487, 99 N. W. 48; *Merriam v. Goodett*, 36 Neb. 384, 54 N. W. 686; *Gaughen v. Kerr*, 99 Iowa, 214, 68 N. W. 694; *Cughan v. Larsen*, 13 N. D. 373, 100 N. W. 1088; *Fergusson v. Talcott*, 7 N. D. 183, 73 N. W. 207; *Keator v. Ferguson*, 20 S. D. 473, 129 Am. St. Rep. 947, 107 N. W. 678; *Peck v. Brighton Co.*, 69 Ill. 200.

Another proposition seems applicable to the question of forfeiture. Templeman did not exercise his option to declare the whole price due upon the default for sixty days in paying any of the installments, but suffered it all to become due by lapse of time. Where in a contract for the sale of land the price is made payable in installments at different times and the deed is to be made when the whole is paid, the vendor may, upon failure to pay any intermediate installment, forthwith sue for its recovery. But if he allows the whole to become due, the payment of the price then becomes a dependent and concurrent condition, nonpayment alone does not put the vendee in default, the vendor must tender a deed as a condition to demanding payment of the price, and he cannot, without such tender, declare a forfeiture, or maintain a suit either for the whole price or for an intermediate installment: *McCroskey v. Ladd*, 96 Cal. 455, 31 Pac. 558; *Russ L. & M. Co. v. Muscupiabe etc. Co.*, 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995; *Glock v. Howard & Wilson C. Co.*, 123 Cal. 18, 69 Am. St. Rep. 17, 55 Pac. 713, 43 L. R. A. 199; *Underwood v. Tew*, 7 Wash. 297, 34 Pac. 1100; *Malaby v. Kuns*, 3 Ind. 398; *Gorham v. Reeves*, 3 Ind. 83; *McCulloch v. Dawson*, 1 Ind. 413; *Cunningham v. Gwinn*, 4 Blackf. (Ind.) 341, and

cases cited in *McCroskey v. Ladd*. There are a few cases to the contrary: *Duncan* ²⁹⁸ *v. Charles*, 4 Scam. (Ill.) 561; *Sheeren v. Moses*, 84 Ill. 448; *Biddle v. Coryell*, 18 N. J. L. 377, 38 Am. Dec. 521. Templeman did not declare a forfeiture, nor take any steps toward doing so until July, 1906, more than a year after the last payment became due. He could not, at that time, put Boone in default as to any of the payments so as to work a forfeiture, without tendering a conveyance of the land. Until Boone was in default there was no right of forfeiture. He attempted to declare a forfeiture without tendering a deed. Having, by his conduct, waived the right of forfeiture for nonpayment of the installments at the precise date of maturity, he could not, after the whole became due, revive or renew it without previous notice accompanied by a tender of a deed. Upon the face of the complaint we hold that the contract is still subsisting. We find nothing in the opinion in *Glock v. Howard*, 123 Cal. 18, 69 Am. St. Rep. 17, 55 Pac. 713, 43 L. R. A. 199, in any manner inconsistent with what is here said. That was a suit against a vendor to recover purchase money paid. The subject of a waiver of the right to a forfeiture was not involved. We have treated the case upon the theory that a forfeiture would occur by a mere failure to pay an intermediate installment, and without awaiting the lapse of sixty days and giving the notice of election to declare the whole due, as provided in the contract. As the question has not been argued and the contract is not set out in full, we do not wish to be understood as definitely deciding anything to that effect.

On the subject of laches the following statements of Professor Pomeroy are pertinent: "When the purchaser has received the equitable title, has obtained possession of the land, has been in the enjoyment of its rents and profits, has paid the price, and nothing remains to complete the contract except the conveyance of the legal title, and nothing has happened which rendered the want of the legal title injurious or detrimental to the vendee, a delay in conveying the legal title, though lasting through many years, and without any excuse of real difficulty in the way, has been repeatedly held to be no impediment to a decree of specific performance. *The same is true where the delay has been in completing the payment*, provided there has been no substantial change in the circumstances and relations of the parties during the interval, and the interest ²⁹⁹ will constitute not only a theoretical, but an actual, compensation for the purchaser's default in payment": Pomeroy on Contracts, sec. 400. The italics are ours. And again: "If the vendee, therefore, takes and retains possession of the premises with the vendor's consent, his mere delay in bringing a suit, or even in paying the price, will not prevent him from compelling a conveyance upon a subsequent pay-

ment or tender of the amount due; nor will his right to the relief be cut off until the vendor places a limit to the lapse of time by a demand of payment at or before a specified day, and a notice that the agreement will be rescinded unless the demand is complied with, and the vendee's default thereon": Pomeroy on Contracts, sec. 404.

It is to be observed that these principles apply where time is merely material to the contract, and not where it is essential. Where time was originally essential, but for sufficient cause a forfeiture for default therein has been waived, time ceases to be essential and becomes only material thereafter until the vendor again makes it essential by a proper notice and demand. In the case at bar, upon the facts shown by the complaint, a forfeiture had been waived, and thereafter time was not essential, but its efflux was a material fact bearing upon the right of Boone to enforce performance by suit.

The defense of laches may be made where the lapse of time is less than the statutory period of limitation, but in such cases it can be maintained only where from the delay and the circumstances there appears either actual or presumptive injury or prejudice to the other party: Cahill v. Superior Court, 145 Cal. 42, 78 Pac. 467; Cohen v. Cohen, 150 Cal. 105, 88 Pac. 267, 11 Ann. Cas. 520; Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317. This case is submitted to the court upon the statement of the facts made by the vendee in his complaint. It appears that the vendor, by the contract, is entitled to eight per cent annual interest, and that, at least until the final payment became due, it was payable monthly and compounded monthly. The contract is not set out according to its tenor, but only in substance and effect. There is nothing in the facts before the court to indicate this interest will not fully compensate Templeman for the delay in payment of the principal, or that he has been at all prejudiced thereby. What may be disclosed when the defendant has answered and ³⁰⁰ the facts developed by a trial may alter the case materially on this point. Upon the complaint alone, we are of the opinion that no laches is shown.

The judgment is reversed.

Angellotti, J., Sloss, J., Lorigan, J., and Henshaw, J., concurred.

Where Time is Declared to be of the Essence of a Contract for the purchase of real property, a vendee who fails to make his payments as agreed upon loses all rights in the property and in the moneys already paid by him, unless there are equitable circumstances entitling him to relief, and he cannot, by a subsequent tender of the amount remaining unpaid, entitle himself either to the specific performance of the contract or the return of the moneys paid by him before his default: Glock v. Howard etc. Co., 123 Cal. 1, 69 Am. St. Rep. 17.

Time as the Essence of a Contract for the Sale of Land, where payment is to be made in installments, is discussed in the note to *State v. Hunter*, 104 Am. St. Rep. 265. See, also, *Vance v. Newman*, 72 Ark. 359, 105 Am. St. Rep. 42.

Mere Default in Payments by a Vendee Does not Work a Forfeiture, and the vendor may, by his acts, estop himself from asserting a forfeiture: *Maday v. Roth*, 160 Mich. 289, 136 Am. St. Rep. 441. A vendor cannot, because of a default in payments, forfeit the rights of the vendee when he himself is not in a position to perform the contract of sale: *Higinbotham v. Frock*, 48 Or. 129, 120 Am. St. Rep. 796.

A Vendor may Waive His Right to Declare a Forfeiture on the ground that payments are not made at the time stipulated: *Keator v. Ferguson*, 20 S. D. 473, 129 Am. St. Rep. 947, and cases cited in the cross-reference note thereto. He may do this by extensions of time or indulgences granted the purchaser: *Douglas v. Hanbury*, 56 Wash. 63, 134 Am. St. Rep. 1096.

Where Payment of an Installment is Independent, an action may be maintained on it after all the installments are due, without averring a performance or an offer to perform on the part of the plaintiff: *Biddle v. Coryell*, 3 Harr. 377, 38 Am. Dec. 521; and see *Russ Lumber etc. Co. v. Muscupiabe etc. Water Co.*, 120 Cal. 521, 65 Am. St. Rep. 186, and cases cited in the cross-reference note thereto.

As to the Loss of the Right to Specific Performance by a vendee through delay in tendering payment after it becomes due, see *Vance v. Newman*, 72 Ark. 359, 105 Am. St. Rep. 42.

MERRILL v. LOS ANGELES GAS AND ELECTRIC COMPANY.

[158 Cal. 499, 111 Pac. 534.]

TRIAL—Instructions.—An Objection to the Refusal of the court to submit a specific question to the jury loses its force where the question, in a less suggestive form, was in fact submitted to the jury and fully answered by its verdict. (pp. 136, 137.)

NEGLIGENCE—Proximate Displacing Primary Cause of Injury.—The independent wrongful act, to constitute the proximate cause by displacing the original primary cause, must be so disconnected in time and nature as to make it plain that the damage was in no way a natural or probable consequence of the original wrong or omission. (p. 138.)

GAS EXPLOSION Through Joint Negligence.—Where an explosion happens through the joint negligence of a gas company in discovering and repairing a leak in its pipe, and the proprietor of the locus bringing a light in contact with the gas, a person present as a patron of the place, who is injured by the explosion, may recover from either or both at his election. Each is and both are the proximate cause of the injury. (p. 139.)

DAMAGES.—In Respect of the Physical Pain and mental anguish for which plaintiff asks compensation, it matters not whether the jury find that such were caused by or were because of the in-

juries received, both expressions being within the meaning of "by reason of the injury" which has been held as the rule in that particular. (pp. 140-142.)

DAMAGES.—The Grief, Anxiety, Worry, Mortification and humiliation which one suffers by reason of physical injuries are component parts of the "mental suffering" for which admittedly damages may be awarded. (pp. 143-146.)

Wm. A. Cheney, Gibson, Trask, Dunn & Crutcher, Lawler, Allen, Van Dyke & Jutten and Le Roy M. Edwards, for the appellant.

Ernest E. Wood, for the respondent.

500 HENSHAW, J. This action was brought to recover damages for injuries sustained by plaintiff through defendant's alleged negligence. The charge of negligence is that defendant, engaged in the business of supplying gas, while so supplying a restaurant in the city of Los Angeles, negligently and carelessly permitted gas to escape from its pipes and collect in and about the building, and negligently and carelessly caused this gas to explode with great force and violence, whereby were inflicted upon the plaintiff the injuries complained of. The answer was a general denial of negligence. A trial was had before a jury and a verdict rendered for plaintiff in the sum of ten thousand dollars. Judgment followed **501** the verdict. Upon motion for new trial the court made its order that it would grant the same unless plaintiff filed a written consent to a reduction of the judgment to the sum of eight thousand five hundred and fifty-five dollars. This plaintiff did, and from the judgment so modified and from the court's refusing to grant its motion for a new trial defendant appeals.

The facts in brief are these: On arriving at his restaurant at about 6 o'clock of the morning of the explosion, Cressaty, the proprietor, noticed the smell of gas, and telephoned to defendant's office that gas was escaping and that he wished it attended to immediately. Nobody coming, he telephoned again at half-past 7, saying that the odor was much stronger and that there was a dangerous leak. At 8 o'clock he telephoned again for the superintendent.

"I called the gas company many times and asked for the complaint department and asked them to send someone to attend to that leak on the gas, and he said 'All right,' and he would go and do his best to send someone at once. I told him the leak was very dangerous and the smell was getting stronger. At 9 o'clock my cashier telephoned and told him there was a strong smell of gas and send someone right away. No one telephoned after 9 o'clock. I employed a plumber to shut off the gas. He came and shut off the meter between 8 and 9 o'clock, but that didn't stop the flow of gas." Defend-

ant's foreman of the mechanical and complaint department testified that he was first notified of the leak at Cressaty's at about 10:40 in the morning. No one had informed him about it before that time; if he had known he would have sent a man to repair it. The foreman sent two men to the place and shortly after followed them. He reached there about five minutes of 11, without tools. Neither of the other men had tools. They told the foreman that the service-pipe was broken, that the leak was under the floor, and that the gas was gushing out with a sizzling noise. The foreman sent one of the men back to the office for a flash-light and tools with which to saw the flooring, for the leak was in a dark corner of the basement and the foreman was afraid to chop up the floor with a hatchet lest, striking a nail, he might produce a spark, causing an explosion. The foreman gave directions to Cressaty to extinguish all lights in the restaurant, and Cressaty said, "All right." One of the men remarked that he had given Cressaty the same ⁵⁰² directions before. The foreman and one employee went across the street to lunch while the third went for the tools. None of them took pains to see whether the directions to extinguish the lights had been carried out, although all knew that gas was escaping in large and dangerous quantities. There was fire in the range, and a flame was burning under a large coffee urn. When the man came back with the flash-light and tools, the foreman handed the flash-light to Holderman, the other employee, and told him to proceed. Holderman was about ten feet in advance as they walked toward the location when the explosion occurred. Plaintiff had entered the restaurant for his lunch and was just about to sit down when the shock came. Both his legs were bruised and broken at the ankle, his knees injured, his side bruised, his eye and nose cut. Abscesses formed. It was six months before he could walk with crutches. At the time of the trial he was still visibly suffering from the injuries.

Two propositions are advanced upon the appeal: The first, that the court erred in refusing to submit to the jury certain special issues requested by defendant; second, that the court erred in an instruction which it gave.

1. The particular interrogatories requested by defendant, which the court refused to submit, are as follows:

"1. As soon as defendant's servants arrived at Cressaty's cafe, did they notify Mr. Cressaty to put out all lights and fires?

"2. Did Mr. Cressaty put out all lights and fires?

"3. Was there an open fire burning in Mr. Cressaty's cafe from the time the defendant's servants first arrived at said restaurant up to the time of the explosion?

"4. If you answer the last question affirmatively, was the sole proximate cause of the explosion the fact that an open fire was kept burning in the kitchen of Mr. Cressaty's cafe?

"5. If you answer the last question in the negative, what was the proximate cause of the explosion?"

Appellant's contention in this regard is that notwithstanding it may have been negligent, if the jury in answer to its proposed interrogatory had declared that the sole proximate cause of the explosion was an open fire kept burning in the kitchen of Cressaty's cafe, such answer would have exonerated it from liability. But there are two complete answers to this. The ⁵⁰³ first is that to the jury was submitted the interrogatory, "What was the proximate cause of the explosion?" and they answered it, "Escaping gas through negligence of the defendant." The interrogatory which the court did thus submit was fair and full. It was in no way suggestive, as most obviously are defendant's proposed interrogatories 3 and 4. Moreover, the proximate cause of the law is not the proximate cause of the logician, nor even always in strictness the proximate cause in fact, and a jury may easily be confused and misled by overniceties in these abstractions. In actions involving negligence, when the law regards the proximate cause, it is always in reference to the person producing it. When the logician is considering the proximate cause, he has in contemplation the moving influence itself, and not at all the person by whom the impetus was given. Thus, if an explosion should occur upon a vessel forcing open its seams and admitting sea water which damaged goods, the law having regard, as has been said, to the person, would declare the explosion to have been the proximate cause, and the person causing it, if culpable, to be liable in damages for the goods injured by the water. But to the logician the proximate cause, the *causa causans*, of the damage to the goods would be sea water. The cause of the admission of the sea water would be the forcing apart of the ship's seams, and the cause of forcing apart the ship's seams would be the explosion. So that, to him, the explosion would be the cause third removed, and it, with the second cause, would be *causa causae causantis*. The legal concept of the proximate cause is quite distinct. It is based on the principle that consequences which follow from the original wrong in unbroken sequence, without an intervening sufficient independent cause, are natural and proximate, and for these the original wrongdoer is responsible: Wells' Pollock on Torts, 36. We are not unmindful of the rule expressed by Judge Ray in "Negligence of Imposed Duties to Passengers" (669, 670), a rule which he states in the following language: "Where the concurring cause is the independent wrongful act of a responsible person, such act arrests causation, being regarded as the proximate cause of

the injury; the original negligence being considered merely as its remote cause. As in the law it is the proximate and not the remote cause which is regarded, he who is guilty of the original negligence is not chargeable, but redress must be sought from him ⁵⁰⁴ who directly causes the injury." But unless the rule as stated be taken with one or two very important modifications, it is not justified by the law. One of these modifications is that the original wrongdoer is not relieved, that the proximate causation is not always arrested by the intervention of an independent concurring cause, whether that independent concurring cause may be classified as an act of God or the wrongful act of a third person. If, to illustrate, a railroad company negligently left a car of dynamite within a city and at a place prohibited by law, and by the explosion of the car injury was occasioned, "causation would not be arrested," and the railroad company relieved from liability, whether the explosion was occasioned by a stroke of lightning or by the act of some wrongdoer making a target of the car for rifle practice. The cases serve to illustrate the true rule, which is that the independent wrongful act, to constitute the proximate cause by displacing the original primary cause, must be so disconnected in time and nature as to make it plain that the damage occasioned was in no way a natural or probable consequence of the original wrongful act or omission. Thus, a car carrying crude petroleum had no valve regulating the outflow of the oil. This was negligence chargeable to the consignor. The consignee, with the knowledge that the car was leaking, attempted to draw off the oil near the plaintiff's mill, the engine-room of which mill was lower than the railroad track. In the absence of a valve to control the flow, the oil ran out so rapidly that it reached plaintiff's engine-room, exploded, and destroyed the mill. It was held that the defendant consignor was not liable therefor, in that the injury was not a natural or probable consequence of the original negligent act in sending out the oil car without a suitable control valve: *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583. So in *Lockridge v. Fesler* (Ky.), 37 S. W. 65, where plaintiff had consigned his horse for keeping to a livery-stable, the horse being improperly tied, escaped through the door of the stable to the public street, where it fell and killed itself. The defendant sought to prove that notwithstanding the horse might have been negligently fastened, and by reason of the negligence have so escaped to the street, yet that its death was occasioned through fright caused by the noise and hubbub made by persons on the street. It was held error to refuse to admit the ⁵⁰⁵ testimony, since, if it were believed by the jury, it would establish that the injury was occasioned by an intervening, independent, and sufficient wrongful cause.

But, upon the other hand, in such cases as *Pastene v. Adams*, 49 Cal. 87, and numerous cases hereinafter to be referred to enunciating the same principle, the concurring cause was not regarded as so independent in character as to relieve the first wrongdoer from responsibility. *Pastene v. Adams* was an action brought to recover damages caused by the falling of lumber carelessly piled by the defendant a long time before the injury. It was urged by the defendant that the lumber was caused to fall by the negligence of a stranger. It was held that this did not constitute a defense, for the negligence of the defendant merely concurred with the negligence of the stranger, and together they constituted the direct primary cause. And so Judge Ray's definition is not to be accepted in its fulness, nor to be accepted at all, without the important further modification that the original act of negligence, the primary causation, may be in its nature so continuous that the concurrent wrongful act precipitating the disaster will in law be regarded not as independent, but as conjoining with the original act to create the disastrous result. And this brings us to the second answer to appellant's proposition.

The second answer is that if these interrogatories had been submitted, and the jury in answer to them had found that the sole proximate cause was the ignition of the gas by a fire in the restaurant, this finding, under the circumstances of this case, would not have controlled a general verdict favorable to plaintiff. We say under the circumstances of this case, because here admittedly the plaintiff was but a patron of the restaurant, owing no duty to either the gas company or the restaurant-keeper, and not charged with negligence in any respect so far as the explosion is concerned. A very different case would be that presented were the restaurateur himself suing for damages and the answer of the gas company charged him with negligence in failing to extinguish the lights in his house upon its demand. In such a case the proposed interrogatories would be pertinent and proper, not for the purpose of establishing that the fire was the sole proximate cause of the explosion (for except in the logician's sense and not within the meaning of the law this could not be), but for the purpose ⁵⁰⁸ of showing that there was concurrent negligence upon the part of the plaintiff, and that he should be forbidden a recovery under the maxim which denies one the right to take advantage of his own wrong. But saving in such cases, and this is not one of them, the English as well as the American rule of decision is uniform to the effect that where an explosion of gas causing damage to a person results from the joint negligence of the gas company in discovering and repairing a leak in its pipes and of another in bringing a light in contact with the gas, whereby it explodes, a person damaged may recover from either or both at his election. Each is and both are the

proximate cause of the injury: *Shearman & Redfield on Negligence*, 3d ed., sec. 338a; 14 Am. & Eng. Ency. of Law, p. 938; 20 Cyc., p. 1170, and the cases there collated. *Haley v. Jump River Lumber Co.*, 81 Wis. 412, 51 N. W. 321, 956, relied on by appellant, is not at variance with this reasoning, nor in conflict with these authorities. There a workman was injured upon a logging train owned by defendant. The accident occurred by the breaking of a chain and the falling off of logs on one of the cars. These cars were loaded by an independent contractor. Special interrogatories were submitted to the jury touching the negligence of defendant. It was possible, in view of the supreme court of Wisconsin, that the accident might have occurred singly and solely by reason of the negligence of the independent contractor in loading the cars, and it was held error to refuse special interrogatories covering this point. In the case which we have under consideration, however, it is indisputable that the negligent act of Cressaty in permitting his lights to burn, conceding such to be the fact, and conceding further that such burning of the lights actually ignited the gas which exploded, constituted but one of two concurrent causes of the accident. The legal result of the jury so finding could not have been to relieve the defendant company from liability, but merely to declare that the company and Cressaty were joint tort-feasors: *Pastene v. Adams*, 49 Cal. 87; *Barrett v. Southern Pacific Co.*, 91 Cal. 296, 25 Am. St. Rep. 186, 27 Pac. 666; *Lewis v. Terry*, 111 Cal. 39, 52 Am. St. Rep. 146, 43 Pac. 398, 31 L. R. A. 220; *Muller v. Hale*, 138 Cal. 163, 71 Pac. 81; *Herr v. City of Lebanon*, 149 Pa. 222, 34 Am. St. Rep. 603, 24 Atl. 207, 16 L. R. A. 106.

2. The court instructed the jury as follows: 507 "If, on the other hand, from such consideration and in view of these instructions you should conclude that the plaintiff ought to recover, then you will award him damages in such amount as, in your judgment, will fairly compensate him for the injuries which he has sustained; and in estimating such damages, you may consider what, before the accident, was his health and physical ability, the extent and nature of his wounds, hurts, bruises and broken limbs he received; also the extent to which, if at all, the injuries he received are permanent in their character, as well as the physical suffering *and mental worry* which he has endured or will suffer in the future *because of* the injuries, if any; also the loss, if any, which plaintiff has sustained or will hereafter sustain by reason of abatement of ability to follow business pursuits or engage in business employments as the direct results of the injuries he received. The law prescribes no measure by which such damages can be estimated, but leaves it to the sound discretion of the jury to fix the amount thereof in such sum as, under all the circumstances, may be deemed just and proper. The law

does not require that the plaintiff present any direct evidence to show the amount of damages which he has sustained, or the amount of money which would compensate him for the injuries he has received. All that is necessary is to show to the jury the extent of the injuries, and then it is for the jury to determine, in the manner I have indicated, the amount of damages which ought to be awarded. In determining the amount of damages, if any, which should be awarded to the plaintiff as compensation for the injuries he has sustained, you can add nothing by reason of sympathy, nor as punishment for the defendant."

The language of the instruction which is complained of is found in the italicized words. The complaint is twofold. First, that legally the recovery must be limited to compensation for the physical pain and mental anguish caused by the injuries, and that this is very different from a recovery for the physical pain and mental anguish which the plaintiff might have suffered because of the injuries. Second, that the instruction permitted a recovery for mental worry entirely disconnected from his physical pain, while the law contemplates a recovery for the physical pain and for the mental anguish or suffering only as a part of, or as growing out of, that physical ⁵⁰⁸ pain. And it is argued that to tell the jury that plaintiff can recover for mental worry is to tell them that they may give him as damages compensation for such anxiety as he may have undergone, or recompense him for worrying over future inability to work, the possible duration of his injuries, or the thousand other subjects disconnected from his physical pain, over which the average man when idle and injured may brood and grieve.

To trace an injurious distinction from the use of the phrase "because of" instead of the phrase "caused by," is mere logomachy. Even this court in laying down the rule declares that plaintiff is entitled to a recovery for "the physical and mental suffering he has sustained by reason of the injury": *Malone v. Hawley*, 46 Cal. 409. If thus "by reason of the injury" is a fair equivalent to "caused by the injury," certainly no just complaint can be lodged against the phrase "physical and mental suffering he has sustained because of the injury."

The more important objection to the instruction, however, is that found in the argument of the appellant above adverted to, namely, that the court, by its language, permitted the jury to consider as an element of damage not alone the mental suffering which plaintiff had sustained by reason of his injuries, and growing out of the physical suffering occasioned thereby, but allowed the jury to consider generally the "mental worry" which he had endured, and would in the future suffer, caused by or because of, or by reason of, these injuries. It is said

that such worry being remote, speculative and incapable of anything like exact ascertainment, is not within the contemplation of the law permitting recovery for physical pain and mental suffering.

The courts of the land have divided upon this question, and as it is new to this state, it merits somewhat detailed consideration. The supreme court of Oregon lays down the rule that mental distress or anguish resulting from the realization of physical inability because of the injury to properly care for those dependent on plaintiff for support and education, is not an element of consequential damages to be recovered in an action for personal injuries: *Maynard v. Oregon R. & N. Co.*, 46 Or. 15, 78 Pac. 983. In *Linn v. Duquesne Borough*, 204 Pa. 551, 93 Am. St. Rep. 800, 54 Atl. 341, the supreme court of Pennsylvania, perhaps as fully as any other, sets forth the ⁵⁰⁹ reasoning of the rule adopted by that court and contended for here by appellant. It is as follows: "While in this state it is a well-settled rule of law that damages may be allowed in cases like this, for the pain and anguish of mind caused by the personal injury, yet we are not aware of any case holding that anguish of mind, wholly sentimental, arising from a contemplation of a disfigurement of person, can be considered for the purpose of swelling such damages. The words 'pain and anguish of mind' are used in a popular sense to denote such as may arise from any cause, and are not necessarily restricted to that arising from personal injury. But the legal meaning of such words found in the reports of decided cases in this state, as will plainly appear from their reading, confines such meaning of the words to such pain and anguish of mind as occur necessarily and spontaneously from any injury of or shock to the nerves of sensation, or such pain and anguish as remain during the continuance of the original and exciting cause and arising therefrom. But where the injury only comes about by reflection or contemplation, then, in the legal sense, it is not caused by the injury, but arises and is produced by a combination of causes other than the injury."

In *Southern Pac. Co. v. Hetzer*, 135 Fed. 274, 66 C. C. A. 26, 1 L. R. A., N. S., 288, the court laid down its rule as follows: "The rule which has been adopted by this court, however, and the rule which seems to us the better one, is that in actions for personal injury the plaintiff may recover for the bodily suffering and mental pain which are inseparable and which necessarily and inevitably result from the injury. But mortification or distress of mind from the contemplation of the crippled condition and of its effect upon the esteem of his fellows, that mental pain which is separable from the physical suffering caused by the injury, is too remote, indefinite and intangible to constitute an element of the damages in such a case."

Without further multiplying quotations, suffice it to refer to the following cases as either wholly or partially embodying the principle for which appellant contends: *Chicago R. I. & P. Ry. Co. v. Caulfield*, 63 Fed. 396, 11 C. C. A. 552; *Johnson v. Wells, Fargo & Co. Express*, 6 Nev. 224, 3 Am. Rep. 245; *Planters' Oil Co. v. Mansell* (Tex. Civ. App.), 43 S. W. 913; *Indianapolis & St. Louis R. Co. v. Stables*, 62 Ill. 313; *Augusta* ⁵¹⁰ *R. Co. v. Randall*, 85 Ga. 297, 11 S. E. 706; *Giffen v. City of Lewiston*, 6 Idaho, 231, 55 Pac. 545; *Atchison etc. R. R. Co. v. Chance*, 57 Kan. 40, 45 Pac. 60, and *Railway Co. v. Douglass*, 69 Tex. 694, 7 S. W. 77.

The other view may, in turn, be presented by the following quotations. Thus the supreme court of Washington, in *Gray v. Washington Water Power Co.*, 30 Wash. 665, 71 Pac. 206, declares: "The objection urged to instruction No. 9 is that it indorsed the doctrine of compensation for mental suffering and distress of mind for disfigurement. On this subject the authorities are somewhat divided, though the decided weight of authority, we think, is to the effect that compensation can be recovered for such damages. We also think that such damages are sustained by the better reasoning. Some of the cases cited by appellant, while permitting compensation for mental suffering induced by physical pain, distinguish such mental suffering from suffering arising from causes other than physical pain, viz., such suffering as arises from the contemplation of a maimed body or deformed face; and the reason assigned is that this element of damage is too vague and indefinite to be susceptible of proof. But we think this discrimination cannot be maintained in sound reasoning, and that mental suffering which is induced by the relations of mind and body is as difficult to measure as mental suffering induced by mortification and disfigurement. Not all people suffer equally from the same bodily injury. In practice mental suffering is always an element considered by juries in slander and libel cases, in actions for false imprisonment and breach of promise, and many other cases of their character, and it ought to be. A wound to one's sensibility is none the less painful when one's character is slandered. The law ought not to grant redress alone to the business man who sustains commercial damage and refuse redress to others who have sustained a more poignant affliction. And he who negligently causes injury to another who is faultless, which makes the latter an object of pity and abhorrence to his fellowmen, and an object of ridicule to the thoughtless and unfeeling, and deprives him of the comforts and companionship of his fellows, ought to respond in damages for the injury sustained."

And the supreme court of Wisconsin in *Heddles v. Chicago* ⁵¹¹ *etc. R. R. Co.*, 77 Wis. 228, 20 Am. St. Rep. 106, 46 N. W. 115, declares: "The first error assigned is the instructions of

the court to the jury on the question of damages. The instruction objected to reads as follows: 'The amount of the damages which you will assess is left to your judgment and discretion, considering the proper elements of damages, which are as follows: Adequate compensation for all of the physical and mental pain and suffering which the plaintiff suffered at the time of the accident, which he has suffered since that time, and which he is reasonably certain to suffer in the future by reason of his injuries; also for the mortification and anguish of mind which he has suffered, and will in the future suffer, by reason of the mutilation of his body, and the fact that he may become an object of curiosity or ridicule among his fellows.' The learned counsel for the appellant take exceptions to the use of the words, 'for the mortification and anguish of mind which he has suffered, and will suffer in the future, by reason of the mutilation of his body, and the fact that he may become an object of curiosity and ridicule among his fellows.' It is urged that these words convey to the jury an idea different from that conveyed by the words 'mental pain and suffering' which resulted from the injury. We think the learned judge only used the expressions excepted to as indicative of the causes from which the mental pain and suffering would be likely to arise from the injury received. There can be no doubt that the loss of the plaintiff's limbs will naturally cause mortification and anguish on the part of the plaintiff, and it is also quite certain that he would be to a considerable extent an object of curiosity, and to the thoughtless and unfeeling an object of ridicule. We think that there was no error in the instructions excepted to. For authorities sustaining the instructions, see the following cases cited by counsel for the respondent: *Wilson v. Young*, 31 Wis. 574; *Braker v. Chicago & N. W. Ry. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Power v. Harlow*, 57 Mich. 107, 23 N. W. 606; *The Oriflamme*, 3 Saw. 397, Fed. Cas. No. 10,572; *Atlanta etc. R. R. Co. v. Wood*, 48 Ga. 565; *Toledo W. & W. Ry. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71; *Ballou v. Farnum*, 11 Allen (Mass.), 73; *Western & A. R. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. Rep. 320, 7 S. E. 912; *McMahon v. Northern etc. R. R. Co.*, 39 Md. 438."

⁵¹² A reference may also be made to *Sedgwick on Measure of Damages*, p. 31; *Webb v. Yonkers R. R. Co.*, 51 App. Div. 194, 64 N. Y. Supp. 491; *Sherwood v. Chicago & W. M. R. R. Co.*, 82 Mich. 374, 46 N. W. 776; *St. Louis etc. Ry. Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147; *Schmitz v. St. Louis etc. R. R. Co.*, 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; *Galveston R. R. Co. v. Clark*, 21 Tex. Civ. App. 167, 51 S. W. 276.

Upon mature consideration of these and other cases we express the views: 1. That the grief, anxiety, worry, mortifica-

tion and humiliation which one suffers by reason of physical injuries are component parts of the "mental suffering" for which, admittedly, damages may be awarded. If this be not so, then "mental suffering" is a meaningless phrase, and when the law says that recovery may be had for physical pain and mental suffering, it means only that recovery may be had for physical pain; 2. We think that the question is largely of academic, and to a very trifling extent, of practical, importance, since always and inevitably, and against any instruction which a court may present, the jury will take into consideration these very elements of mental suffering. Physical pain has no existence if it is sought to dissociate it from mental suffering. Physical pain is but one of many forms of mental suffering. If the law contemplated an award of damages solely for physical pain, it is meaningless to say that recovery may also be had for mental suffering. It is equally meaningless to say that the mental suffering must be that occasioned by the physical pain, for then the latter phrase would alone be sufficient to convey the full meaning of the law. Therefore, when the law says that a recovery may be had for mental suffering, it means a recovery for something more than that form of mental suffering described as physical pain. What more does it mean? To mean anything, it must include the numerous forms and phases which mental suffering may take, which will vary in every case with the nervous temperament of the individual, his ability to stand shock, his financial condition in life, whether dependent upon his own labor or not, the nature of his injuries, whether permanent or temporary, disfiguring and humiliating, and so through a long category, the enumeration of which it is unnecessary here even to attempt. Worry and anxiety over the future of his family would be a great element ⁵¹³ of mental suffering to a man dependent upon his own exertions for his and their support. It would not constitute any element of suffering to a man of abundant means and wealth, identically injured. A woman's mental suffering would be much increased by knowledge of facial disfigurements—a man's naturally not so much so. Shall a jury be not permitted to consider these matters in estimating mental suffering, and is it an answer to say that they are too remote or "too delicate to be weighed by any scales which the law has yet invented"? They are not remote. They are direct and consequential. They differ in degree with individuals, with their sex, circumstances and positions in life. But so do men differ in sensing physical pain; so do they differ in the mental suffering occasioned by physical pain alone. No one would pretend to say that the actual physical suffering of a crushed leg is the same in case of a sodden, phlegmatic tramp

as it would be with a high-strung, nervous, active man of affairs. Yet the law has scales by which it measures the compensation for suffering of this kind, and measures it, of course, in terms of money. Why should it be supposed that those scales will break down and prove inadequate when other legitimate elements of mental suffering are cast into their balance? In truth, the admeasurement of suffering in terms of money is a most clumsy device, but it is the best device which the law knows, and it is a device which the law will employ until some better is discovered. To forbid the consideration of these other elements of mental suffering, because the scales are not sufficiently delicate for their weighing, is equally to condemn the use of the scales in the very cases and for the very purposes now admittedly sanctioned by the law.

We think, therefore, that mental worry, distress, grief, mortification, where they are shown to exist, are properly component elements of that mental suffering for which the law entitles the injured party to redress in monetary damages.

But as we have said, we also think the whole matter possesses more academic than practical significance. Conceive the case of a plaintiff before a jury with a face shockingly mutilated and distorted. He testifies that he endured mental suffering caused by his injuries. He is asked of what the mental suffering consists. He replies, physical pain, anxiety for fear his injuries may prove so permanent and disabling as to render ⁵¹⁴ him incapable of supporting his family, grief as he reviews the whole situation lest his disfigurement may humiliate him and make him an object of ridicule to his fellows. At the suggestion of defendant's counsel the jury is instructed to disregard all the elements of mental suffering excepting that arising solely from the physical pain. Can the jury do it? Will the jury do it? It is mere self-stultification to believe that it will do other than make up its verdict under the rule which, while not one of law, is one of well-nigh universal human conduct, the rule of "Put yourself in his place." Each juror will consider how he would feel under like circumstances, and he will not narrow his contemplation to the mere matter of physical suffering under the direction of any court. So that, in fact, verdicts always have and always will be rendered from this point of view.

For the foregoing reasons the judgment and order appealed from are affirmed.

Lorigan, J., and Melvin, J., concurred.

The Test of Proximate Cause is whether the facts between the negligent act and the final result constitute a succession of events so linked together that they become a natural whole; *Cohn v. May*, 210

Pa. 615, 105 Am. St. Rep. 840. If a person by his negligence produces a dangerous condition of things, which does not become active for mischief until another person has operated upon it by the commission of another negligent act which might not unreasonably be anticipated to occur, the original act of negligence is regarded as the proximate cause of the injury which finally results. The principle is, that the first act is regarded as being continuous in its operation up to the time of the second, and therefore, for the purposes of fixing the defendant's liability, the two acts are treated as contemporaneous: *Note to Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 845. If the original negligence operates with the intervening cause, then it becomes the proximate cause by the continuity of its action: *Seith v. Commonwealth Electric Co.*, 241 Ill. 252, 132 Am. St. Rep. 204.

As to the Liability for Explosion of Gas, see *Creel v. Charleston Nat. Gas Co.*, 51 W. Va. 129, 90 Am. St. Rep. 772; *Consolidated Gas Co. v. Getty*, 96 Md. 683, 94 Am. St. Rep. 603; *Diehle v. United Gas Imp. Co.*, 225 Pa. 494, 133 Am. St. Rep. 888. As to what constitutes the proximate cause of such explosion, see *Consolidated Gas Co. v. Getty*, 96 Md. 683, 94 Am. St. Rep. 603; *United States Nat. Gas Co. v. Hicks*, 134 Ky. 12, 135 Am. St. Rep. 407. When the presence of gas in a cellar is due to the negligence of a gas company, and an explosion results from the negligent striking of a match by a stranger, the party injured may recover against either the gas company or the stranger, or against both, at his election: *Koelsch v. Philadelphia Co.*, 152 Pa. 355, 34 Am. St. Rep. 653.

Damages for Mental Suffering: See *Dorrah v. Illinois Cent. R. R. Co.*, 65 Miss. 14, 7 Am. St. Rep. 629; *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370; *Ewing v. Pittsburgh etc. Ry. Co.*, 147 Pa. 40, 30 Am. St. Rep. 709; *Sullivan v. Old Colony St. Ry. Co.*, 197 Mass. 512, 125 Am. St. Rep. 378.

McLEMORE v. EXPRESS OIL COMPANY.

[158 Cal. 559, 112 Pac. 59.]

MINING CLAIMS.—*Discovery and Appropriation* are the source of title to mining claims, and assessment or development work is the condition of their continued possession, provided the location is valid and complete. (p. 149.)

MINING CLAIMS—Necessity of Discovery.—A Mining Location is valid and complete only when after compliance with other requirements a discovery of valuable minerals in place has been made. (p. 149.)

MINING CLAIMS—Necessity of Actual Possession.—Where a mining claim is held under a mining location, and assessment work has been done on it sufficient to satisfy the national statute in that regard, actual possession is no more necessary for the protection of the title than it would be in the case of any other description of grant from the United States. (p. 149.)

OIL LANDS—Location—Discovery.—The Act of Congress whereby the locating of claims to oil lands was made to be regulated by the laws relating to placer mining claims gravely embarrassed the courts as well as the locators, since in locating a mining claim

discovery is required as an initial step, whereas great length of time necessarily is consumed in efforts to discover an oil deposit. (pp. 149, 150.)

OIL LANDS—Location—Boundaries and Discovery.—In view of, on the one hand, the requirement of discovery as an initial step in locating validly a placer mining claim, and, on the other hand, the long time consumed necessarily in discovering an oil deposit, the placer mining law becomes available to the oil claim locator only through his being permitted to mark his boundaries and post and record his notice, and being protected in possession while prosecuting with diligence his work toward discovery. (p. 150.)

OIL LANDS—Rights of Locator Prior to Discovery.—Having made his location in good faith, one who maintains possession of an oil land claim and diligently pushes on toward a discovery is protected against all forms of forcible, fraudulent, surreptitious or clandestine entries or intrusions; still his location remains incomplete and merely inchoate until perfected by actual discovery. (p. 150.)

OIL LANDS—Vested Rights Prior to Discovery.—Until the perfection of the inchoate and incomplete location by actual discovery, the locator of a mining claim has no vested rights which Congress is obliged to recognize, and it may change its policy in regard to the lands to the extent even of excluding from them the diligent operator who has not made discovery. (p. 150.)

OIL LANDS.—The Diligent Prosecution of Work Toward Discovery required of the locator of an oil land claim, contemplates, not assessment work or the looking about for capital to push the enterprise or any attempted holding through the presence on the land of cabin, lumber pile or unused derrick, but just the diligent, continuous prosecution of the work itself, with the expenditure of whatever money may be necessary, to the end in view; and where the locator's "diligent prosecution of work" is not within such contemplation the land concerned is open to homestead entry. (p. 151.)

PUBLIC LAND—Requisites of Homestead Entry.—To constitute an entry on public land under the homestead law, the applicant must make an affidavit of facts entitling him to enter, he must make formal application, and make payment of the money required. With these things done and the certificate issued, the entry is complete. (pp. 152, 153.)

PUBLIC LANDS—Agricultural Lands—Mineral Entry.—No right of entry, upon lands already held under agricultural entry, exists in favor of a mineral claimant, unless he can show by a preponderance of testimony that as a present fact the land is more valuable for mining than for agricultural purposes. (p. 153.)

Frank H. Short and F. E. Cook, for the appellant.

Larkins & Feemster, for the respondent.

⁵⁶⁰ HENSHAW, J. The action is in ejectment. Judgment passed for plaintiff, and from that judgment and from an order denying defendant's motion for a new trial it appeals. The controversy is between a claimant to government land ⁵⁶¹ under homestead entry and a claimant to the same land under a purported mining location. An attempted location had been made by eight associates, defendant's grantors, under the placer mining laws. The valuable

mineral sought to be discovered was oil. This was in January, 1906. A cabin was constructed upon the claim, its boundaries were marked, some bits of road built, and, in the language of appellant's brief, work had been done and improvements made upon the claim "far in excess of the requirements of the United States statutes with respect to assessment work, and before any claim had been initiated by the plaintiff, they had expended in a direct and legitimate way many times over the amount required in the way of assessment work." Upon April 12, 1907, plaintiff first connected himself with the land by fulfilling all the requirements for entering it as a homestead. At that time, finds the court, no one of the defendant's grantors was in possession of the land. Appellant's first contention is that the evidence of location, occupation and possession of the ground as a mining claim by defendants was sufficient to exclude it from entry by plaintiff upon the twelfth day of April, 1907, when his homestead entry was made. Undoubtedly appellant's contention in this respect would be correct if the location was valid and complete at the time of the homestead entry, since "actual possession of a mining claim held under a mining location is no more necessary for the protection of the title thereto, than it is for any other grant of the United States" (*Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735), and the principle has become axiomatic that discovery and appropriation are the source of title to mining claims, and that assessment or development work is the condition of their continued possession: 27 Cyc. 588. But this rule applies only when the location is valid and complete. And a location is valid and complete only when, after compliance with other requirements, a discovery of valuable minerals in place has been made. In the case of ordinary minerals little or no difficulty has been experienced by the courts in this matter. In practice, the miner went upon the public domain, and before he took the trouble to stake his claim and post and record his notice, he made discovery. The staking of the boundaries of the claim and the posting of notice followed such discovery. When, however, Congress enacted that locations could and should be made ⁵⁶² of public lands containing petroleum or other mineral oils under the laws relating to placer mining claims (Act Feb. 11, 1897, 29 Stats. at Large, c. 216, p. 526, U. S. Comp. Stats. 1901, p. 1435), the courts were at once confronted with serious difficulty in their endeavor to obey the congressional mandate, and fit the placer mining laws to the exigencies of oil locations which, in their nature, were radically dissimilar. Thus, it is well established that the sole power of disposition and control of the public lands being vested by the constitution of the United States in Congress (Const. U. S., art. 4,

sec. 3), Congress could at any time change its policy in regard to those lands so long as vested rights were not impaired. It was fully established also that a qualified person, who had made a valid location upon a part of the public mineral domain (which valid location always, of course, included discovery), acquired vested rights, which no change in congressional policy could affect or impair, but per contra that a change in policy could impair the rights of one upon the public domain who had not acquired a valid location. As has been said, in the case of other minerals, discovery preceded the demarkation of the boundaries, the posting and recording of the notice. In the case of oil, discovery, in the very nature of things, would rarely or never be made except at the end of much time and after the expenditure of much money, the discovery of oil involving the erection of a derrick, the installation of machinery and the laborious drilling of a well, frequently to the depth of three thousand feet or more. If, therefore, the placer mining laws, which were declared by Congress to be the only laws under which oil locations could be established, were to be made of any practical benefit to the oil locator, it must be by permitting him to mark the boundaries of his location and post and record his notice, and by protecting him in possession while he was with diligence prosecuting the labor of digging his well to determine whether or not a discovery could be made. So it was held by the federal courts, by the courts of some of the other states, and by this court in *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444, to the following effect: "One who thus in good faith makes his location, remains in possession and with due diligence prosecutes his work toward a discovery, is fully protected ⁵⁸³ against all forms of forcible, fraudulent, surreptitious or clandestine entries and intrusions upon his possession. Such entry must be always peaceable, open and above board, and made in good faith, or no right can be founded upon it": *Weed v. Snook*, 144 Cal. 439, 77 Pac. 1023; *Cosmos E. Co. v. Gray Eagle Oil Co.*, 104 Fed. 20, 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, 190 U. S. 301, 23 Sup. Ct. Rep. 692, 24 Sup. Ct. Rep. 860, 47 L. ed. 1064; *Whiting v. Straup*, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849; *Moffatt v. Blue River etc. Co.*, 33 Colo. 142, 80 Pac. 139. But it is always to be borne in mind that until the perfection of the inchoate and incomplete location by discovery, the locator has, first, no vested rights which Congress is obliged to recognize. So that Congress may change its policy in regard to the lands to the extent even of excluding therefrom the diligent operator who has not made discovery. However inequitable such a proceeding might be, it in no way would be illegal.

Second, it is to be observed that the laws touching assessment work are not applicable to such an imperfect location. When the location is valid and complete, the law exacts the doing of but one hundred dollars of work per year, and when that is done, all of the locator's rights are fully protected, whether he remains in possession longer than is necessary to do that work or not. But where the location is incomplete, no question of assessment work is involved. What the attempting locator has is the right to continue in possession, undisturbed by any form of hostile or clandestine entry, while he is diligently prosecuting his work to a discovery. This diligent prosecution of the work of discovery does not mean the doing of assessment work. It does not mean the pursuit of capital to prosecute the work. It does not mean any attempted holding, by cabin, lumber pile or unused derrick. It means the diligent, continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view. Of such work, defendant's grantors were not in the prosecution up to April 12, 1907. They were not only not in the actual possession of the land, as the court finds, but the evidence discloses that what they had done was no more than to attempt to hold the land, under the theory that assessment work was adequate for that purpose. It is shown by the evidence that they were not only not engaged in the diligent prosecution of the work, but that they were not financially ⁵⁰⁴ able so to prosecute it, and were either in search of capital to enable them to do so, or in search of a purchaser to buy out such interest as it might be thought that they had. The cases of *Cosmos E. Co. v. Gray Eagle Oil Co.*, 104 Fed. 20, 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, are not at all in conflict with these views. To the contrary, these views and those expressed in *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444; *Weed v. Snook*, 144 Cal. 439, 77 Pac. 1023, and *New England etc. Oil Co. v. Congdon*, 152 Cal. 211, 92 Pac. 180, are themselves in great part based upon the opinion of the learned circuit judge in those cases. The federal cases involved conflicts between "scrippers" and oil locators, under an act which allowed the scrippers, for the land from which they had been displaced, to "select in lieu thereof an equal tract of vacant land open to entry." They endeavored to select land that was not only in the possession of oil men, but of oil men who were diligently prosecuting their work to a discovery so as to complete their locations. The circuit court held that such land so occupied and worked was not vacant land open to entry within the meaning of the act, and declared (we quote from the syllabus, which correctly enunciates the determination): "A claimant

of land entered under act June 4, 1897 (30 Stats. 36, U. S. Comp. Stats. 1901, p. 1541), in lieu of land situated within a forest reservation, on an affidavit stating its nonmineral character, that it was free from mining claims, and was entered for agricultural purposes, will not be granted relief in equity against another claimant in possession under an oil placer mining location, made prior to such entry, and followed up by development work, which was being prosecuted on the land when the entry was made, and resulted in valuable producing wells, where the affidavit of the entryman was also false in other particulars, the land being valueless for agricultural or grazing purposes, but situated in an oil district, and the entry being in fact made because of its supposed value for oil, although no discovery of oil had then been made thereon."

Plaintiff filing his homestead entry upon the twelfth day of April, 1907, made physical and personal entry on the fifth day of October, 1907—within the six months limited by law. Appellant contends that plaintiff had made no "entry" within ⁵⁶⁵ the meaning of the law until he took possessionam pedis on October 5th; that up to that time he had acquired merely a preferential right of entry over those claiming under the homestead or agricultural laws, but not over those who might have entered under the mining laws. In this connection appellant expounds the different meanings which have been given to the word "entry," and concludes that the entry of a homesteader is not complete, within the meaning of the law, until he has actually gone upon the ground. But this is not the meaning of the word as employed in the statute. In "Suggestions to Homesteaders," issued by the commissioner of the general land office, March, 9, 1908 (paragraph 27, page 12), it is said: "Actual residence on the lands entered must begin within six months from the date of all homestead entries, except additional entries and adjoining farm entries of the character mentioned in paragraphs 14 and 15, and residence with improvements and annual cultivation must continue until the entry is five years old, except in cases thereafter mentioned, but all entrymen who actually reside upon and cultivate lands entered by them prior to making such entries may make final proof at any time after entry when they can show five years' residence and cultivation." Says the supreme court of the United States in *Hastings etc. R. R. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. Rep. 112, 33 L. ed. 363: "Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such entry; second, he must make a formal ap-

plication; and third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is issued to him, the entry is made—the land is entered.” All of these things had been done by plaintiff, and his entry was therefore complete. What effect did this entry have upon the right of defendant subsequently to enter upon the land and exploit it for minerals?

“A homestead entry,” says the supreme court of the United States, “which is prima facie valid removes the land, temporarily at least, out of the public domain”: *Hastings etc. Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. Rep. 112, 33 L. ed. 363; *United States v. Turner*, 54 Fed. 228. But appellant contends that this language is to be construed with an exception, and that this ^{see} exception is that one who claims the land to be valuable for mineral purposes has the right, notwithstanding such homestead entry, to enter thereon and explore it for the valuable minerals it is thought to contain. Herein reliance is placed upon *McClintock v. Bryden*, 5 Cal. 97, with the note which is appended to that case in 63 American Decisions, page 87. But it will be found upon examination that that, and the cases like it, all arose where the land was of proved mineral value, and the decisions were based upon the national laws, which, in effect, excepted from homestead entry the mineral lands of the nation, the mineral lands being those of more value for mineral than for agricultural purposes. We know of no case, and have been cited to none, where a right of entry upon lands held under an agricultural entry has been permitted without proof of the present value of the lands for mineral purposes, merely for the purpose of exploiting them to see if perchance they possess such value. That is precisely what appellant desires here to do, and contends that it has the right to do. No discovery of oil has been made upon the lands, but defendant insists that it has the right to enter and explore them to see if there is oil therein. The decisions are against the existence of such a right. In *Lentz v. Victor*, 17 Cal. 271, it is declared that such an entry upon an agricultural holding can be justified and upheld only by showing, first, that the land is public land, and, second, “that it contains mines or minerals.” The land department has uniformly laid down the rule to the following effect: “The burden of proof being upon the protestants (mineral claimants), they are required to show by a preponderance of testimony that the land is more valuable for mining than for agricultural purposes as a present fact; not that it might possibly hereafter develop minerals in such quantity, and of such character, as to establish its mineral value”: 1 L. D. 561; 8 L. D. 440; 17 L. D. 103, 274; 25 L. D. 223, 349.

For these reasons the judgment and order appealed from are affirmed.

Lorigan, J., and Melvin, J., concurred.

DISCOVERY OF MINERAL IN MINING CLAIMS AND RIGHTS OF LOCATORS PRIOR THERETO.

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I. General Purposes of Federal Mining Law and Difficulties in Application to Discoveries.

The general purpose of the mineral laws is to encourage citizens to assume the hazards of searching for and extracting the valuable minerals deposited in the public lands. By allowing the citizen to locate mining claims in the manner provided by the mineral laws it was thought that a stimulus would be given to the production of mineral wealth and render it available for commerce and the arts, and thereby indirectly render to the public a consideration commensurate with the value of the grant: *United States v. Rizzinelli*, 182 Fed. 675.

Much of the difficulty experienced in the administration of the mineral laws is, doubtless, caused by the fact that there is no requirement that mining locations be filed in any office of the land department as are other applications to purchase public lands, and thus acquaint the land department with the fact that the land is claimed as a mining claim, and in that way prevent the land from being claimed under some one of the many other ways of purchasing public land. The only way in which the land department can officially know that a mining claim exists upon any part of the public domain is through the locator applying for a patent. This is illustrated in the controversies between locators of oil claims and entrymen of the same land under homestead or other forms of agricultural entries.

The questions in respect to the subject of this note most frequently arise between miners who have located on the same lode, between placer and lode locators, and between mineral locators and persons holding under agricultural or like entries. Hence, in looking to the decisions on the question of discovery it must be borne in mind that the expressions of the courts must be considered in the light of the character of the contest which was before them in the particular case. Thus in *Migeon v. Montana Cent. Ry. Co.*, 77 Fed. 249, 23 C. C. A. 156, it was said: "The particular character of each case necessarily determines the rights of the respective parties, and must be kept constantly in view, in order to enable the court to arrive at a correct conclusion. What is said in one character of cases may or may not be applicable in the other."

It is because of the facts stated in the above cited case that there is at times an apparent conflict in the decisions of the courts in cases involving the question of discovery. An examination of the cases on this subject will show a growing tendency of the courts to attach considerable importance to the decisions of the Interior Department upon matters affecting the disposition of the public lands. And with the growing responsibility of that department in rendering decisions

which are looked to as carrying authority, there is more of a disposition by it to have a harmonious system of decisions which establish principles which are in accord with the spirit of the mineral laws and the practical needs of the mineral-bearing states.

In *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. Rep. 112, 33 L. ed. 363, the United States supreme court, after citing numerous decisions by the Land Department, said: "It is true that the decisions of the Land Department on matters of law are not binding upon this court, in any sense. But on questions similar to the one involved in this case they are entitled to great respect at the hands of any court. In *United States v. Moore*, 95 U. S. 760, 24 L. ed. 588, this court said: 'The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. . . . The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterward called upon to interpret.'"

The general administration of the forest reserve act and the determination of questions arising under it before issuance of patent for lands selected under its provisions are vested in the Land Department: *Cosmos E. Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 23 Sup. Ct. Rep. 672, 41 L. ed. 1064. The decisions of the United States supreme court upon questions involving the disposition of land under the mineral laws are, of course, of paramount importance.

II. Provisions of Federal Law Applicable to Question of Discovery.

Before entering into a consideration of the question which is made the subject of this note, it may be well to refer to the principal provisions of the federal mining law relating to the subject.

Section 2318, United States Revised Statutes, reserves all lands valuable for minerals from sale unless otherwise expressly directed by law.

Section 2319, United States Revised Statutes, declares that all valuable mineral deposits in lands belonging to the United States are free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law and according to the local customs or rules of miners in the several mining districts so far as the same are applicable and not inconsistent with the laws of the United States. While section 2320, United States Revised Statutes, declares: "Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to the length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface. Nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May,

eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other."

Section 2329, United States Revised Statutes provides: "Claims usually called 'placers,' including all forms of deposit excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public land."

The location of public lands containing petroleum or other mineral oils is authorized under the act of Congress of February 11, 1897 (29 Stats. at Large, c. 216, p. 526), which declares: "That any person authorized to enter lands under the mining laws of the United States may enter and obtain patents to lands containing petroleum or other mineral oils and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims."

Section 2322, United States Revised Statutes, gives the locators, their heirs and assigns, so long as they comply with the laws, rules and regulations relating to the acquisition of mineral land, the exclusive possession and enjoyment of all the surface included within the limits of their location.

Section 2302, United States Revised Statutes, specifically exempts all mineral lands from entry and settlement under the homestead laws.

The general policy of dealing with mineral lands shown by the federal mineral laws was sustained by the courts of California prior to the enactment of federal legislation on the subject: *McClintock v. Bryden*, 5 Cal. 97, 63 Am. Dec. 87; *Gillan v. Hutchinson*, 16 Cal. 153; *Lentz v. Victor*, 17 Cal. 271.

Mineral lands can be disposed of only under the mineral laws: *In re Mountain Meadow Placer Co.*, 35 L. D. 216. And lands containing petroleum and other mineral oils are governed by the provisions of the law relating to placer claims, and a discovery of oil within the limits of the claim is essential to the validity of the location: *New England etc. Oil Co. v. Congdon*, 152 Cal. 211, 92 Pac. 180; *Whiting v. Straup*, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849.

III. Rights and Estate Acquired by Completed Mining Location.

A lode locator acquires a vested property right by virtue of his location made in compliance with the mining laws, but the fee remains in the government until patent issues: *Creede & C. C. Min. Co. v. Uinta etc. Co.*, 196 U. S. 337, 25 Sup. Ct. Rep. 266, 49 L. ed. 501.

The legal right of possession can only come from a valid location: *Hamilton v. Huson*, 21 Mont. 9, 53 Pac. 101; *Bevis v. Markland*, 130 Fed. 226. By a valid location, the ground included within its boundaries is segregated from the public domain, and the exclusive right of possession thereof is vested in the locators: *Southern Cal. R. Co. v. O'Donnell*, 3 Cal. App. 382, 85 Pac. 932; *McFetters v. Pierson*, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076; *Silver Bow etc. Min. Co. v. Clark*, 5 Mont. 378, 5 Pac. 574; *Argentine Min. Co. v. Benedict*, 18 Utah, 183, 55 Pac. 559; *Meydenbauer v. Stevens*, 78 Fed. 737; *Gillis v. Downey*, 85 Fed. 483, 29 C. C. A. 236. After discovery and location, the locator's right of possession is as complete as if he had a patent provided that he continues to perform each year the amount of labor and improvement required by the mining law: *Banagan v.*

Dulaney, 2 L. D. 744; *Tam v. Story*, 21 L. D. 440. Where the locator has fully complied with the law relating to the making of a mining location, the territory embraced within his surface boundaries is segregated from the public domain as to all parties except the government. A prospector cannot go within such surface boundaries for the purpose of prospecting for minerals, and his act in doing so is a trespass as much so as if the land were patented: *Armstrong v. Lower*, 6 Colo. 393. The effect of such a mining location is not perceptively different from the right acquired by entrymen of agricultural land: *Tyee Cons. Min. Co. v. Langstedt*, 136 Fed. 124, 69 C. C. A. 548. The estate obtained by virtue of a valid mining location is in the nature of an estate in fee. It is an appropriation of land by the locator to the exclusion of all others: *Stenfjeld v. Espe*, 171 Fed. 825. And as between all persons except the government, the rights of the locator are regarded as a fee in the land: *Merced Min. Co. v. Fremont*, 7 Cal. 517, 68 Am. Dec. 262; *Merritt v. Judd*, 14 Cal. 59; *Attwood v. Fricot*, 17 Cal. 37, 76 Am. Dec. 567; *Hughes v. Devlin*, 2 Cal. 551; *Mt. Rosa Min. etc. Co. v. Palmer*, 26 Colo. 56, 56 Pac. 176.

"A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent: *Forbes v. Gracey*, 94 U. S. 762, 24 L. ed. 313. There is nothing in the act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location, than it is for any other grant from the United States": *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735.

The title of the locator of a valid mining claim is such a title to land as may be bought and sold as other property: *Weed v. Snook*, 144 Cal. 439, 77 Pac. 1023; *Kern River Oil Co. v. Clarke*, 30 L. D. 550; *In re H. H. Yard*, 38 L. D. 59.

In *United States v. Rizzinelli*, 182 Fed. 675, the court, in describing the rights of a mineral locator, said: "The rights of a locator of a mining claim, and the nature of his estate therein, have not infrequently been considered by the supreme court of the United States. That the discovery of valuable mineral and the proper location of his claim operate to vest in the locator a substantial interest may not be doubted. The interest thus acquired is a valuable property right which may be mortgaged, transferred, inherited and taxed; the right of possession is good against all the world, including the United States: *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348; *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. Rep. 651, 38 L. ed. 532; *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735; *Forbes v. Gracey*, 94 U. S. 762, 24 L. ed. 313; *St. Louis Mining Co. v. Montana Mining Co.*, 171 U. S. 650, 19 Sup. Ct. Rep. 61, 43 L. ed. 320; *Elder v. Wood*, 208 U. S. 226, 28 Sup. Ct. Rep. 263, 52 L. ed. 464."

In this respect Mr. Lindley, in his work on Mines, second edition, section 539, says: "As between the locator and everyone else save the paramount proprietor, the estate acquired by perfected mining location possesses all the attributes of a title in fee, and so long as the requirements of the law with reference to continued development are satisfied, the character of the tenure remains that of the fee. As between the locator and the government, the former is the owner of the beneficial estate and the latter holds the fee in trust, to be conveyed to such beneficial owner upon his application in that behalf and in compliance with the terms prescribed by the paramount proprietor.

"Until the patent issues the locators' muniments of title consist of the laws under the sanction of which his rights accrue, the series of

acts culminating in a completed valid location, and those necessary to be continuously performed to perpetuate it."

The nature and extent of the right acquired were also very clearly set forth by the circuit court of appeals in *Teller v. United States*, 113 Fed. 273, 51 C. C. A. 230, in a criminal prosecution in which the extent of the rights of the locator were a material issue, the court saying:

"Possession of a mining claim, in accordance with the provisions of the statute, by well-settled authority, confers the right, subject to certain limitations and conditions, upon a locator, to work the claim for precious metals for all time, if he desires to do so; but confers no right to take timber, or otherwise make use of the surface of the claim, except so far as it may be reasonably necessary in the legitimate operation of mining. The next right in order of time is the equitable one, already defined. The last one in the sequence is the perfect legal title in fee simple absolute, created by the issue of the patent by the United States. The claimant may be entirely satisfied with his possessory title, and be neither able nor willing to perform the further acts or pay the further consideration requisite to securing the equitable or legal title. For reasons of public policy, and for the purpose of encouraging the mining industry, the United States gratuitously grants the privilege to any citizen, or person having declared his intention to become a citizen, of locating a claim for mineral lands and working the same for precious metals; but it has not seen fit to give away the land containing the minerals, but, on the contrary, has adopted the policy of selling the same to the locator, if he desires to purchase, on terms fixed by the acts of Congress. Mullison's location, record and working of his claim secured to him the possessory title only. While his location so far segregated and withdrew the land from the public domain that no rival claimant could successfully initiate any right to it until his location was avoided and his entry was canceled (*James v. Germania Iron Co.*, 107 Fed. 597, 46 C. C. A. 476, and cases there cited; *Hartman v. Warren*, 76 Fed. 157, 22 C. C. A. 30; *Kansas Pac. Ry. Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. Rep. 566, 28 L. ed. 1122), it gave him nothing but 'the right of present and exclusive possession' for the purpose of mining. It did not divest the legal title of the United States, or impair its right to protect the land and its product, by either civil or criminal proceedings, from trespass or waste. While for the purpose of subsequent entry and location by private parties the lands which Mullison claimed were segregated from the public domain and appropriated to a private purpose, they were so segregated for that purpose only, and the legal and equitable title to them still remained in the government and they were still 'lands of the United States' within the meaning of section 2461, Revised Statutes, and the act of August 4, 1892 (27 Stat. 348), which are under consideration in this case."

But until the locator has made a discovery of mineral within the limits of the ground embraced in his location, the land remains a part of the public domain: *Tuolumne Con. Min. Co. v. Maier*, 134 Cal. 583, 66 Pac. 863.

IV. Necessity for Making a Discovery of Mineral.

a. General Rule.—Discovery of mineral within the limits of the mining claim located is a necessary prerequisite to a complete and valid mining location: *Redden v. Harlan*, 2 Alaska, 402; *Tuolumne Con. Min. Co. v. Maier*, 134 Cal. 583, 66 Pac. 863; *Weed v. Snook*, 144

Cal. 439, 77 Pac. 1023; Daggett v. Yreka Min. etc. Co., 149 Cal. 357, 86 Pac. 968; McCleary v. Broadbudd (Cal. App.), 111 Pac. 125; Bryan v. McCaig, 10 Colo. 309, 15 Pac. 413; Johnson v. Young, 18 Colo. 625, 34 Pac. 173; Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948; Healey v. Ropp, 37 Colo. 25, 86 Pac. 1015; Upton v. Larkin, 5 Mont. 600, 6 Pac. 66; Overman Silver Min. Co. v. Corcoran, 15 Nev. 147; Gleeson v. Martin White Min. Co., 13 Nev. 442; Patterson v. Tarbell, 26 Or. 29, 37 Pac. 76; Marshall v. Harney Peak etc. Mfg. Co., 1 S. D. 350, 47 N. W. 290; Lockhart v. Farrell, 31 Utah, 155, 86 Pac. 1077; Copper Globe Min. Co. v. Allman, 23 Utah, 410, 64 Pac. 1019; King v. Amy etc. Min. Co., 152 U. S. 222, 14 Sup. Ct. Rep. 510, 38 L. ed. 419; O'Reilly v. Campbell, 116 U. S. 418, 6 Sup. Ct. Rep. 421, 29 L. ed. 669; Larkin v. Upton, 144 U. S. 19, 12 Sup. Ct. Rep. 614, 36 L. ed. 330; Zollars v. Evans, 2 McCrary, 39, 5 Fed. 172; Jupiter Min. Co. v. Bodie Con. Min. Co., 11 Fed. 666, 7 Saw. 96; Erwin v. Perego, 93 Fed. 608, 35 C. C. A. 482; Ledoux v. Forester, 94 Fed. 600.

In other words, discovery is the all-important fact upon which title to mining claims depends: Lawson v. United States Min. Co., 207 U. S. 1, 28 Sup. Ct. Rep. 15, 52 L. ed. 65. The principle has become axiomatic that discovery and appropriation are the source of title to mining claims, and that assessment or development work are the conditions of their continued possession: McLemore v. Express Oil Co., 158 Cal. 559, ante, p. 147, 112 Pac. 59.

The necessity for the discovery of mineral within the limits of a mining claim in order to constitute a valid location is, of course, as essential in the case of placer claims as to lode claims: Bay v. Oklahoma etc. Min. Co., 13 Okl. 425, 73 Pac. 936; Whiting v. Straup, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849; Steele v. Tanana Mines R. Co., 148 Fed. 678, 78 C. C. A. 412.

"Discovery is indispensable to the validity of a mining location, and necessarily must precede or be coincident with the perfection thereof. The ultimate right to a patent must always rest upon the basis of a lawful location; and if the element of discovery be drawn in question so as to involve the right of possession as between rival claimants, the Land Department cannot ignore an alleged absence of discovery by the applicant for patent in time to have enabled a court of competent jurisdiction pursuant to an adverse claim and suit, to determine the respective rights of the parties": Rupp v. Healey, 38 L. D. 387.

In speaking of the purpose and necessity of a discovery of mineral by the locator of a mining claim, the court in Creede etc. Milling Co. v. Uinta Tunnel etc. Co., 196 U. S. 337, 25 Sup. Ct. Rep. 266, 49 L. ed. 501, said:

"Three things are provided for: Discovery, location and patent. The first is the primary, the initial fact. The others are dependent upon it, and are the machinery devised by Congress for securing to the discoverer of mineral the full benefit of his discovery. Chapter 6 of title 32, Revised Statutes, is devoted to the subject of 'Mineral Lands and Mining and Mining Resources.' The first section (2318) reserves mineral land from sale, except as expressly directed. The next provides that all valuable mineral deposits in government lands shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase. In the next it is declared that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim. The

whole scope of the chapter is the acquisition of title from the United States to mines and mineral lands, the discovery of the mineral being, as stated, the initial fact. Without that no rights can be acquired. As said by Lindley, in his work on Mines, second edition, volume 1, section 335: 'Discovery in all ages and all countries has been regarded as conferring rights or claims to reward. Gamboa, who represented the general thought of his age on this subject, was of the opinion that the discoverer of mines was even more worthy of reward than the inventor of a useful art. Hence, in the mining laws of all civilized countries the great consideration for granting mines to individuals is discovery. "Rewards so bestowed," says Gamboa, "besides being a proper return for the labor and anxiety of the discoveries, have the further effect of stimulating others to search for veins and mines, on which the general prosperity of the state depends." Location is the act or series of acts by which the right of exclusive possession of mineral veins and the surface of mineral lands is vested in the locator. For this the only requirement made by Congress is the marking on the surface of the boundaries of the claim. By section 2324, however, Congress recognized the validity of any regulations made by the miners of any mining district not in conflict with the laws of the United States or the laws of the state or territory within which the district is situated. This is held to authorize legislation by the state. Thus in *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735, it was said: 'A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations.'

Until a discovery has been made, the prospector's rights are limited to the ground in his actual possession. A notice of location posted upon mineral land before discovery is made has been held to be an absolute nullity: *Gemmell v. Swain*, 28 Mont. 331, 72 Pac. 662.

Discovery, under the mining statute, means the acquirement of knowledge that a vein or lode exists within the limits of the claim sought to be located: *Waterloo Min. Co. v. Doe*, 56 Fed. 685.

The mere posting of a notice of location on a ridge of rocks cropping out of the earth or in other ground, without any discovery or knowledge on the part of the locator of the existence of metal there or in its immediate vicinity, is "justly treated as a mere speculative proceeding, and would not of itself initiate any right": *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. Rep. 560, 28 L. ed. 1116.

The government is, obviously, interested in the question whether a locator has made a discovery of mineral, for the reason that such a discovery is one of the conditions upon which it allows the locator to hold the possession of the land and purchase it. Hence it requires a discovery in order to prevent a fraud upon the government in obtaining land not mineral in character as mineral land: *Sanders v. Noble*, 22 Mont. 110, 55 Pac. 1037; *Nevada Sierra Oil Co. v. Miller*, 97 Fed. 681; *Lange v. Robinson*, 148 Fed. 799, 79 C. C. A. 1.

In the principal case there is a dictum to the effect that until the location is made complete by a discovery, the locator has no vested rights which Congress is obliged to recognize, and that in view of that fact Congress may, under such circumstances, change its policy in regard to the public lands to the extent even of excluding therefrom the diligent operator who has not yet made a discovery: *McLemore v. Express Oil Co.*, 158 Cal. 559, 563, ante, p. 147, 112 Pac.

59. But it will be observed that the court also observed that a locator under such circumstances has a right to maintain his possession while diligently seeking to make a discovery.

A person in possession of mineral land under a mining location is not a trespasser although he has not discovered mineral: *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230. A discovery of mineral may be made by an agent of the locator as well as by the locator himself: *Whiting v. Straup*, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849.

A locator need not be the first discoverer of mineral on the mining claim located. He may appropriate an abandoned discovery by locating the claim as a relocation. It is sufficient if he knew at the time of making his location that there had been a discovery of mineral within the limits of his location: *Willeford v. Bell* (Cal.), 49 Pac. 6; *Conway v. Hart*, 129 Cal. 480, 62 Pac. 44; *McMillen v. Ferrum Min. Co.*, 32 Colo. 38, 105 Am. St. Rep. 64, 74 Pac. 461; *Wenner v. McNulty*, 7 Mont. 30, 14 Pac. 643; *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302; *Hayes v. Lavaguino*, 17 Utah, 185, 53 Pac. 1029; *Jupiter Min. Co. v. Bodie Con. Min. Co.*, 7 Saw. 96, 11 Fed. 666; *Nevada-Sierra O. Co. v. Home O. Co.*, 98 Fed. 673.

b. **Presumption Arising from Long-standing Mining Location.**—Every reasonable presumption will be indulged in favor of a discovery after a mining claim has stood unchallenged for years and work of importance done and the claim has been transferred to innocent purchasers: *Cheesman v. Hunt*, 42 Fed. 98. So, also, where land has been located as a mining claim, it will ordinarily be presumed that the locators complied with the law and made a discovery: *Fox v. Myers*, 29 Nev. 169, 86 Pac. 793; *Vogel v. Warsing*, 146 Fed. 949, 77 C. C. A. 199; *Northern Pac. R. Co. v. Marshall*, 17 L. D. 545; *Tam v. Story*, 21 L. D. 440. Though the mere recording of a mining location and fact of marking the boundaries on the ground is not of itself sufficient to authorize a court to presume a discovery: *Smith v. Newell*, 86 Fed. 56. But where the locators testify that they discovered mineral, persons who attack their discovery long afterward must make a clear and persuasive showing that there was in fact no discovery: *Cheesman v. Shreeve*, 40 Fed. 787.

c. **Estoppel of Locators to Claim That No Discovery was Made.**—Persons who locate a mining claim and record a location certificate of such location are estopped, as against a purchaser of an interest in the claim, from showing that the location is void for want of a discovery of mineral in place within the limits of the claim: *McCarthy v. Speed*, 11 S. D. 302, 77 N. W. 590, 12 S. D. 7, 80 N. W. 135, 50 L. R. A. 184.

d. **Subsequent Richness of Mine as Evidence of Discovery.**—Evidence as to the extent and richness of the vein, as developed subsequent to the location, is not admissible to show that the location was based upon a discovery thereof where other rights have intervened: *Upton v. Larkin*, 7 Mont. 449, 17 Pac. 728.

e. **Time of Discovery With Respect to Other Locatory Acts.**—The discovery need not precede the other acts required to make a mining location. It is sufficient if the discovery of mineral be made before the rights of third persons intervene. And in the absence of intervening rights, a discovery, made subsequent to the posting of notice

of location, marking of boundaries and other locatory acts will validate the location: *Field v. Grey*, 1 *Ariz.* 404, 25 *Pac.* 793; *Tuolumne Con. Min. Co. v. Maier*, 134 *Cal.* 583, 66 *Pac.* 863; *New England etc. Oil Co. v. Congdon*, 152 *Cal.* 211, 92 *Pac.* 180; *Brewster v. Shoemaker*, 28 *Colo.* 176, 89 *Am. St. Rep.* 188, 63 *Pac.* 309, 53 *L. R. A.* 793; *Healey v. Rupp*, 37 *Colo.* 25, 86 *Pac.* 1015; *Beals v. Cone*, 27 *Colo.* 473, 83 *Am. St. Rep.* 92, 62 *Pac.* 948; *Treasury Tunnel Min. etc. Co. v. Boss*, 32 *Colo.* 27, 105 *Am. St. Rep.* 60, 74 *Pac.* 888; *Sharkey v. Candiani*, 48 *Or.* 112, 85 *Pac.* 219, 7 *L. R. A.*, *N. S.*, 791; *Sands v. Cruikshank*, 15 *S. D.* 142, 87 *N. W.* 589; *Cedar Canyon etc. Co. v. Yarwood*, 27 *Wash.* 271, 91 *Am. St. Rep.* 841, 67 *Pac.* 749; *Protective Min. Co. v. Forest City Min. Co.*, 51 *Wash.* 643, 99 *Pac.* 1033; *Whiting v. Straup*, 17 *Wyo.* 1, 129 *Am. St. Rep.* 1093, 95 *Pac.* 849; *Olive Land etc. Co. v. Olmstead*, 103 *Fed.* 568; *Walton v. Wild Goose Min. etc. Co.*, 123 *Fed.* 209, 60 *C. C. A.* 155; *Waskey v. Hammer*, 170 *Fed.* 31; *Reins v. Raunheim*, 28 *L. D.* 526, 529. The discovery should, however, be made before application for a patent on the claim: *In re James Mitchell*, 2 *L. D.* 752.

The whole question was elaborately considered by the United States supreme court in the comparatively recent case of *Creede etc. Milling Co. v. Uinta Tunnel etc. Co.*, 196 *U. S.* 337, 25 *Sup. Ct. Rep.* 286, 49 *L. ed.* 501. The court, referring to the statute which requires the discovery of a mineral-bearing vein or lode within the limits of the claim, said: "But what is the meaning of the statute? Its language is 'no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.' Does that require that a discovery must be made before any marking on the ground, especially when, as under the Colorado statutes, several other steps in the process of location are prescribed, or does it mean that no location shall be considered as complete until there has been a discovery? Bearing in mind that the principal thought of the chapter is exploration and appropriation of mineral, does it mean anything more than that the fact of discovery shall exist prior to the vesting of that right of exclusive possession which attends a valid location? This may be looked at in another aspect. Suppose a discovery is not made before the marking on the ground and posting of notice, but is then made, and it and all other statutory provisions are complied with before the entry, which is an application for the purchase of the ground—of what benefit would it be to the government to require the discoverer to repeat the marking on the ground, the posting of notice, and other acts requisite to perfect a location? If everything has been done which, under the law ought to be done to entitle the party to purchase the ground, wherein is the government prejudiced if the precise order of those acts is not followed? Or, to go a step further, suppose, on an application for a patent, an adverse suit is instituted, and on the trial it appeared that the plaintiff in that suit had made a discovery and taken all the steps necessary for a location in the statutory order, although not until after the applicant for the patent had done everything required by law, would there be any justice in sustaining the adverse suit, and awarding the property to the plaintiff therein, on the ground that the applicant had not made any discovery until the day after his marking on the ground, and so the discovery did not precede the location? These suggestions add strength to the concurring opinion of three leading commentators

on mining law, the general trend of the rulings of the department and decisions of the courts, to the effect that the order in which the several acts are done is not essential, except so far as one is dependent on another. Doubtless a locator does not acquire a right of exclusive possession unless he has made a valid location, and discovery is essential to its validity; but if all the acts prescribed by law are done, including a discovery, is it not sacrificing substance to form to hold that the order of those acts is essential to the creation of the right? It must be remembered that the discovery and the marking on the ground are not matters of record put in pais, and, if disputed in an adverse suit or otherwise, must be shown as other like facts, by parol testimony."

f. Local Statutes Relative to Time of Sinking Discovery Shaft.—

Under the statutes which exist in several of the states requiring the discovery shaft to be sunk within sixty or ninety days, it has been held that the discovery must be made within that period: *Wiltsee v. King of Arizona etc. Co.*, 7 Ariz. 95, 60 Pac. 896; *Patterson v. Hitchcock*, 3 Colo. 533; *Bramlett v. Flick*, 23 Mont. 95, 57 Pac. 869. We have doubts, however, of the validity of legislation of that character on the ground that it creates requirements for the location of a mining claim which are not authorized by the United States law authorizing legislation by the states on the subject not in conflict with the laws of the United States on the subject.

g. Whether Two Locations can be Based upon One Discovery.—A discovery of mineral is an entirety and is not susceptible of being divided and parceled out among the discoverers. The law contemplates that the discoverer shall have a right to locate his claim to the exclusion of others, and if the discovery is made by two parties; but one location can be made by them, for it is but a simple discovery. Hence a simple discovery cannot be construed into two discoveries in order to support two locations, by merely running an imaginary line through the discovery point: *In re Poplar Creek Con. Quartz Mine*, 16 L. D. 1; *Reynolds v. Pascoe*, 24 Utah, 219, 66 Pac. 1064.

But where a discovery shaft is partly on the claim located and partly on another claim which had been previously located, it will be deemed a sufficient discovery upon which to base the last location: *Larkin v. Upton*, 14 U. S. 19, 12 Sup. Ct. Rep. 614, 36 L. ed. 330. It will be observed on an examination of the last cited case that the discovery shaft in question was one sunk by the last locators on their north end line, which formed the south end line of the claim which had been previously located, and the jury rendered a special finding to the effect that the vein or lode was discovered south of the line and within the limits of the last location, and that its top or apex was not within the limits of the prior claim.

In *Phillips v. Brill*, 17 Wyo. 41, 95 Pac. 856, the court refused to pass upon the question whether a gas-well situate upon the boundary line of two placer locations could serve as a discovery for both locations, although the question appears to have been ably argued by counsel. The court, however, said: "This much may be said. The question in relation to placer claims does not seem to have arisen in any reported case. In reference to lode claims, the text-writers do not agree upon the question. Lindley states the proposition, adopting the syllabus of a decision of the land department, that a dis-

covery is not susceptible of subdivision for the purpose of two locations having a common end line that bisects the discovery shaft. Snyder, on the other hand, says that two locations may be made upon one discovery, a portion of the vein being found within the limits of each claim, and he states his reason for thinking that to be the correct principle: 1 Lindley on Mines, 2d ed., sec. 337; 1 Snyder on Mines, secs. 351, 356. The following are the only cases appearing to touch the questions: *Larkin v. Upton*, 144 U. S. 19, 12 Sup. Ct. Rep. 614, 36 L. ed. 330; *Poplar Creek Con. Quartz Mine*, 16 Land Dec. Dept. Int. 1; *McKinstry v. Clark*, 4 Mont. 370, 1 Pac. 759; *Upton v. Larkin*, 7 Mont. 449, 17 Pac. 728; *Reynolds v. Pascoe*, 24 Utah, 219, 66 Pac. 1064; *Healey v. Rupp*, 28 Colo. 102, 63 Pac. 319, 21 Morr. Min. Rep. 117. The case of *Reynolds v. Pascoe* did not involve a discovery on a common boundary line, and merely holds in this connection that it is not permissible for a party to locate two or more claims over the same discovery point. In *Healey v. Rupp* there was a shaft partly on each of two adjoining claims, but it does not appear that the two "claims had been located upon or depended upon the discovery in the same shaft."

h. Whether Discovery on Abandoned Claim can Serve for Location of Additional Ground.—A prior discovery on an adjoining oil claim which completes the location of that claim cannot be used as a basis of discovery for an association claim of one hundred and sixty acres in which the claim upon which the discovery was made would be included where such an association claim would interfere with the locators of ground included therein, who were in possession and preparing in good faith and with proper diligence to drill a well thereon. Such a course would lead to strife and bloodshed, and hence a rule which would allow such a course of conduct cannot be sanctioned by the courts: *Weed v. Snook*, 144 Cal. 439, 442, 77 Pac. 1023.

i. Sufficiency of Discovery of One Kind of Mineral.—The discovery of one mineral and a valid location carries with it all other minerals, excepting only such veins or lodes of quartz as are described in section 2320, United States Revised Statutes, as not passing with a placer claim. Hence the fact that the locator designates his location as a "placer mining or stone quarry claim" does not limit him to the stone quarry found thereon, but he is entitled to all mineral deposits therein: *Freezer v. Sweeney*, 8 Mont. 508, 21 Pac. 20.

j. Sufficiency of Single Discovery for an Association Placer Claim. A placer claim, if made by an association of persons, may include as much as one hundred and sixty acres of ground. Such a claim, however, is regarded as only a single claim, and hence a single discovery is sufficient to support it: *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444; *McDonald v. Montana Wood Co.*, 14 Mont. 88, 43 Am. St. Rep. 616, 35 Pac. 668; *Whiting v. Straup*, 17 Wyo. 1, 19, 129 Am. St. Rep. 1093, 95 Pac. 849; *Olive Land etc. Co. v. Olmstead*, 103 Fed. 568; *Rein v. Raunheim*, 28 L. D. 358; *In re H. H. Yard*, 38 L. D. 59.

The Land Department, in *Re Union Oil Co.*, 25 L. D. 351, speaking through Acting Secretary Ryan, in this connection, said: "On the point now being considered, the 'circumstances and conditions,' and the 'proceedings,' requisite in vein or lode claims, are, that 'no

location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.'

"This provision of the law distinctly makes discovery the basis of all vein or lode claims. There can be no legal location until there has been a discovery. It is to be observed that discovery and not discoveries is what is required on each claim before location. This requirement or condition applies to every claim whatever its dimensions, whether equal to or less than the maximum area allowed: Placer claims are declared to be subject to entry and patent under *like circumstances and conditions* and upon similar proceedings. The statute demands that discovery shall precede a vein or lode location, and the only demand as to placer claims, is that they shall be preferred under *like circumstances and conditions*, and upon *similar proceedings*. [The italics are by the secretary.] There is nothing in the statute requiring different proceedings in the matter of discovery on placer claims from those required for vein or lode claims. The law is precisely the same in both cases: That no location can be made until there has been a discovery of mineral within the limits of the claim located. A placer location, if made by an association of persons, may include as much as one hundred and sixty acres. It is nevertheless a single location, and as such only one discovery is, by the statute, required to support it. The provision in section 2331, that 'no such location shall include more than twenty acres for each individual claimant,' does not militate against this view. A placer location may be of a greater or less quantity of land, according to the number of persons uniting in it, the only limitations in this respect being that it shall not include more than twenty acres for each individual, or one hundred and sixty acres, as a whole. Whatever its area, however, but one discovery of mineral within the limits of the claim is required to precede its location. If it be of twenty acres, located by one or more persons, it must be based on discovery; or, if it be of one hundred and sixty acres, by eight or more persons, it is but one location, and but one discovery is required by the statute. This was the construction given by the supreme court of Montana (1894) in the case of McDonald v. Montana Wood Co., 14 Mont. 88, 43 Am. St. Rep. 616, 35 Pac. 668, and it seems to be in accord with both the letter and spirit of the law. In view thereof, and of what has been herein said on this point, I am constrained to hold that but one discovery of mineral is required to support a mining location under the placer laws, whether it be of twenty acres by an individual or of one hundred and sixty acres or less, by an association of persons."

k. Right of Land Department to Investigate Alleged Discoveries Within National Forests.—The Land Department has full authority, of its own motion or at the instance of others, to inquire into and determine whether mining locations within national forests were preceded by the requisite discovery of mineral and whether the lands are of the character subject to occupation and purchase under the mining laws, notwithstanding the locator has not applied for patent; and if the locations be found to be invalid, the lands covered thereby will be administered as part of the public domain, subject to the reservation for forest purposes without regard to the locations: In re H. H. Yard, 38 L. D. 59. In so holding, First Assistant Secretary Pierce, at page 66, said:

"As to public lands not valuable for their mineral deposits within national forests, the forestry reservation attaches absolutely and the government, through its proper executive officers, is entitled to the free and unrestricted possession and control of such area and the timber growing thereon, in order to properly administer the same as the law directs. Mining claims not asserted in good faith and not based upon any sufficient discovery of mineral interfere with and infringe upon the governmental right of possession, control and administration. In such cases a determination as to the character of the land and the validity of locations becomes essential, and that duty devolves upon the Land Department. In a national forest, the government occupies a position, so far as the mining claimant is concerned, very similar to that of an individual claimant upon the open public domain under any of the nonmineral land laws, and the government is not without its remedy any more than the individual, when rights under the law are not respected.

"Again, if the asserted placer locations are without proper foundation and are unlawful, as is alleged, and if, as the record indicates, these claimants have constructed telephone lines, wagon roads, trails, ditches, dams, and reservoirs within the national forest without proper application having been made therefor and requisite authority granted in that behalf by the proper officer, pursuant to the statutes and regulations governing those matters, such construction work within the reserve is unlawful and constitutes a trespass, merely colorable mining locations affording no protection for such unwarranted intrusion and unlawful invasion upon the territory of the national forest. The investigation of these matters is clearly cognizable before the Land Department in order that the actual facts and circumstances may be ascertained and declared and that such further and appropriate action may be taken in regard thereto as will secure compliance with and enforcement of the laws and regulations controlling such works."

1. Discovery Alone Without Other Locatory Acts.—Mere discovery without other locatory acts is not sufficient. The discovery is but one step in the acquisition of a mining claim. It must be followed by or follow a location, which consists of the marking of the claim in such a manner that its boundaries can be readily traced, the posting of a notice thereon, and, where the state or district law requires it, the recording of such notice: *Adams v. Crawford*, 116 Cal. 495, 48 Pac. 488; *Pelican & D. Min. Co. v. Snodgrass*, 9 Colo. 339, 12 Pac. 206. Discovery with possession but without location is not good as against a subsequent peaceable location: *Horswell v. Ruiz*, 67 Cal. 111, 7 Pac. 197; *Gleeson v. Martin White Min. Co.*, 13 Nev. 442.

V. What Constitutes a Discovery of Mineral.

a. General Rule.—In our consideration of this subject we shall not go into the question as to what sort of a geological formation constitutes a lode within the meaning of the mining law. The vein or lode to be discovered must be one which contains mineral of the class designated by the statute, and the most important question in respect to lode claims is whether the lode contains mineral within the meaning of the mining law.

A vein is discovered when there is a well-defined body of rock in place carrying gold disclosed, which body is afterward proven to be

continuous without regard to the value of such body as pay ore: *Golden Terra Min. Co. v. Mahler*, 2 Dak. 377, 11 N. W. 98.

The general rule on the question as to what constitutes a discovery is quite well settled. The difficulty lies in applying the rule to the various conditions under which mineral is found.

The adaptability of the federal mining law to the variant conditions to be found in various mining districts in respect to what sort of a find amounts to a discovery within the statute was early in the history of mining law shown by Judge Hawley, who is regarded by lawyers versed in mining law as one of the most eminent jurists who have expounded the law relating to mines, in the case of *Book v. Justice Mining Co.*, 58 Fed. 106. The federal mining law, though a piece of compromise legislation, was framed by men who were conversant with the conditions actually existing in mining communities. Hence decisions by judges who by their opinions show a practical knowledge of the business of mining are entitled to great consideration. In the case cited above, Judge Hawley, after quoting section 2320, United States Revised Statutes, which provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," said:

"The words 'vein or lode,' in the last clause of this statute, were evidently intended to apply to such 'veins or lodes' as were described in the first section, and to have the same meaning, viz., a vein or lode 'of quartz or other rock in place bearing gold, silver,' etc. This statute was intended to be liberal and broad enough to apply to any kind of a lode or vein of quartz or other rock-bearing mineral, in whatever kind, character, or formation the mineral might be found. It should be so construed as to protect locators of mining claims, who have discovered rock in place, bearing any of the precious metals named therein, sufficient to justify the locators in expending their time and money in prospecting and developing the ground located. It must be borne in mind that the veins and lodes are not always of the same character. In some mining districts the veins, lodes, and ore deposits are so well and clearly defined as to avoid any questions being raised. In other localities the mineral is found in seams, narrow crevices, cracks, or fissures in the earth, the precise extent and character of which cannot be fully ascertained until expensive explorations are made, and the continuity of the ore and existence of the rock in place, bearing mineral, is established. It never was intended that the locator of a mining claim must determine all these facts before he would be entitled, under the law, to make a valid location. Every vein or lode is liable to have barren spots and narrow places, as well as rich chimneys and pay chutes, or large deposits of valuable ore. When the locator finds rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim.

"Numerous references have been made by the respective counsel to the works of scientists as to the origin of ore deposits, the character of mineral formations, and the causes thereof: *Le Conte's Elements of Geology*, 205, 207, 220, 225, 228, 235, 236; *Phillips on Ore Deposits*, 18, 19, 32, 35, 74, et seq.; *Von Cotta's Treatise on Ore*

Deposits, 26, 27, 34, 35, 69, 70, which have been examined. Various courts have at different times given a definition of what constitutes a vein or lode, within the meaning of the act of Congress; but the definitions that have been given, as a general rule, apply to the peculiar character and formation of the ore deposits or vein matter, and of the country rock, in the particular district where the claims are located. There is no conflict in the decisions; but the result is that some definitions have been given in some of the states that are not deemed applicable to the conditions and surroundings of mining districts in other states, or other districts in the same state. The following cases are instructive upon the point, and are here cited. Some of them will be more particularly noticed after the facts of this case are reviewed: *Overman S. Min. Co. v. Corcoran*, 15 Nev. 147; *Eureka Consolidated Min. Co. v. Richmond Min. Co.*, 4 Saw. 302, Fed. Cas. No. 4548; *Mt. Diablo M. & Min. Co. v. Callison*, 5 Saw. 439, Fed. Cas. No. 9886; *Jupiter Min. Co. v. Bodie C. Min. Co.*, 7 Saw. 96, 11 Fed. 666; *North Noonday Min. Co. v. Orient Min. Co.*, 6 Saw. 299, 1 Fed. 522; *Hyman v. Wheeler*, 29 Fed. 347; *Doe v. Waterloo Min. Co.*, 54 Fed. 935; *Iron S. Min. Co. v. Cheesman*, 116 U. S. 529, 6 Sup. Ct. Rep. 481, 29 L. ed. 712; *Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98; *Upton v. Larkin*, 7 Mont. 449, 17 Pac. 728; *Mining Co. v. Mahler*, 4 Morr. Min. Rep. 390; *Duggan v. Davey*, 4 Dak. 110, 28 N. W. 887; *Harrington v. Chambers*, 3 Utah, 94, 1 Pac. 362; *Armstrong v. Lower*, 6 Colo. 393."

And in answer to the proposition that it was necessary to find a lode which carried sufficient values to pay the cost of mining in order to constitute a discovery, the learned judge said:

"If this theory were adopted by the courts, it would invalidate many mining locations. Logically carried out, it would prohibit a miner from making any valid location until he had fully demonstrated that the vein or lode of quartz or other rock in place, bearing gold or silver, which he had discovered, would pay all the expenses of removing, extracting, crushing, and reducing the ore, and leave a profit to the owner. If this view should be sustained, it is manifest that it would lead to absurd, injurious, and unjust results, destructive of the rights of prospectors and miners, in their honest, patient, and industrious efforts to explore, discover, and develop the veins and lodes that exist in the public mineral lands of the United States. A vein or lode of quartz or other rock in place, bearing gold and silver, is found upon the side of a hill or mountain. It is within well-defined walls, and the rock assays from one dollar to fifteen dollars per ton. The cost of extracting, removing and milling the ore is twenty dollars per ton. The miner making the discovery is aware of this fact, but he knows, or has good reason to believe from his own knowledge, gained by years of experience, that, within or along the veins or lodes of that particular district, places are liable to be found that may prove to be much greater value, and that the ore is liable to be richer at a greater depth than it is upon the surface. Now, in such a case, can it be reasonably claimed, under the provisions of the mining laws, that the person making the discovery—a discovery which, in good faith, induces him to locate the vein or lode, and to commence the running of a tunnel into the hill or mountain for the purpose of properly working and developing the ground, and complying with all of the provisions of the law, after he has

expended thousands of dollars in labor and improvements upon the same—can be deprived of his location by the fact that other persons, subsequent to his discovery and to his location, went upon the hill five hundred or one thousand feet distant from the place where he had found and prospected the lode, but within the limits of his location, and there, by sinking a deeper shaft upon the same lode, found ore which assayed over forty dollars per ton—enough to insure a profit to the owners—and thereupon located the ground? This may be an extreme case, but it fairly illustrates the theory, for, according to the testimony of some of complainants' witnesses, the latter location would be valid, and the prior location invalid. The act of Congress is not susceptible of any such construction. It does not impose any conditions as to the value or extent of the ore. It simply provides that 'no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located.'"

The law does not require that the lode found shall be one which would appeal only to a miner in order to constitute a discovery. The law relating to the requisites for the location of mining claims applies to all persons regardless of their occupation. Thus, in *McShane v. Kenkle*, 18 Mont. 208, 56 Am. St. Rep. 579, 44 Pac. 979, 33 L. R. A. 851, it was said:

"The statutes of the United States (Rev. Stats., secs. 2319, 2320), and the interpretations placed upon them by the supreme court, so far as we are advised, have never required as a prerequisite to the location of a mining claim that a locator discover rock in place bearing any of the precious metals named in the statute sufficient to justify persons pursuing any particular phase of any particular occupation in life only, as distinguished from any others, in expending time and means in prospecting and developing the ground within the limits of the location. Any person may become a prospector by exploring a region of country for mineral; any person qualified by reason of citizenship in the United States may make a valid location of a mining claim by compliance with the law; and if the rock discovered by such a person is in place, and carries enough precious metal in it to justify the locator in expending his time and money in prospecting and developing the ground located, such a discovery is valid, and a location thereof may be made, no matter what the locator's vocation may be. The law does not discriminate. Its justification to locate extends to any citizens complying with its requirements; not only to the miner, whose experience lies in years of toil, but to the geologist, whose life has been in books of science, and to any other citizen, regardless of his calling. When the validity of a mining location is assailed upon the ground of no sufficient discovery, and there arises a question of whether the locator was justified in expending his time and money in prospecting and developing the ground located, then, of course, the testimony of mining men, including practical and scientific miners, geologists, and mineralogists, is most valuable, to the end that the court and jury may correctly determine if the locator has made a discovery of rock in place carrying precious metal sufficient to warrant his expending time and money in prospecting and developing his located ground. Such testimony fixes the character of the rock, the nature of the vein or seam or crevice, the formation of the country about, whether there is a well-defined

wall or not, the probabilities of the result of future development work, and in other material ways assists the court or jury in arriving at a just conclusion as to the existence or nonexistence of the facts plainly essential as bases for such justification. But if the justification is found, it is a justification to the locator by reason of the existence of facts—mineralogical and geological; while, if such facts exist, the justification exists, and whether or not it is such a justification as the practical miner would avail himself of is not of vital import."

It has been very strenuously urged by oil miners that a different rule should be declared in respect to what constitutes a discovery in respect to petroleum or other mineral oils than that which is applied to the metallic minerals, for the reason that an oil miner is obliged to expend so much time and money in sinking a well to ascertain whether he has discovered mineral under the rule which has been applied to the metallic minerals. We do not think any different rule is necessary for the protection of bona fide oil miners than exists at the present time, provided that a person who has initiated a location and is diligently pursuing his work of discovery will be accorded a vested right to continue such work of exploration a reasonable length of time before losing his right of possession. It would not, of course, be proper for such an inchoate locator to maintain possession of the ground embraced within his location an indefinite length of time without diligently continuing the work of drilling and thereby prevent others from attempting to discover the oil. The question as to the nature and extent of the right of an inchoate locator to remain in possession of the ground embraced in his location has not been as satisfactorily determined by the courts as the importance of the subject demands and especially so in view of the invitation extended to prospectors to explore the public domain declared by section 2319, United States Revised Statutes, which for purposes of public policy declares all valuable mineral deposits in lands of the United States to be free and open to exploration and purchase under the mineral laws.

The question of discovery as applied to oil claims was presented to the United States supreme court in *Chrisman v. Miller*, 197 U. S. 313, 25 Sup. Ct. Rep. 468, 49 L. ed. 770. In discussing the question the court said:

"What is necessary to constitute a discovery of mineral is not prescribed by statute, but there have been frequent judicial declarations in respect thereto. In *United States v. Iron Silver Min. Co.*, 128 U. S. 673, a suit brought by the United States to set aside placer patents on the charge that the patented tracts were not placer mining ground but land containing mineral veins or lodes of great value, as was well known to the patentee on his application for the patents, we said (p. 683, L. ed. 575): 'It appears very clearly from the evidence that no lodes or veins were discovered by the excavations of Sawyer in his prospecting work, and that his lode locations were made upon an erroneous opinion, and not upon knowledge, that lodes bearing metal were disclosed by them. It is not enough that there may have been some indications, by outcroppings on the surface, of the existence of lodes or veins of rock in place having gold or silver or other metal, to justify their designation as "known" veins or lodes. To meet that designation the lodes or veins must be clearly ascer-

tained, and be of such extent as to render the land more valuable on that account, and justify the exploitation. Although pits and shafts had been sunk in various places, and what are termed in mining crosscuts had been run, only loose gold and small nuggets had been found, mingled with earth, sand and gravel. Lodes and veins in quartz or other rock in place bearing gold or silver or other metal were not disclosed when the application for the patent was made.' This definition was accepted as correct in *Iron Silver M. Co. v. Mike & Starr G. & S. M. Co.*, 143 U. S. 394, 12 Sup. Ct. Rep. 543, 36 L. ed. 201, though in that case there was a vigorous dissent upon questions of fact, in which Mr. Justice Field, speaking for the minority, said (p. 412, 36 L. ed. 207): 'The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral'; and again (p. 424, 36 L. ed. 211): 'It is not every vein or lode which may show traces of gold or silver that is exempted from sale or patent of the ground embracing it, but those only which possess these metals in such quantities as to enhance the value of the land and invite the expenditure of time and money for their development. No purpose or policy would be subserved by excepting from sale and patent veins and lodes yielding no remunerative return for labor expended upon them.' By the Land Department this rule has been laid down: *Castle v. Womble*, 19 L. D. 455, 457. 'Where minerals have been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby all valuable mineral deposits in lands belonging to the United States . . . are . . . declared to be free and open to exploration and purchase.' Some cases have held that a mere willingness on the part of the locator to further expend his labor and means was a fair criterion. In respect to this, Lindley on Mines, first edition, section 336, says: 'But it would seem that the question should not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, will be a mere mental state which could not be satisfactorily proved. The facts which are within the observation of the discoverer, and which induce him to locate, should be such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property.'

But there must be something more than a mere guess on the part of the miner of the existence of mineral in order to authorize him to make a location which will exclude others from the ground: *Copper Globe Min. Co. v. Allman*, 23 Utah, 410, 64 Pac. 1019; *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. Rep. 565, 28 L. ed. 1113. The existence of the mineral-bearing vein or lode within the limits of the claim must not be merely conjectural or imaginary: *King v. Amy etc. Min. Co.*, 152 U. S. 222, 14 Sup. Ct. Rep. 510, 38 L. ed. 419. It must be, as was said by Mr. Justice Henshaw in *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444, "something more than conjecture, hope or even indications." It is suffi-

cient, however, if a person of ordinary prudence would be justified in the further expense of labor and money with a reasonable prospect of success in developing a mine: *Shreve v. Copper Bell Min. Co.*, 11 Mont. 309, 28 Pac. 315; *Harrington v. Chambers*, 3 Utah, 94, 1 Pac. 362; *Castle v. Womble*, 19 L. D. 455.

Inasmuch as the apex of a vein is not necessarily a point, but often a line of great length, the finding of any portion of the apex on the course or strike of the vein within the limits of a claim is sufficient discovery to entitle the locator to obtain title. But in such a case the vein beyond the end lines of the location is subject to further discovery and appropriation: *Larkin v. Upton*, 144 U. S. 19, 12 Sup. Ct. Rep. 614, 36 L. ed. 330.

The location of a lode claim based on a valid discovery raises a presumption that the lode extends the whole length of the claim, and the burden of proof is on one who asserts the contrary: *Armstrong v. Lower*, 6 Colo. 393. But the discovery of a lode two or three hundred feet outside of the boundaries of the claim does not create any presumption of the possession of a vein or lode within such boundaries or that such a vein or lode existed within them: *Dahl v. Raunheim*, 132 U. S. 260, 10 Sup. Ct. Rep. 74, 33 L. ed. 324. Where a mining location is relocated, the relocater adopting a discovery shaft of the former locator as his discovery shaft, he must stand or fall by what is shown in said shaft, even though he knew of the existence of a vein within the limits of the claim: *McMillen v. Ferrum Min. Co.*, 32 Colo. 38, 105 Am. St. Rep. 64, 74 Pac. 461.

b. Surface Conditions and Indications.

1. "Float" Ore, Bunches and Pockets of Mineral.—To warrant the location of a mining claim, it is not sufficient to discover detached pieces of quartz or mere bunches of quartz not in place: *Jupiter Min. Co. v. Bodie Con. M. Co.*, 7 Saw. 96, 11 Fed. 666.

"It is the finding of the mineral in rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim": *Book v. Justice Min. Co.*, 58 Fed. 106. The mere discovery of mineral in broken or fragmentary condition is not sufficient to constitute a discovery: *Terrible Min. Co. v. Argentine Min. Co.*, 89 Fed. 583. And the fact that "float" is found in debris or loose material on a hillside, or that even six hundred dollars' worth of ore is found in an open cut, is not sufficient to constitute a discovery: *Waterloo Min. Co. v. Doe*, 56 Fed. 685.

But the first locator of a quartz lode is not confined simply to the solid quartz embodied in the bedrock, but is entitled to the loose quartz rock and decomposed material which was once a part of the lode and which had become detached: *Brown v. '49 & '56 Quartz Min. Co.*, 15 Cal. 152, 76 Am. Dec. 468.

2. Outcroppings of Vein Matter.—In order to constitute a discovery of mineral, it is not necessary that the showing on the surface be ore; it is sufficient if it be such a showing of vein matter that the locator is willing to spend his time and money in following it with the expectation of finding ore: *Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98; *Davidson v. Bordeaux*, 15 Mont. 245, 38 Pac. 1075; *Harrington v. Chambers*, 3 Utah, 94, 1 Pac. 362; *Hayes v. Lavaguino*, 17 Utah, 185, 53 Pac. 1029; *Montana Cent. Ry. Co. v. Migeon*, 68 Fed.

811. It is immaterial whether the mineral values in the outcroppings be rich or poor, provided that the locator be willing to spend his time and money in its development, and in a lode claim the outcroppings may be considered with special reference to the formation and character of the particular district: *Fox v. Myers*, 29 Nev. 169, 86 Pac. 793.

3. Oil Seepages, Sandstone, Shale and Other Geological Formations. As has been indicated before, it has on several occasions been strongly urged that the presence of oil seepages, sandstone, shale, and other geological formations which are sufficient in practice to induce oil-mining men to drill for oil, should be considered a discovery within the meaning of the mining law in the same manner that vein matter of a character which would induce miners to follow it up with the expectation of reaching ore is deemed to be a discovery, but the courts have held that the mere finding of surface indications of the character mentioned are not sufficient to constitute a discovery: *Miller v. Chrisman*, 140 Cal. 440, 446, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444; *Weed v. Snook*, 144 Cal. 439, 77 Pac. 1023; *McLemore v. Express Oil Co.*, 158 Cal. 559, ante, p. 147, 112 Pac. 59; *Bay v. Oklahoma etc. Min. Co.*, 13 Okl. 425, 73 Pac. 936; *Whiting v. Straup*, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849; *Nevada-Sierra O. Co. v. Home Oil Co.*, 98 Fed. 673; *Olive Land etc. Co. v. Olmstead*, 103 Fed. 568.

In order to make a discovery of petroleum, the showing must be such as to justify a prudent person in the expenditure of money and labor in its exploitation. A showing which merely suggests a possibility that the ground contains oil sufficient to make it "chiefly valuable therefor" is not sufficient to constitute a discovery. Thus the fact that the locator discovered "indications" of petroleum, saw a spring in which the oil came out and floated over the water in the summer time, when it was hot, and at other times saw water with oil and oil with water, although not in pools, is not a sufficient showing to constitute a discovery: *Chrisman v. Miller*, 197 U. S. 313, 25 Sup. Ct. Rep. 468, 49 L. ed. 770.

In *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444, Mr. Justice Henshaw, delivering the opinion of the court, said: "To constitute a discovery, the law requires something more than conjecture, hope, or even indications. The geological formation of the country may be such as scientific research and practical experience have shown to be likely to yield oil in paying quantities. Taken with this, there may be other surface indications, such as seepage of oil. All these things combined may be sufficient to justify the expectation and hope that, upon driving a well to sufficient depth, oil may be discovered, but one and all they do not in and of themselves amount to a discovery."

The question as to what amounts to a discovery of petroleum also arose in the case of *Nevada-Sierra Oil Co. v. Home Oil Co.*, 98 Fed. 673. In that case the oil locators had discovered sandstone and shale on the lands in controversy, and there were seepages of oil on some of the adjoining land as also wells which were producing more or less oil. The court held that these were nothing more than indications of existing oil under the surface of the ground in question which might or might not prove to be true. The court, speaking through Judge Ross, said (at page 676):

"Indications of the existence of a thing is not the thing itself. It is entirely true that the statute, requiring as a condition to a valid location the discovery of mineral within the limits of the claim, should, as between conflicting claimants to mineral lands, receive a broad and liberal construction, and so as to protect bona fide locators who have really made a discovery of mineral, whether it be under the statute providing for the location of vein or lode claims or placer claims. As was well said by Judge Hawley in *Book v. Justice Min. Co.*, 58 Fed. 106, in speaking of vein and lode claims: 'When the locator finds rock in place containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim.'

"So, in respect to placer claims, if a competent locator actually finds upon unappropriated public land petroleum or other mineral in or upon the ground, and so situated as to constitute a part of it, it is a sufficient discovery, within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay. The question whether a particular piece of the public land is more valuable for mineral than for agricultural purposes is one that does not arise in cases like the present. While, as has been said, the statute requiring a discovery of mineral as one of the essential conditions of a valid location of land under the mining laws should be liberally construed in behalf of bona fide locators, no court would be justified in ignoring the statutory requirement. Mere indications of mineral, I repeat, do not constitute the discovery of the mineral itself. If so, a location made upon the discovery of such indications, followed by the proper markings of the boundaries of the claim and the doing of the statutory amount of work within the prescribed time, whether the work resulted in the actual discovery of mineral or not, would entitle the locator to apply for, and upon due proof and payment receive, the government title to the land as mineral land; which obviously would not only be unauthorized by any provision of the statute, but would be in direct conflict with the sections already cited."

The case of *Olive Land etc. Co. v. Olmstead*, 103 Fed. 568, was an important decision in respect to what constitutes a discovery of petroleum. The case was decided upon the pleadings. The mineral claimants alleged that the land in controversy was of no agricultural value, and of but little, if any, value for grazing purposes; and had no appreciable value for any purpose except for the petroleum to be found therein. It was alleged that the land was situated in a well-recognized petroleum-producing belt; that adjacent properties in the belt were actually producing petroleum in large and profitable quantities, and that the surface indications of such producing lands and upon the lands in controversy are the same; that the surface rock and sand and the surface geological formation and stratification upon the lands in controversy were such as would lead any experienced petroleum expert or any practical geologist familiar with petroleum-bearing lands in California to pronounce it to be petroleum territory and chiefly valuable therefor. It was also alleged that one of the

most pronounced and well-marked anti-clinal folds of sandstone and shale formation of that part of the country runs through the land in controversy and has its apex thereon, and that where this anti-clinal fold is most exposed, by a declivity which sharply cuts it, bituminous sand several feet in thickness and one hundred or more feet long was clearly visible, and that this sand, when excavated, gave out a distinct odor of petroleum, and that such bituminous sand, in the formation in which it was found, shows the land in controversy to be mineral or petroleum in character, and constitutes such a discovery as would justify any prudent petroleum miner in locating the land as petroleum land, and in spending his time and money in developing it for its petroleum products. The case was decided upon the pleadings. The court, in holding that the showing was insufficient to constitute a discovery, said:

"In the case of *Gird v. California Oil Co.*, 60 Fed. 531, this court pointed out that the government title to oil-bearing lands can only be acquired, under existing laws, pursuant to the provisions of the mining laws relating to placer claims. And in the very recent case of *Nevada-Sierra Oil Co. v. Home Oil Co.*, 98 Fed. 673, it was here decided, as it had been many times before by other courts, as well as by the Land Department of the United States, that mere indications, however strong, are not sufficient to answer the requirements of the statute of the United States relating to placer as well as lode claims, which requires, as one of the essential conditions to the making of a valid location of unappropriated public land of the United States under the mining laws, a discovery of mineral within the limits of the claim. That decision seems to have occasioned surprise among those seeking to acquire from the government lands supposed to contain oil, although it was, as was shown in the opinion delivered at the time, in strict accord with the provisions of the statute, and is abundantly supported by the authorities: *Davis v. Weibbold*, 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35 L. ed. 238; *Dughi v. Harkins*, 2 Land Dec. Dep. Int. 721; *Cleghorn v. Bird*, 4 Land Dec. Dep. Int. 478; *Commissioners v. Alexander*, 5 Land Dec. Dep. Int. 126; and numerous cases cited in *Davis v. Weibbold*. It is a matter of common knowledge that, in consequence of the decision in the case of *Nevada-Sierra Oil Co. v. Home Oil Co.*, strenuous efforts were made by strong and influential organizations to induce Congress at its last session to dispense with the necessity of an actual discovery of oil as a basis of acquiring such lands under the placer mining laws, and to provide that certain indications of the existence of such mineral should be sufficient evidence of the mineral character of the land; but all of these efforts were unsuccessful, and the law remains the same in that respect as before. Applying the law to the facts as made to appear by the pleadings in the present case, it is clear that the location of the lands in controversy by the predecessors in interest of the defendants in October, 1899, under the statute relating to placer claims, amounted to nothing, for the reason that no discovery of oil or other mineral had then been made, nor, indeed, has yet been made, in or upon any part of the lands in controversy."

And basing its argument upon the fact that petroleum in valuable quantities is not found on the surface of the ground nor seeping from the earth, and is only found by drilling or boring into the depths of

the earth, the supreme court of Oklahoma has also declared in favor of the rule that surface conditions are not sufficient to constitute a discovery: *Bay v. Oklahoma etc. Min. Co.*, 13 Okl. 425, 73 Pac. 936.

c. **Geological Formations and Experiences of the Particular District.**—In many mining districts the miners follow lode formations which miners in other districts would not follow with the expectation of finding valuable ore, because the experience of their district has shown that certain formations, though apparently not promising, do in fact make mines. It was the knowledge of this fact that induced Mr. Justice Field in *Erhardt v. Boaro*, 113 U. S. 536, 5 Sup. Ct. Rep. 565, 28 L. ed. 113, to have said, with reference to what constitutes a discovery, that "a jury from the vicinity of the claim will seldom err in their conclusions on the subject."

In accordance with this view it has been held that the finding of seams, containing mineral, which are similar in character to the seams or veins that had induced others to locate claims in the same vicinity, and which when followed in depth developed into mines, are sufficient to constitute a discovery: *Shoshone Min. Co. v. Rutter*, 87 Fed. 801, 31 C. C. A. 223. In this case (which was reversed in the supreme court on other points: 177 U. S. 505, 20 Sup. Ct. Rep. 726, 44 L. ed. 864), the court in a very well-considered opinion, explained the rule in that respect, saying:

"The discovery was made in mining a tunnel, where small seams of iron oxide, quartz and small quantities of carbonate of lead were found, two or three inches wide. These indications were of such character as miners in that district would follow in the expectation of finding ore, and such as would justify miners in working a claim for that purpose. The rock in these seams was different from the country rock, and was of such character as is designated by the witnesses, who were practical miners, 'as a vein containing rock in place bearing minerals.' These facts show that the location was made in good faith, and not 'simply upon a conjectural or imaginary existence of a vein or lode,' which cannot be permitted: *King v. Amy etc. Min. Co.*, 152 U. S. 222, 14 Sup. Ct. Rep. 510, 38 L. ed. 419. The seams, containing mineral-bearing earth and rock, which were discovered before the location was made, were similar in their character to the seams or veins of mineral matter that had induced other miners to locate claims in the same district, which by continued developments thereon had resulted in establishing the fact that the seams, as depth was obtained thereon, were found to be a part of a well-defined lode or vein containing ore of great value. The discovery made at the time of the Kirby location was therefore such as to justify a belief as to the existence of such a lode or vein within the limits of the ground located: *Erhardt v. Boaro*, 113 U. S. 536, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113. The subsequent developments made after the claim was located, and before the location of the Shoshone, show more clearly the existence of a lode or vein. We are of opinion that the testimony on behalf of appellees is sufficient to show a compliance with the provision of section 2320, which requires that there must be a discovery of a vein or lode within the limits of the claim before a valid location thereof can be made: *In Book v. Justice Min. Co.*, 58 Fed. 106, the court, in construing this section of the statute, said: 'The words "vein or lode," in the last clause of this statute, were

evidently intended to apply to such veins or lodes as were described in the first section, and to have the same meaning, viz., a vein or lode "of quartz or other rock in place bearing gold, silver," etc. This statute was intended to be liberal and broad enough to apply to any kind of a lode or vein of quartz or other rock-bearing mineral, in whatever kind, character or formation the mineral might be found. It should be so construed as to protect locators of mining claims, who have discovered rock in place, bearing any of the precious metals named therein, sufficient to justify the locators in expending their time and money in prospecting and developing the ground located. It must be borne in mind that the veins and lodes are not always of the same character. In some mining districts the veins, lodes and ore deposits are so well and clearly defined as to avoid any question being raised. In other localities the mineral is found in seams, narrow crevices, cracks or fissures in the earth, the precise extent and character of which cannot be fully ascertained until expensive explorations are made, and the continuity of the ore and existence of the rock in place bearing mineral is established. It never was intended that the locator of a mining claim must determine all these facts before he would be entitled, under the law, to make a valid location. Every vein or lode is liable to have barren spots and narrow places, as well as rich chimneys and pay chutes, or large deposits of valuable ore. When the locator finds rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim: See, also, *Migeon v. Montana Cent. Ry. Co.*, 44 U. S. App. 724, 23 C. C. A. 156, 77 Fed. 249; *McShane v. Kenkle*, 18 Mont. 208, 56 Am. St. Rep. 579, 44 Pac. 979, 33 L. R. A. 851; *Bonner v. Meikle*, 82 Fed. 697. The purpose of the statute in requiring that 'no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located' was to prevent frauds upon the government by persons attempting to acquire patents to land not mineral in its character. But it was said in *Bonner v. Meikle*, 82 Fed. 697: It was never intended that the court should weigh scales to determine the value of mineral found, as between a prior and subsequent locator of a mining claim, on the same lode."

The evidence, however, of the geological conditions which the miners of the district have followed successfully merely goes to prove that one who follows such indications is acting in good faith and under a reasonable expectation of finding ore. The same practical rule was laid down by the supreme court of Idaho in *Ambergris Min. Co. v. Day*, 12 Idaho, 108, 85 Pac. 109. The court in that case said:

"If a miner has discovered certain mineral indications, which he has followed up, with the result that a rich and valuable ore body has been developed therefrom, it seems clear that another miner, finding similar indications and conditions on contiguous ground or in the immediate vicinity, would be in a measure justified in following up those evidences with a reasonable expectation of finding mineral deposits. And this is true, even though the indications, rock and deposits found are such as the expert, scientist, geologist and mineralogist in their finest of theories tell him are not evidence of mineral

deposits, or even that they are evidences of the entire absence of mineral. As a matter of fact, and greatly to their credit, these scholars, who have added so largely to the store of knowledge, have been observant and progressive enough to from time to time revise and modify their views and theories to keep apace with the actual demonstrations of the man who risks his judgment (though oftentimes a hazard) and delves into the earth at uninviting and unseemly places. The miner, as well as the man engaged in any other occupation or business, is entitled to act on experience and observations, and while he may not, and indeed will not, always attain the same results, the exception to the rule does not preclude him from availing himself of his own observations and those of his fellows, as well as demonstrated existing conditions."

d. Rule in Districts Where Blind Lodes are Found.—In many mining districts blind veins or lodes exist—that is, such as are entirely underneath the surface of the ground. Of course in some instances such mineral deposits may be located by means of a tunnel claim, but undoubtedly many such veins or lodes are located by miners by means of the croppings or surface indications. In some of the states, statutory provisions exist which require the sinking of the discovery shaft ten feet or more in order to disclose rock in place and allow the locator a definite time within which to sink such a shaft. It was held in *Field v. Grey*, 1 Ariz. 404, 25 Pac. 793, that where a locator attempts to locate such a blind vein or lode, he may hold the tract of land embraced within his mining location exempt from intruders while continuously and industriously seeking the vein or lode believed to exist therein.

A prospector in the actual possession of a tract of land covered by a mining location under which he has not made a discovery may, however, protect his actual possession of the entire claim by proper legal proceedings prior to making his discovery. He has a right to protect himself in the possession of his *pedis possessio* while he is searching for mineral: *Crossman v. Pendery*, 8 Fed. 693. In the case just cited Mr. Justice Miller said: "His possession so held is good as a possessory title against all the world, except the government of the United States. But if he stands by and allows others to enter upon his claim and first discover mineral in rock in place, the law gives such first discoverer a title to the mineral so first discovered, against which the mere possession of the surface cannot prevail."

e. Richness of Adjoining Claims in Aid of Discovery.—A discovery having been made, the probable value of the land for its mineral may be shown by evidence as to the value of adjoining tracts: *Hamilton v. Anderson*, 19 L. D. 168. And although the mere possibility that the ground may contain gold or that there are indications of the existence of mineral is not sufficient to justify a prudent person in expending money and work in its exploration, still where there is an actual existence of gold in the claim and the evidence of that fact is sufficient to submit to the jury upon the issue of discovery, the locator may strengthen his proof upon any of the elements which enter into what is comprehended by the term discovery. In doing so, he may supplement the showing that mineral actually did exist by evidence of the fact that the adjacent ground in the same gulch is rich in the same mineral, or that adjacent claims were developed into paying

mines after their development upon a similar showing of mineral, or that the geological conditions are so similar that it is reasonable to expect to find mineral in valuable quantities in the exploitation of the ground embraced in his claim. This evidence is for the purpose of showing that the locator was justified in expending his time and money in the location and development of the claim: *Cascaden v. Bortolis*, 162 Fed. 267. In laying down the foregoing sensible rule, Judge Hunt, in the case cited, said:

"It is not uncommon to find that certain physical conditions in one district may reasonably lead to the conclusion, if gold is found, that, by following certain slight showings of such mineral, deposits of immense value will be uncovered; while apparently like conditions in other districts may afford neither justifiable expectation, nor even well-founded hope, to the prospector. Such conditions are, nevertheless, evidentiary. They become proper as a means by which the alleged matter of discovery, the truth of which is being investigated, is established or disapproved. Of course, there must be a discovery of mineral within the limits of the claim before a valid location thereof can be made; but, as Judge Hawley said in his learned opinion upon quartz locations, in *Book v. Justice Min. Co.*, 58 Fed. 106: 'It must be borne in mind that the veins and lodes are not always of the same character. In some mining districts the veins, lodes and ore deposits are so well and clearly defined as to avoid any questions being raised. In other localities, the mineral is found in seams, narrow crevices, cracks or fissures in the earth, the precise extent and character of which cannot be fully ascertained until expensive explorations are made, and the continuity of the ore and existence of the rock in place bearing mineral is established. It never was intended that the locator of a mining claim must determine all these facts before he would be entitled under the law, to make a valid location.'

"How is the prospector for placer gold to be guided? He discovers gold, a few cents only to the pan. He knows he is in a gold-bearing placer region, but is unacquainted with any distinct characteristics of the mineral-bearing area in the vicinity where he has made his discovery. Naturally, he does not wish to make a location unless the mineral discovered is of sufficient value to justify the belief that the ground will be valuable for placer mining. He is thus confronted with the need of deciding whether or not he is justified in spending his time and money in going ahead with his work, expecting to find gold in paying quantities. To aid him in making up his mind, he will consult miners who are experienced in that particular district. He will find out the special character of the country about, and will at once gather all the knowledge he can readily obtain of how the adjacent claims are paying, where the pay-streak is likely to be, and what amount of gold was discovered by the miners who located such other claims and developed them afterward, and what method of development was adopted; and when he has informed himself upon these matters, he will use the information, together with the fact that he has found mineral, as a basis for a justification for action, and, if the justification for his action is well founded, the facts and circumstances upon which it was based are proper to be shown. 'It is impossible,' says Lindley on Mines, section 437, 'to lay down any arbitrary rule to govern all cases as to what may be a sufficient dis-

covery upon which to predicate a location. It is a question of fact, to be determined from a consideration of all the circumstances and surroundings.' The same doctrine is recognized by Judge De Haven, speaking for this court, in *Lange v. Robinson*, 148 Fed. 799, 79 C. C. A. 1, citing authorities: *Nevada-Sierra Oil Co. v. Home Oil Co.*, 98 Fed. 673; *Shoshone M. Co. v. Rutter*, 87 Fed. 801, 31 C. C. A. 223."

f. Whether Pay Ore or Gravel is Necessary to be Found.—In order to constitute a discovery, it is not necessary that pay ore or gravel be found: *Score v. Griffin*, 9 Ariz. 295, 80 Pac. 331; *Tuolumne Con. Co. v. Maier*, 134 Cal. 583, 66 Pac. 863; *Armstrong v. Lower*, 6 Colo. 393; *Golden Terra Min. Co. v. Mahler*, 4 Morr. Min. Rep. 390; *Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98; *Shreve v. Copper Bell Min. Co.*, 11 Mont. 309, 28 Pac. 315; *McShane v. Kenkle*, 18 Mont. 204, 56 Am. St. Rep. 579, 44 Pac. 979, 33 L. R. A. 851; *Murray v. White*, 42 Mont. 423, 113 Pac. 754; *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147; *Muldrick v. Brown*, 37 Or. 185, 61 Pac. 428; *Book v. Justice Min. Co.*, 50 Fed. 106; *Shoshone Min. Co. v. Rutter*, 87 Fed. 801, 31 C. C. A. 223.

The value of mineral discovered in a mining claim will not be inquired into by the Interior Department except in a controversy between mineral and agricultural claimants: *Tam v. Story*, 21 L. D. 440. The law does not require any particular degree of richness in order to support a quartz location. It only requires that there shall be sufficient indication to justify a reasonably prudent person in expending his time and money in its development: *Muldrick v. Brown*, 37 Or. 185, 61 Pac. 428. Thus, for instance, in order to constitute a discovery of gold in a placer claim as against another mineral claimant, it is not necessary that gold must have been found thereon in paying quantities, but there must have been such a discovery of gold as to give reasonable evidence that the ground is valuable for placer mining, taking into consideration its character, location and surroundings: *Charlton v. Kelly*, 156 Fed. 433, 84 C. C. A. 295, 13 Ann. Cas. 518. In the case cited the court in explaining the charge of the trial court said:

"It is argued that a discovery sufficient to justify the expenditure of time and money in the development of a mining claim must necessarily be greater than that which is necessary to justify the expenditure of money for the purpose of exploration, with the reasonable expectation that, when developed, the claim will be found valuable as a placer mining claim. Counsel for the plaintiffs in error have assumed for the word 'development' a broader meaning than was intended in the charge. The court did not mean that, in order to comply with the law, there must be such a discovery as to justify the expenditure of time and money upon a claim to the extent of opening up the whole thereof and acquiring an exhaustive knowledge concerning its resources. The word as it was used by the court, and as in connection with the whole charge it must have been understood by the jury, was equivalent to the word 'exploration,' and was used in the sense in which it was employed in *Chrisman v. Miller*, 197 U. S. 313, 25 Sup. Ct. Rep. 468, 49 L. ed. 770, in which the court thus quoted with approval the language of Mr. Justice Field in a prior case: 'The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify the expenditure of money for the development of the mine and the extraction of the mineral.'"

Expert evidence is admissible to show that the claim contains such a vein as a miner would be likely to follow with the reasonable expectation of finding pay ore: *Harrington v. Chambers*, 3 Utah, 94, 1 Pac. 362.

The fact that "pay ore" is not expected by mining locators in making the discovery which is sufficient for a reasonably prudent man to be willing to spend his time and money in exploration and development is amply shown by the significance with which the man with experience in such affairs often speaks of a location as a "hole in the ground." This view was very aptly expressed by Mr. Justice De Witt in his dissenting opinion in *Shreve v. Copper Bell Min. Co.*, 11 Mont. 309, 28 Pac. 315 (which was concurred in by the majority of the court on this point), wherein the learned justice said:

"There may be a vast difference between mineral ground which is valuable for exploitation and that which appears to be valuable for exploration. There are immense tracts which appear to the miner to be valuable for the latter purpose, and a large portion of which develops to be valueless for the former. This is evidenced by the honey-combed and deserted mountains throughout the mining regions, where toil and wealth have been expended on leads which once attracted the miner's exploration, but where the sound of the pick and the drill is long since stilled. And it is just this fact that has made and will make the mines: the ever-present and alluring appearance of value, and the occasional reward of development. Without prospecting, there will be no discovered mines. Without the privilege to claim and locate and hold a discovery, there will be no prospecting. A prospect not once in one hundred times is a mine in sight. If the locator must show a paying mine at location, the riches in these mountains are a locked treasury. The law does not contemplate this. The mineral lands are open for two purposes—for exploration, and for purchase. Exploration precedes purchase. It opens the way for purchase. Without exploration, purchase would be rare. A miner would desire to purchase the mineral lands at once, if they at once appeared to be of sufficient value to pay to work. He would desire to explore them, if they seemed sufficiently valuable to attract exploration. It is a rare claim that is a mine at the grass roots, or where the paying vein is first found at or near the surface. The history of the mining countries has shown that, in the vast majority of cases, years of toil and thousands of dollars have been required to demonstrate that a mineral vein will pay to work. And in many of them, even after years of immense production, when dead work, prospecting and development is offset against output, whether they have paid to work is a doubtful proposition. Must the miner await large development and tremendous expenditure before he can take the first steps, by locating and recording, to secure to himself the right of possession, and of a grant from the government, when the great mine is developed? I think not.

"Again, the government will not issue a patent for a mine at once upon discovery, no matter how valuable it then appears and actually is. It requires, first, the expenditure of five hundred dollars in improvement and development. For what purpose? In order to demonstrate that the claim is of that character that the government will grant the ground as a mine. Before the mining acts of Congress, the miner was a trespasser upon the public domain. The acts of Con-

gress gave him rights upon the mineral lands. The object of the requirement of the expenditure of one hundred dollars annually before the issuance of patent, and of five hundred dollars in the aggregate before patent, was to develop the mines and demonstrate their character. If it were the ordinary nature of valuable mining claims to appear, upon the instant of discovery, to be of sufficient value to pay to work them, why make the requirements of these expenditures in development before the issuance of patent? The whole spirit of the statute, and the construction given by the learned tribunals that have considered them, is not that the prospector must find a paying mine before he can locate his claim. If it were, mining prospecting in these regions would suffer an instant and well-nigh total paralysis. If the fear be suggested that speculative locations may take the public domain, we can do no better than adopt the language of Mr. Justice Field, cited above from *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, which he concludes with the remark that 'a jury from the vicinity of the claim will seldom err in their conclusions on the subject.'

g. Effect of Assays in Ascertaining Discovery.—When a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, with this qualification—that the definition of a lode must always have special reference to the promotion and peculiar characteristics of the particular district in which the lode or vein is found: *Bonner v. Meikle*, 82 Fed. 697; *Book v. Justice Min. Co.*, 58 Fed. 106; *Fox v. Myers*, 29 Nev. 169, 86 Pac. 793; *Columbia Copper Min. Co. v. Duchess Min. etc. Co.*, 13 Wyo. 244, 79 Pac. 385. But the mere fact that samples when assayed showed an appreciable amount of gold is not sufficient to constitute a discovery in the absence of proof of the continuity of the vein or lode: *Ledoux v. Forester*, 94 Fed. 600.

But assays of rock taken from a mining claim subsequent to its location are relevant to show that a mineral-bearing vein or lode was discovered at the time of the location: *Southern Cross etc. Min. Co. v. Europa Min. Co.*, 15 Nev. 383. The locator need not, however, show that he has made assays of the vein, when no one disputes the *prima facie* showing by the evidence of the prospector that the vein was a good one and appeared to be sufficiently good to justify locating and working it: *Davidson v. Bordeaux*, 15 Mont. 245, 38 Pac. 1075.

h. In Placer Claims Over Ancient River Channels.—In order to constitute a discovery of gold sufficient upon which to base a placer location, it is not necessary that gold be found within the limits of the claim in paying quantity, but there should be such a discovery of gold as gives reasonable evidence that the ground is valuable for placer mining, taking into consideration its character, location and surroundings. The question must be decided, not only with reference to the gold actually found within the limits of the claim, but also with reference to its situation in respect to other lands known to contain valuable deposits of placer gold. It is a material question whether its rock and soil formation is such as is usually found where these deposits are found in paying quantity. Hence where a claim is

located along a creek one mile from a tributary creek which has produced gold in paying quantity at bedrock from ninety to one hundred feet below the surface, the ground above bedrock not containing sufficient gold to pay for working it, it is a sufficient discovery to find from two to six fine colors of gold in washings of sediment deposited in and along the sides of the creek, where the general character of sediment deposit and soil formation is the same as on the tributary creek, and the "pay-streak" on such creek is often narrow and confined within the limits of an old channel which can be usually reached only by means of sinking shafts on the claims: *Lange v. Robinson*, 148 Fed. 799, 79 C. C. A. 1. In the case cited, which was decided by the circuit court of appeals, the opinion of the court was rendered by Judge De Haven, who fortified the rule above set forth, by very apt and well-reasoned cases supporting the common-sense rule announced by the court.

i. Question of Discovery as One of Fact.—The question whether there has been such a discovery of mineral as will sustain a mining location is one of fact: *Bryan v. McCaig*, 10 Colo. 309, 15 Pac. 413; *Columbia Copper Min. Co. v. Duchess Min. etc. Co.*, 13 Wyo. 244, 79 Pac. 385; *Iron Silver Min. Co. v. Mike etc. Co.*, 143 U. S. 394, 12 Sup. Ct. Rep. 543, 36 L. ed. 201; *Lange v. Robinson*, 148 Fed. 799, 79 C. C. A. 1; *Bonner v. Meikle*, 82 Fed. 697; *Meydenbauer v. Stevens*, 78 Fed. 787; *Book v. Justice Min. Co.*, 58 Fed. 106.

j. Distinction as to Rule in Contests Between Mineral Claimants and Nonmineral Entrymen.—The court does not weigh scales to determine the value of the mineral found as between a prior and subsequent locator of a mining claim on the same lode: *Migeon v. Montana Cent. Ry. Co.*, 77 Fed. 249, 23 C. C. A. 156.

After entry for patent has been made, in the absence of fraud and as between the claimant and the government, mineral will be found to have existed in the discovery shaft, if necessary to sustain the entry in case of a conflict of evidence on the question: *Wight v. Tabor*, 2 L. D. 738.

But where the controversy is between persons claiming the land as mineral and others seeking to make an agricultural entry, the court is not so liberal in respect to the sufficiency of the evidence relative to the making of a discovery. In such case where it is sought to take the lands out of the category of agricultural lands, the evidence of its mineral character should be reasonably clear. Where the question is one between mineral claimants alone, the question is largely one of priority: *Lange v. Robinson*, 148 Fed. 799, 79 C. C. A. 1. In *Chrisman v. Miller*, 197 U. S. 313, 25 Sup. Ct. Rep. 468, 49 L. ed. 770, the court, in speaking of this distinction, said:

"It is true that, when the controversy is between two mineral claimants, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands, the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is, simply, Which is entitled to priority? That, it is true, is the case before us. But even in such a case, as shown by the authorities we have cited, there must be such a discovery of mineral as gives reasonable evidence of the fact, either that there is a vein or lode

carrying the precious mineral, or, if it be claimed as placer ground, that it is valuable for such mining.

VI. Rights of Locator Prior to a Discovery of Mineral.

a. *Locator in Actual Possession Without a Location.*—Prior to the making of a discovery of mineral, public mineral land is said to be in law vacant and open to exploration and location, subject to the well-established rule that no prospector is authorized by any form of forcible, fraudulent, surreptitious, or clandestine conduct to enter or intrude upon the actual possession of another prospector. Every prospector upon the public domain is entitled to hold the place in which he may be working against all others having no better right: *Hanson v. Craig*, 170 Fed. 62. Judge Ross, after laying down the above rule, observed: "The matter is, we think, well and tersely put by Costigan on Mining Law, page 156, where he says: 'Pedis possessio means actual possession, and pending a discovery by anybody the actual possession of the prior arrival will be protected to the extent needed to give him room for work and to prevent probable breaches of the peace. But while the pedis possessio is thus protected, it must yield to an actual location on a valid discovery made by one who has located peaceably, and neither clandestinely nor with fraudulent purposes.'"

"These views are, we think, well sustained by numerous decisions of the supreme court, of this court, and various other courts, some of which we cite: *Del Monte Min. etc. Co. v. Last Chance Min. etc. Co.*, 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43 L. ed. 72; *Jennison v. Kirk*, 98 U. S. 453, 25 L. ed. 240; *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735; *King v. Amy & Silversmith M. Co.*, 152 U. S. 222, 14 Sup. Ct. Rep. 510, 38 L. ed. 419; *Creede v. Uinta M. Co.*, 196 U. S. 337, 25 Sup. Ct. Rep. 266, 49 L. ed. 501; *Cook v. Klonos*, 164 Fed. 529; *Johanson v. White*, 160 Fed. 901, 88 C. C. A. 83; *Malone v. Jackson*, 137 Fed. 878, 70 C. C. A. 216; *Nevada-Sierra Oil Co. v. Home Oil Co.*, 98 Fed. 673; *Olive Land & Development Co. v. Olmstead*, 103 Fed. 568; *Gemmel v. Swain*, 28 Mont. 331, 98 Am. St. Rep. 570, 72 Pac. 662; *Du Prat v. James*, 65 Cal. 555, 4 Pac. 562; *Horswell v. Ruiz*, 67 Cal. 111, 7 Pac. 197. Applying the foregoing decisions to the present case, it is impossible to hold upon the record here that the defendants in error had such a possession of the strip of public land six hundred and sixty feet wide and two miles long as precluded any other good-faith prospector from peaceably going within those boundaries and himself making a discovery and location. It is pertinent to add that the Land Department of the government has recently decided that it would not recognize any such shoestring location as conforming to the provisions of the United States statutes upon the subject."

Hence the rule appears to be quite well settled that a prospector who is in the actual possession of the ground and working with the intent of making a discovery will be protected in his possession, and upon making his discovery his location will relate back to the time of commencing work and be extended to territory to the extent of a full-sized claim if adverse rights had not intervened at the time of commencing his possession: *Omar v. Soper*, 11 Colo. 380, 7 Am. St. Rep. 246, 18 Pac. 443; *Gleeson v. Martin White Min. Co.*, 13 Nev. 442; *Golden Fleece Min. Co. v. Cable Con. Min. Co.*, 12 Nev. 312; *Marshall v. Harney Peak etc. Min. Co.*, 1 S. D. 350, 47 N. W. 290. Mere possession of mining ground without a location is good as

against an intruder who has made no location: *English v. Johnson*, 17 Cal. 107; *Gregory v. Pershbaker*, 73 Cal. 109, 14 Pac. 401; *Neubaumer v. Woodman*, 89 Cal. 310, 26 Pac. 900. And a person who is in the actual possession of public land on which he has attempted to make a mineral location is entitled as against everyone but the government to retain that possession: *New England etc. Oil Co. v. Congdon*, 152 Cal. 211, 92 Pac. 180. It has been held, however, that previous to the making of a discovery the rights of a locator are limited to the ground in his actual possession and not the tract included in his location notice: *Gemmell v. Swain*, 28 Mont. 331, 48 Am. St. Rep. 570, 72 Pac. 662. In other words, the right to the exclusive possession of mineral land not actually held in possession *pedis* may be acquired only by a legal location thereof: *Becker v. Pugh*, 9 Colo. 589, 13 Pac. 906.

Where, however, preliminary work is necessary to disclose whether a vein or deposit exists of such richness as to justify work to extract the mineral, the first locator is protected in his possession for that purpose: *Marshall v. Harney Peak etc. Co.*, 1 S. D. 350, 47 N. W. 290.

"If surface indications are found sufficient to warrant the prospector to spend his time and money on the property with the reasonable prospect of reaching deposits of greater commercial value, such indications will protect the prospector as against any new locator until he can follow up his indications and make the discovery": *Bay v. Oklahoma etc. Co.*, 13 Okl. 425, 73 Pac. 936.

We believe that the rule is now well settled in regard to both gold and petroleum placers, that where one who in good faith makes a location, remains in possession and prosecutes with due diligence his work toward a discovery, he is fully protected against all forms of forcible, fraudulent, surreptitious or clandestine entries and intrusions upon his possession: *Bulette v. Dodge*, 2 Alaska, 427; *McLemore v. Express Oil Co.*, 158 Cal. 559, ante, p. 147, 112 Pac. 59; *Weed v. Snook*, 144 Cal. 439, 77 Pac. 1023; *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444; *Moffatt v. Blue River etc. Co.*, 33 Colo. 142, 80 Pac. 139; *Bay v. Oklahoma etc. Co.*, 13 Okl. 425, 73 Pac. 936; *Phillips v. Brill*, 17 Wyo. 26, 95 Pac. 856; *Whiting v. Straup*, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849; *Cosmos v. Gray Eagle Oil Co.*, 112 Fed. 4, 50 L. R. A. 79, 61 L. R. A. 23.

The above rule is in accord with the rule which has long existed to the effect that one in possession of land peaceably and in good faith seeking to perform the acts necessary to make a complete location of a mining claim, will be protected in his possession for a reasonable time in order to give him an opportunity to complete his location: *Gregory v. Pershbaker*, 73 Cal. 109, 14 Pac. 401; *Patterson v. Hitchcock*, 3 Colo. 533; *Gleeson v. Martin White Min. Co.*, 13 Nev. 442; *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113.

And this rule is undoubtedly the only one under which oil locators can obtain any practical benefit under the laws now existing in respect to petroleum placers. The supreme court of Wyoming, in *Phillips v. Brill*, 17 Wyo. 26, 95 Pac. 856, has declared the rule in more detail than has any other court whose opinion we have observed. It said:

"At that time they performed all the necessary acts of location, except that of making discovery. The surrounding indications were unquestionably sufficient to justify them in prospecting the premises

with the expectation of finding oil or gas underneath the surface. Having staked the ground, put up the usual notice, and recorded the claim, the defendants had the right to take actual possession, and continue in such possession, at least for a reasonable time, while diligently at work thereon exploring the ground for the purpose of discovery. The previous acts of location would indicate, not only the extent of surface intended to be appropriated, but the extent of such possession, and the locators would be protected against the forcible, fraudulent, surreptitious, or clandestine entries or intrusions of others."

We believe that an inchoate mineral locator who has complied with all the statutory requirements for a valid mining location, with the exception of having made a discovery, and who is diligently prosecuting the work of discovery, has a right which is property of such a nature that he cannot thereafter be deprived of it without giving him a reasonable opportunity to make a discovery and thereby complete his location. We believe this right follows from the invitation extended to prospectors of minerals by the federal government in declaring the mineral lands open to exploration and purchase under the mineral laws. The invitation is one based on the beneficial results which will accrue to the public from the hazards taken by the men who avail themselves of the standing offer of the government. This view is sustained to some extent by the court in *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 112 Fed. 4, 50 C. C. A. 79, 61 L. B. A. 230, where the court said: "Appellees could not at that time have acquired any title to the lands included in their locations. The discovery of mineral was essential for that purpose, but they were not trespassers upon the public lands of the United States. They had a lawful right to be there. They were in occupancy of the land they had located. They claimed it to be mineral and were diligently at work to prove it to be such. Under these circumstances it cannot, in our opinion, be said to be vacant land at the time of appellant's selection thereof under the provisions of the act of 1897. The land was not vacant and open to settlement at that time, because it was then occupied by the defendant's grantors under a claim and color of right. It matters not that they had not at that time acquired any rights against the United States."

But where lands are mineral lands, is not a mineral locator who has partly availed himself of the right afforded by the statute entitled to complete the locatory acts even as against the right of the government to withdraw the offer?

b. *What Constitutes Diligent Prosecution of Work of Discovery.*—What work on the part of a locator of a mining claim will constitute a diligent prosecution of the work of discovery is naturally a question which must be determined from the circumstances of each case. Owing to the necessity of a discovery upon which to base the location of a mining claim and to the policy of the law to avoid breaches of the peace through conflicts between rival prospectors, it is a well-settled rule that where one seeks in good faith to make a location, he is entitled to exclusive possession of the land sought to be located for a reasonable time to complete his location, or for such time as may be allowed by the customs or rules of miners, or the statutes of the state or territory. But such possession must be actual and connected with active diligent work of exploration with the bona fide intention if mineral is found to make a location.

Merely watching a tract of land or an intended claim for a considerable time to see that it is not intruded upon by others is not proper diligence toward making a discovery: *Whiting v. Straup*, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849.

Where a locator of oil lands has not made a discovery and has not retained possession for the purpose of prosecuting work looking to a discovery, his mere posting of notice and marking of boundaries upon the ground will not serve to exclude others who may peaceably enter upon the land which he is not actually working or occupying. And where he posted his notice and marked his boundaries on January 1, 1903, and failed to do any drilling or other actual development work prior to an adverse entry in October, 1904, it was held to be merely a pretense of occupying without intention of actually doing so: *New England etc. Oil Co. v. Congdon*, 152 Cal. 211, 92 Pac. 180.

Where a person places a tent and a few tools and a small supply of provisions upon a placer mining claim, the fact that he has in good faith temporarily gone away from his claim for the purpose of purchasing provisions or supplies, or for any other temporary purpose, intending to return and resume his actual possession, occupation and labors will not subject the ground to location by others during such temporary absence, since such temporary absence cannot be construed to be an abandonment of his rights to the ground: *Charlton v. Kelly*, 156 Fed. 433, 437.

Where a locator of a mining claim, such as an oil claim, has been guilty of such laches in making a discovery that it could be presumed that he has abandoned his location, others may make an open peaceable entry and acquire bona fide rights at a time when the original locators are not in possession and prosecuting work. But where the original locator is engaged in good faith in prospecting it for minerals and is in possession, the land is not open for location by others. The law must be given a liberal and equitable interpretation with a view to protecting prior rights acquired in good faith: *Weed v. Snook*, 144 Cal. 439, 77 Pac. 1023.

See, in this connection, the note in 87 Am. St. Rep. 403, on the abandonment and forfeiture of mining claims.

Where no discovery has been made by the locator of a mining claim, no question of assessment work is involved. The locator has a right to continue in possession undisturbed by any form of hostile or clandestine entry while he is diligently prosecuting his work to a discovery. But diligence in this respect does not mean the doing of assessment nor the pursuit of capital to prosecute the work, nor any attempted holding by cabin, lumber pile or unused derrick. It means the diligent, continuous prosecution of the work with the expenditure of whatever money may be necessary to the end in view: *McLemore v. Express Oil Co.*, 158 Cal. 559, ante, p. 147, 112 Pac. 59.

c. **Effect Where Two Locators on Ground by Consent.**—Where two locators are in possession of the ground by common consent, it becomes a race of diligence between them to discover mineral, and he who first discovers it obtains a prior right to the exclusion of others: *Johanson v. White*, 160 Fed. 901, 88 C. C. A. 83.

d. **Right to Initiate Location on Land Entered by or in Possession of Others.**

1. **In General.**—"No proposition connected with the disposal of mineral land," said Mr. Chief Justice Helm in *Seymour v. Fisher*, 16

Colo. 188, 27 Pac. 240, "is more conclusively established than that such land, when held under a valid mining location, is no longer subject to exploration and entry. The locator thereof is entitled to the present exclusive possession and use as against all the world, including even the United States, which prior to patent retains the legal ownership: *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348. A stranger going thereon for the purpose of discovering veins, of cutting and removing timber, or of otherwise interfering with the locator's possession and use, is a trespasser. The interest acquired by compliance with the mining statutes is, until a failure to perform annual labor, or until abandonment in some other way, for most purposes, as valuable and effective as if the title had actually passed by patent. Such interest in this state is subject to taxation, and is liable to levy and sale under execution in satisfaction of the owner's debts. It has been designated by the supreme court of the United States a 'grant' of the present exclusive right to possession."

So, also, it has been stated by the Land Department that portions of public lands may be occupied, and for that reason be not subject to selection, even though there be no mention of their occupancy in the records of the land department: *Kern Oil Co. v. Clarke*, 30 L. D. 550, 567. Hence the rule is that a valid claim cannot be initiated by forcible or fraudulent entry upon land in the possession of one who has no right either to the possession or to the title. But a valid claim may be initiated by a peaceable adverse entry upon land in the possession of persons who have no superior right to acquire the title or to hold the possession *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735; *Atherton v. Fowler*, 96 U. S. 513, 24 L. ed. 732; *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485; *Thallmann v. Thomas*, 111 Fed. 277, 49 C. C. A. 317.

In *Nevada-Sierra Oil Co. v. Home Oil Co.*, 98 Fed. 673, Judge Ross, in this connection, said:

"It is true that upon mineral land of the United States upon which there is no valid existing location any competent locator may enter, even if it is in the actual possession of another, provided he can do so peaceably and in good faith, in order to initiate a location for himself; but no right upon any government land, whether mineral or agricultural, which is in the actual possession of another, can be initiated by a forcible, fraudulent, surreptitious or clandestine entry thereon. Such entry must be open and aboveboard, and made in good faith: *Belk v. Meagher*, 104 U. S. 279, 26 L. ed. 735; *Atherton v. Fowler*, 96 U. S. 513, 24 L. ed. 732. One who is in the actual possession of a mining claim, working it for the mineral it contains, and claiming it under the laws of the United States, whether the location under which he so claims is valid or invalid, cannot be forcibly, surreptitiously, clandestinely, or otherwise fraudulently intruded upon or ousted while he is asleep in his cabin, or temporarily absent from his claim."

2. Prospecting Placer Claim to Locate Lode Claim Thereon.—The owner of a valid mining location, whether lode or placer, has the right to the exclusive possession and enjoyment of all the surface included within the lines of the location. A third person has no right to prospect such ground for the purpose of discovering a lode: *Clipper Min. Co. v. Eli Min. etc. Co.*, 194 U. S. 220 (affirming same case. 29 Colo. 377, 93 Am. St. Rep. 89, 68 Pac. 286, 64 L. R. A. 209), 24 Sup.

Ct. Rep. 632, 48 L. ed. 944. In the case just cited Mr. Justice Brewer said:

"It is contended that because a vein or lode may have its apex within the limits of a placer claim a stranger has a right to go upon the claim, and, by sinking shafts or otherwise, explore for any such lode or vein, and on finding one obtain a title thereto. That, with the consent of the owner of the placer claim, he may enter and make such exploration, and if successful, obtain title to the vein or lode, cannot be questioned. But can he do so against the will of the placer locator? If one may do it, others may, and so the whole surface of the placer be occupied by strangers seeking to discover veins beneath the surface. Of what value then would the placer be to the locator? Placer workings are surface workings, and if the placer locator cannot maintain possession of the surface, he cannot continue his workings. And if the surface is open to the entry of whoever seeks to explore for veins, his possession can be entirely destroyed. In this connection it may be well to notice the last sentence in section 2322. That section, from which we have just quoted, is the one which gives a locator the right to pursue a vein on its dip outside of the vertical side lines of his location. The sentence, which is a limitation on such right, reads: 'And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.'

"It would seem strange that one owning a vein and having a right in pursuing it to enter beneath the surface of another's location should be expressly forbidden to enter upon that surface if at the same time one owning no vein and having no rights beneath the surface is at liberty to enter upon that surface and prospect for veins as yet undiscovered.

"We agree with the supreme court of Colorado as to the law when it says that 'one may not go upon a prior valid placer location to prospect for unknown lodes and get title to lode claims thereafter discovered and located in this manner and within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or by his conduct is estopped to complain of it.' Perhaps if the placer owner, with knowledge of what the prospectors are doing, takes no steps to restrain their work and certainly if he acquiesces in their action, he cannot after they have discovered a vein or lode assert right to it, for, generally, a vein belongs to him who has discovered it, and a locator permitting others to search within the limits of his placer ought not thereafter to appropriate that which they have discovered by such search."

3. **Meaning of Term "Entry."**—The meaning of the term "entry" has been deemed important in considering the rights of mineral and nonmineral claimants to the same land. In *Chotard v. Pope*, 12 Wheat. 586, 6 L. ed. 737, the court in defining its meaning said:

"The term 'entry' as applied to appropriations of land was probably borrowed from the state of Virginia, in which we find it used in that sense at a very remote period. Many cases will be found in the reports of the decisions of this court, in which the title to western lands was drawn in question, which will show how familiarly and generally the term is used by court and bar. Its sense, in the legal nomenclature of this country, is now as fixed and definite as that of

many terms borrowed from the common law. It means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known in the legislation of several states by the epithet of an entry-taker, and corresponding very much in his functions with the registers of land offices, under the acts of the United States. In the natural progress of language, the term has been introduced into the laws of the United States; and, by reference to those laws, we think the meaning of the term will be found to be distinctly confined to the appropriation of lands under the laws of the United States at private sale. It is familiarly known that the public lands are uniformly brought into market in pursuance of a system which commenced in the year 1796, and was perfected about the year 1800. The lands are first surveyed, then advertised at public auction, and then, whatever remains unsold at public auction, is offered at private sale to the first applicant, at stipulated prices. The act of 1800 presents a full view of the course pursued on this subject, and the seventh section (2 U. S. Stats. 76) of that act distinctly shows that the right to enter lands is confined to those lands which are offered at private sale. The words 'enter,' 'entry' and 'book of entries' will be found in that section, all used, and exclusively used, with reference to the appropriation of lands of that description. Now, no one ever imagined that, under the general system, the right of appropriation, by entry in the register's office, extended to any appropriated lands, however those appropriations were legally made. The ideas on this subject were so fixed in familiar use that Congress felt no necessity for further precautions in legislating on this subject in this instance, than what is implied in the use of language belonging to their general system."

And in *Lockwitz v. Larson*, 16 Utah, 275, 52 Pac. 279, the court also said:

"In *Chotard v. Pope*, 12 Wheat. 586, 6 L. ed. 737, the supreme court of the United States defined the term 'entry' to mean 'that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known in the legislation of several states by the epithet of an entry-taker, and corresponding very much in his functions with the registers of land offices, under the acts of the United States.' Doubtless, in this sense the term has been used in the several acts of Congress, referring to the appropriation of public lands of the United States at private sale, including the townsite laws. So the term 'to enter,' with reference to such public lands, means to acquire an inceptive right to a portion of the unappropriated soil of the United States by filing a claim with the register of the land office. When, then, these terms are used with reference to laws concerning the private sale of the public lands of the United States, they have a fixed and definite sense in the legal nomenclature of this country, like many of the terms borrowed from the common law, and their technical meaning will not be changed by construction. Therefore, by the term 'entry,' when speaking with reference to the appropriation of public land for a townsite under the act of 1867, is meant the filing of an application by the proper officer with the register of the land office, and proof showing the performance of the statutory conditions respecting the settlement and occupancy of the land as a townsite.

By making such filing the officer acquires an 'inceptive right' to the legal title to the land in trust, however, for the persons who are, at the time of the filing, the occupants and entitled to the possession of the land."

The meaning of the term also arose in the principal case, and it was there held that under the federal laws relating to homesteads an entry of land is complete when the applicant has made an affidavit setting forth the facts which entitle him to make such entry, has made a formal application, paid the money required, and had the certificate of entry issued to him: *McLemore v. Express Oil Co.*, 158 Cal. 559, ante, p. 147, 112 Pac. 59.

4. Effect Where Lands are Entered Under Nonmineral Entries or Grants.—Land upon which an entry of record, valid upon its face, has been made is regarded as appropriated and withdrawn from subsequent entry under settlement, pre-emption or sale until the original entry be canceled or declared forfeited, in which case the land reverts to the government as part of the public domain and becomes again subject to entry under the land laws: *Hastings etc. R. Co. v. Whitney*, 132 U. S. 357. A homestead entry is said to operate as an appropriation of the land covered by it and to segregate it from the mass of the public domain: *United States v. Turner*, 54 Fed. 228. And where a valid homestead entry has been made, the right of possession of the land embraced therein inures to the person making such entry as against a trespasser: *Hastay v. Bonners*, 84 Minn. 120, 86 N. W. 896. In the principal case it was held that a homestead entry which is prima facie valid removes the land, temporarily at least, out of the public domain, and one claiming it to be valuable for oil without proof of its present value for such mineral purpose has no right to enter thereon and explore it for the purpose of discovering oil: *McLemore v. Express Oil Co.*, 158 Cal. 559, ante, p. 147, 112 Pac. 59.

No right to a patent is acquired under the homestead law until all the conditions precedent prescribed by law have been fully performed: *McCune v. Essig*, 118 Fed. 273. Or as has been said by the Land Department, no vested right is gained by the mere presentation of an application to make a homestead entry: *In re Ira J. Newton*, 36 L. D. 271. A homestead entry cannot be made upon public land in the actual possession of another although no force be used to gain possession: *Goodwin v. McCabe*, 75 Cal. 584, 17 Pac. 705. And a homestead entry made with knowledge that the land embraced therein contains a valuable deposit of phosphate of lime is illegal and will be canceled: *Gary v. Todd*, 18 L. D. 58.

The question whether land embraced in a homestead claim is mineral or nonmineral may be raised up to the date of the final entry. A discovery of its mineral character between the time of the submission of defective proof and the date of final entry will defeat the homestead claim: *Spratt v. Edwards*, 15 L. D. 290; *Jones v. Driver*, 14 L. D. 514. The practice where land embraced within a homestead entry is found to be valuable for the coal found therein is to file a protest against the homestead entry being allowed on the ground of its being valuable for its coal and apply to enter it under the coal laws: *Dickenson v. Capen*, 14 L. D. 426. One contesting for a preference right has no right to the possession of the land pending the litigation as against a homestead entryman in possession: *Reaves v. Oliver*, 3 Okl. 62, 41 Pac. 353.

The rule is well settled that after a legal entry of public land whereby the entryman becomes entitled to a patent, he holds the beneficial title and the government holds merely the naked legal title in trust for him until the issuance of the patent: *Goodlet v. Smithson*, 5 Port. (Ala.) 245, 30 Am. Dec. 561; *People v. Shearer*, 30 Cal. 645; *Deno v. Griffin*, 20 Nev. 249, 20 Pac. 308; *Gwynne v. Niswanger*, 15 Ohio, 367; *Ross v. Supervisors*, 12 Wis. 26; *Carroll v. Safford*, 3 How. 441, 11 L. ed. 671; *Deffeback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. Rep. 95, 29 L. ed. 423; *Benson etc. Co. v. Alta etc. Co.*, 145 U. S. 428, 12 Sup. Ct. Rep. 877, 36 L. ed. 762. And where, under such circumstances, the patent does issue, it relates back to the inception of the right of the patentee: *Cosmo Exploration Co. v. Gray Eagle Oil Co.*, 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230.

Hence the discovery of mineral or of the mineral character of the land after final proof of a homestead entry or the issuance of a final certificate will not make the land subject to location under the mineral laws: *Colorado etc. Iron Co. v. United States*, 123 U. S. 307; *Rea v. Stephenson*, 15 L. D. 37; *Dickenson v. Capen*, 14 L. D. 426; *In re Nicholas Abercrombie*, 6 L. D. 393. Likewise after the purchase of a tract of land, under a commuted homestead entry and the issuance of a final certificate therefor, a discovery of coal on such land will not defeat the issuance of patent: *Arthur v. Earle*, 21 L. D. 92. So, also, a discovery of minerals after a pre-emption entry of land will not defeat the entry: *Harnish v. Wallace*, 13 L. D. 108.

This whole subject was very exhaustively considered in *Bay v. Oklahoma etc. Min. Co.*, 13 Okl. 425, 73 Pac. 936. The court in that case said:

"Where a homestead entry has been made in good faith, after an examination by the entryman of the surface indications, and no evidences of minerals or oils discovered, the discovery of minerals or oils in such land afterward will not necessarily defeat his right to the land. Until he has made final proof, paid the land office charges, and obtained his final receipt, the character of the land is open to inquiry, and, if it can be shown by one making an adverse claim that the land is more valuable for mineral than agricultural, the homestead entry may be canceled and the mineral location allowed: *Rea et al. v. Stephenson*, 15 L. D. 37; *Jones v. Driver*, 15 L. D. 514. This rule was announced in the above-cited cases by Assistant Secretary Chandler in 1892, and we have not found where the courts or department has questioned the correctness of it. The homestead entry may be attacked by contest or protest, and when the character of the land as mineral or nonmineral is put in issue, it must be determined by the Land Department, and the findings of that department on questions of facts are, as a general rule, conclusive on the courts. But this court has frequently held that a homestead entry entitles the entryman to the exclusive possession of the land embraced in his entry as against all persons except one asserting a superior or prior right: *Sproat v. Durland*, 2 Okl. 24, 35 Pac. 682, 886; *Woodruff v. Wallace*, 3 Okl. 355, 41 Pac. 357; *Reaves v. Oliver*, 3 Okl. 62, 41 Pac. 353; *Littlefield v. Todd*, 3 Okl. 1, 42 Pac. 10; *Glover v. Swartz*, 8 Okl. 642, 58 Pac. 943; *Barnes v. Newton*, 5 Okl. 423, 48 Pac. 190, 49 Pac. 1074. And injunction is a proper remedy to prevent trespassers and interlopers from interfering with the entryman's possession. At the time the above decisions were enunciated, there were no mineral lands in

Oklahoma, and the only class of claimants who were permitted to jointly occupy the lands with the entryman was one claiming prior settlement or under a soldier's declaratory filed prior to the homestead entry. We are now confronted for the first time in this court with a claimant under the mineral laws of the United States. As stated before, the defendants in error have filed no brief, and we have made such examination of the authorities as the character of the questions involved and the conditions of the case requires. We can see no reason why the same rule applied by this court in former cases is not applicable to the case of a mineral claimant claiming adversely to a homestead claimant. The land is *prima facie* nonmineral, the entryman has made the necessary nonmineral affidavit, and the officers of the Land Department have allowed his entry. This impresses the land embraced in his entry with the character of agricultural nonmineral land. If there was a valid prior location of a mineral claim on the tract, such location entitles the mineral claimant to possession of his mineral claim until the Land Department hears and determines the question as to the character of the land. On the other hand, if the mineral claimant had not made a valid location prior to the homestead entry, then he must contest the adverse homestead entry, and secure its cancellation; and until he has done this we see no reason why he should be permitted to jointly occupy the land any more than would one contesting for a preference right. There cannot be two valid entries on the land at the same time; neither can there be a valid mineral location and a valid homestead entry. One must yield to the other, dependent upon the character of the land. If the homestead entryman has acted in bad faith, and obtained his entry through fraud, knowing that the tract is mineral land, then his entry may be canceled for fraud any time before final proof by a contestant and after final proof by the United States."

Land embraced within a townsite patent is not affected by the fact that subsequent to the townsite entry it was discovered to be mineral in character: *Thos. J. Laney*, 9 L. D. 83. But it is different if it is known before their occupation or residence under the townsite title that they are valuable for their minerals: *Deffebach v. Hawke*, 115 U. S. 392, 6 Sup. Ct. Rep. 95, 29 L. ed. 423.

Under grants to railroads, the fact that land has been returned as nonmineral by the surveyor general prior to the grant will not prevent it being excepted from the grant if its mineral character is discovered at any time prior to the issuance of the patent, where the grant excepts mineral lands from its provisions: *Barden v. Northern Pacific R. Co.*, 154 U. S. 288, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992; *Central Pacific R. Co. v. Valentine*, 11 L. D. 238; *North Star Min. Co. v. Central Pac. R. Co.*, 12 L. D. 608; *Southern Pac. R. Co. v. Allen G. Min. Co.*, 13 L. D. 165; *Winscott v. Northern Pac. R. Co.*, 17 L. D. 274.

Under the grant of school lands, the title of the state vests, if at all, at the date of the completion of the survey: *Cooper v. Roberts*, 18 How. 173, 15 L. ed. 338; *Virginia Lode*, 7 L. D. 459. And under such circumstances the title of the state to the land, even though mineral in character, if not then known to be mineral, is not affected by a subsequent discovery of its mineral character: *Miner v. State of California*, 9 L. D. 409; *State of Colorado*, 6 L. D. 412, 7 L. D. 490;

Warren v. State of Colorado, 14 L. D. 681; Pereira v. Jacks, 15 L. D. 273; Free v. State of Colorado, 22 L. D. 510.

5. **Effect of Land Being Selected as Lieu Land Under Act of 1897.** The presentation of an application to make lieu land selections under the act of 1897 does not preclude inquiry by the government as to the character of the land applied for, since that question remains open for investigation and determination until the equitable title passes: In re Thos. B. Walker, 36 L. D. 495.

The fact that land has been selected under the act of June 4, 1897, which allows the holder of lands within a forest reserve to surrender such lands and select other lands, and a deed to the surrendered land, together with an abstract of title and nonmineral affidavit with the register and receiver of the United States land office, who entered the same upon his official records, is not sufficient to withdraw the selected lands from exploration, entry and purchase as mineral lands. The local land office has no power to accept the offer, and until the transaction has been approved by the proper officials of the Land Department, the equitable title to the land selected does not pass: *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 23 Sup. Ct. Rep. 692, 47 L. ed. 1064 (affirming same case in 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230). In rendering its decision on this question the supreme court said:

"Counsel insists that the act of June 4, 1897, constitutes a standing offer on the part of the government to exchange any of its 'vacant land, open to settlement' for a similar area of patented land in a forest reservation, and that whenever a person relinquishes to the government a tract in a forest reservation, and places his deed to the government of record as required by the Land Department rules, and selects in lieu thereof a similar area of vacant land, open to settlement, that such offer of the government has thereupon been both accepted and fully complied with, and that a complete equitable title to the selected land is thereby vested in the selector.

"But even the complete equitable title asserted by complainant must, as it would seem, be based upon the alleged right of the local land officers to accept the deed and approve the selection, even though such approval may be thereafter the subject of a review in the nature of an appeal from the action of the local officers. There must be a decision made somewhere regarding the rights asserted by the selector of land under the act, before a complete equitable title to the land can exist. The mere filing of papers cannot create such title. The application must comply with and conform to the statute, and the selector cannot decide the question for himself.

"We do not see how it can be successfully maintained that, without any decision by any official representing the government, and by merely filing the deed relinquishing to the government a tract of forest reserve land and assuming to select a similar area of vacant land open to settlement, the selector has thereby acquired a complete equitable title to the selected land. The selector has not acquired title simply because he has selected land which he claims was at the time of selection vacant land open to settlement, nor does the filing of his deed conveying the land relinquished and the abstract of title with it show necessarily that he was the owner of the land as provided for by the statute. So far as his action goes, it is an assertion on his part that he was the owner in fee simple of the land he proposed to

relinquish, and that the deed conveys a fee simple title to the government, and also that he has selected vacant land which is open to settlement, and that therefore he is entitled to a patent for such land. These assertions may or may not be true. Who is to decide? Complainant asserts that if a decision be necessary before the vesting of a complete equitable title, that in that case the local officers are to decide that question, and by accepting the deed and making the certificate already mentioned, they have decided it, and thereupon, at all events, the complete, equitable title accrued, even though such decision were subject to a review by the commissioner of the general land office and thereafter by the secretary.

"But, as has already been stated, there is nothing in the statute of 1897 which gives the local land officers the right to decide whether the selector has complied with the provisions of the act, and unless those officers had that power, they did not acquire it by assuming to exercise it. We do not say they did so assume. They received, accepted and filed the deed, the abstract of title, the nonmineral affidavit and the selection as made by Clarke. They entered that selection upon the official records of the land office, and they certified that it was free from conflict, and that there was no adverse filing, entry or claims thereto; but it cannot be said that they decided that the selector had complied with the provisions of the statute, or that he had done all that he ought to have done in order to acquire his alleged complete, equitable title.

Their certificate that the land was free from conflict was simply a certificate as to what appeared on the books of the local office, and the same may be said of the statement that there was no adverse filing, entry, or claim thereto upon such books. No affidavit of non-occupancy was filed, and they did not certify that the land so selected was in fact vacant or unoccupied, nor did they assume to certify that the selected land contained no minerals, although an affidavit to that effect was presented to them. In truth, all that these local officers did was to certify that the selector had done certain things, and that the land selected was vacant and open to settlement so far as it appeared from the books of the local land office.

"Taking into consideration, however, the fact that the statute did not vest the local officers with the right to decide upon the question of a compliance with its terms, and the further fact that the Land Department had adopted rule 18, above referred to, which provides for the forwarding of all applications for change of entry or settlement to the commissioner of the general land office for his consideration, together with a report as to the status of the tract applied for, we must conclude that the action of the local officers did not, as it could not, amount to a decision upon the application of the selector, so that he became vested with the equitable title to the land he assumed to select. It is certain, as we have already remarked, there must be some decision upon that question before any equitable title can be claimed—some decision by an officer authorized to make it. Under the rule above cited, that decision has not been made."

e. Effect of Return of Surveyor General as to the Mineral or Non-mineral Character.—The question of the mineral or nonmineral character of public lands is open until the acquisition of the complete title: *Miller v. Thompson*, 36 L. D. 492.

Where lands are classed as agricultural lands by the surveyor's reports, anyone who makes an adverse claim as to the character of the lands takes the burden of overcoming the prima facie case made by the records of the Interior Department and of showing affirmatively that the land claimed as mineral is more valuable for minerals than for agricultural purposes. And if the lands are claimed under an oil placer claim, the locator must show that the lands "contain petroleum or other mineral oils, and is chiefly valuable therefor." "If the oil is in such limited quantities that it cannot be worked at a profit, then it cannot be said to be 'chiefly valuable' for its oil": *Bay v. Oklahoma etc. Min. Co.*, 13 Okl. 425, 73 Pac. 936.

The fact that land is returned as mineral in character by the surveyor general does not dispense with the necessity of a locator making a discovery of mineral as prerequisite to a valid location of a mining claim: *Reins v. Murray*, 22 L. D. 409.

Where there has been a legal location of a mining claim on land returned as agricultural, the burden of proof shifts to the party attacking the mineral entry: *Rhodes v. Treas.*, 21 L. D. 502. In *Northern Pac. R. Co. v. Marshall*, 17 L. D. 545 (which was approvingly cited by the United States supreme court in *Creede etc. Milling Co. v. Uinta Tunnel etc. Co.*, 196 U. S. 337, 25 Sup. Ct. Rep. 266, 49 L. ed. 501), the Secretary of the Interior said:

"It will be presumed that the locators complied with the law and made a discovery of mineral prior to location. It follows, therefore, that the land was accepted [excepted] from the grant (*Central Pacific R. R. Co. v. Valentine*, 11 L. D. 238), unless it was shown by the company that the land was not mineral in character, and the burden of proof to establish this fact was rightfully placed upon the railroad company. It is true that the surveyor general's return shows the land to be agricultural in character. The presumption arising from the return of the surveyor general is necessarily a slight one. This question was discussed in all its details in the recent case of *Winscott v. Northern Pacific R. R. Co.*, 17 L. D. 274, where, in concluding the discussion—on page 276—it is said, 'so that the report of the surveyor must necessarily constitute but a small element of consideration, when the question is as to the true character of the land.' In the location of a mineral claim, placer or lode, the first requirement of the law is a discovery: *Rev. Stats.*, secs. 2329, 2320. All rights inuring to the benefit of the locators are based upon this initial act: *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. Rep. 565, 28 L. ed. 1116; *United States v. Iron Silver Min. Co.*, 128 U. S. 673, 9 Sup. Ct. Rep. 195, 32 L. ed. 571; *O'Reilly v. Campbell*, 116 U. S. 418, 6 Sup. Ct. Rep. 421, 29 L. ed. 669. When, therefore, a legal location has been made on land returned as agricultural, the slight presumption in favor of the return of the surveyor general is, ipso facto, overcome, and the burden of proof shifts to the party attaching such mineral entry. By such discovery and location it is demonstrated that the return was erroneous, and it would be trifling with physical facts to put the onus on the locator to present further evidence until it is shown that, as a matter of fact, he had no discovery."

In a contest between a mineral and agricultural claimant for land returned as agricultural, it rests with the former to show as a present fact that the character of the land is such as to warrant the conclusion that mineral can be obtained therefrom in such quantity and

value as to make the land more valuable for mining than agriculture. It is not sufficient to show that they might possibly hereafter develop minerals in such quantity and of such a character as to establish its mineral value: *Creswell Mining Co. v. Johnson*, 8 L. D. 440; *Kern River Oil Co. v. Clarke*, 30 L. D. 550; *Dobler v. Northern Pac. R. Co.*, 17 L. D. 103; *Hamilton v. Anderson*, 19 L. D. 168; *Cleghorn v. Bird*, 4 L. D. 478.

In *Cowell v. Lammers*, 10 Saw. 246, 21 Fed. 200, Judge Sawyer said: "By the words 'mineral lands' must be understood lands known to be such, or which there is satisfactory reason to believe are such at the time of the grant or patent. And the United States courts which have had occasion to act upon this subject, so far as I am aware, have adopted that idea. There must be some point of time when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent."

Mere fact that other lands in the vicinity contain oil does not establish the character of the lands as mineral lands where they have been returned as agricultural: *Roberts v. Jepson*, 4 L. D. 60.

Lands containing valuable mineral deposits, whether of the metaliferous or fossiliferous class, of such quantity and quality as to render them subject to entry under the mining laws, that is, when they are more valuable on account of such mineral deposits than for agricultural purposes, are "mineral lands" within the meaning of that term as used in the exception from the grants to the railroads and to the states for school purpose: *Pacific Coast Marble Co. v. Northern Pac. R. Co.*, 25 L. D. 233; *In re Union Oil Co.*, 25 L. D. 351.

In *United States v. Copper Queen Con. Min. Co.*, 7 Ariz. 80, 60 Pac. 885, the question arose whether certain land was mineral in character. The court said:

"Upon this subject the trial court charged the jury as follows: 'Proof of the existence of some measure of minerals in the land from which timber was cut, or proof of traces, indications, or possibilities that said land contained valuable mineral deposits, or that the lands in question are high, rugged, rough, and precipitous, cannot in itself impress said lands with a mineral character. Mineral in sufficient quantities to justify exploration and development, and in quantities which it will pay to work, must be shown to exist, and the existence thereof in the land must be demonstrated as a present fact, in order to justify the cutting of timber therefrom, or the purchase of such timber after being cut under the act of June 3, 1878. The mere fact that portions of the land from which the timber was cut contained particles of gold or other valuable mineral deposits, or veins of gold-bearing quartz, would not necessarily impress it with the character of mineral land as herein defined, and within the meaning of the act of June 3, 1878. It must, at least, be shown that said lands contained metals in quantities sufficient to render it available and valuable for mining purposes.' These instructions embrace a full and accurate definition of the term 'mineral lands' as used in said act of Congress and other statutes of the United States. A mass of testimony was introduced at the trial on the part of the defendant and on the part of the plaintiff tending to show, on the one part, the mineral character of the land, and, on the other, the nonmineral character of the land. A consideration of the evidence satisfies us that the

geological conditions exist at the place where the timber was cut which render it probable that mineral in paying quantities may exist; that discoveries of mineral of more or less value have been made, but that it is still to some extent problematical as to whether paying mines will ever be discovered and developed thereon."

f. **Effect of Government Withdrawing the Land from Entry Before Discovery.**—"Lands known to contain valuable mineral deposits are not subject to withdrawal or appropriation for use in the administration of forest reserves any more than they are subject to inclusion in such reserves. . . . Land not known at the time to be mineral in character may be devoted to purposes recognized by law as proper in aid of the objects sought to be attained by establishment of forest reserves or coming within the purview of the appropriation acts for protection and administration of such reserves, and subsequent discovery of mineral therein will not affect its use for those purposes or render it liable to exploration, location or entry under the mining laws": Opinion of Asst. Atty. Gen., 35 L. D. 262, 267.

Lands valuable for the mineral deposits contained therein, although embraced within the limits of a withdrawal of lands susceptible of irrigation under the reclamation act, are not affected by such withdrawal, and are not taken out of the operation of the mining laws: *In re Mountain Meadow Placer Co.*, 35 L. D. 216. In the case just cited the lands were withdrawn for reclamation purposes, and instructions were requested as to whether prospecting for oil upon the lands so withdrawn would be permitted and the department held that the privilege of exploring for minerals on such lands remained in full force notwithstanding the withdrawal.

Coal lands have been held subject to disposition under the coal land laws notwithstanding that they are embraced within a withdrawal order made under the reclamation act, under what is called the "second form": *In re Albert M. Crafts*, 36 L. D. 138, 140. Where land embraced in an entry is covered by an order of the Land Department withdrawing certain lands from entry under the desert land laws and suspending such entries already made pending an investigation "by a special agent to determine their bona fides," the entryman is not compelled to comply with the law under which the entry was made during the period of suspension, and a contest on the ground of failure to comply with such requirements during the period of such suspension should not be allowed: *Porter v. Carlile*, 34 L. D. 361.

The question as to the validity of orders withdrawing lands upon which locators under the mineral laws are in possession is not within the scope of this note, and will not be considered.

g. **Transfer of Mining Location Prior to Discovery.**—A placer location for one hundred and sixty acres, made by eight persons and subsequently transferred to a single individual, which is invalid because not preceded by a discovery, cannot be perfected by the transferee upon a subsequent discovery: *In re H. H. Yard*, 38 L. D. 59. In this connection the department, in laying down the above rule in this much discussed case, said:

"So far as the evidence shows, no discovery of mineral was made prior to the making of the 'paper' locations; that is, the posting and recording of the notices of location. These claims, in the majority of instances, were transferred either to H. H. Yard or to the North California Mining Company, a corporation. The appellants maintain that,

the proposition is equally true, that if such conveyance be made without any such understanding, it is in law no more than a surrender and abandonment of the possessory rights which the original locators had, and the establishment, in effect, of a new and independent location in their grantees."

In *Buck v. Jones*, 18 Colo. App. 250, 70 Pac. 951, it was held that where a locator of a mining claim has made no discovery of mineral, he acquires no right to the claim, and his deed to a corporation in consideration of its stock conveys nothing, and makes him liable to a creditor upon the stock even though it was issued as fully paid.

In our opinion, the transfer of the right of possession under such circumstances would be a consideration for the transfer and would not necessarily avoid the transaction.

PENNEBAKER v. SAN JOAQUIN LIGHT AND POWER COMPANY.

[158 Cal. 579, 112 Pac. 459.]

ELECTRIC COMPANY—Duty to Shut Off Current in Case of Fire.—A public service corporation furnishing electric light and power to a municipality and its residents is not charged with a duty to cut off, at its own instance, the current from some certain district merely upon knowledge being brought to it that a building within that district is on fire. (pp. 206, 207.)

ELECTRIC COMPANY—Duty to Shut Off Current in Case of Fire.—In the event of a fire occurring within a municipality, no duty, in the absence of an ordinance to that effect, rests upon a local electric light and power company to have an agent present to disconnect from the main feed any wire possibly in or about the burning structure, or signal to the power-house to have the current cut off. (pp. 206, 207.)

ELECTRIC COMPANY—Burning Building.—No Imputation of Negligence on the part of an electric light and power company arises from the fact that one of its employees, at the time off duty, was present when a house was afire during the night and, seeing one of the company's wires disconnected from the building and sputtering on the ground, "did nothing." (pp. 207, 208.)

ELECTRIC COMPANY—Injury from Wires to Persons in Street.—The right enjoyed by an electric light and power company, through permission of a municipality, to use the streets in the prosecution of an enterprise for its own gain, does not, apart from any other fact, require it to insure all other persons on or near by the streets against possible injury from its wires. (p. 209.)

NEGLIGENCE—Firemen Entering Burning Building.—In the absence of some ordinance or statute changing the common-law rule in this regard, a fireman entering a building under imperative public necessity is but a licensee, who assumes risks as he finds them and to whom the owner of the premises owes no special duty to maintain those premises in a safe condition. (p. 209.)

ELECTRIC COMPANY—Liability to Firemen.—The duty of an electric light and power company, whose wire runs into a private house, is not the same as that of the owner of the house as to a fire-

man who enters the premises in the line of his vocation and is exposed to peril from the wire; but, without proof that the company had knowledge of the peril in time to avert it, liability does not follow. (p. 210.)

ELECTRIC COMPANY—Disconnected Wire—Knowledge.—Though dereliction of duty may be imputed to an electric light and power company which, with knowledge that a certain disconnected wire is a menace to life, makes no effort to correct the circumstance, none can be when it has no such knowledge, and besides is in preparation always to act at once upon such knowledge being furnished. (p. 210.)

ELECTRIC COMPANY—Voltage not Regarded Dangerous.—A defendant's conduct is to be judged by the ordinary knowledge of mankind. Hence an electric light and power company cannot be charged with the maintenance of a deadly wire when the current, notwithstanding it caused the death of plaintiff's intestate, had a voltage that is regarded as not dangerous to human life. (p. 210.)

ELECTRIC COMPANY—Liability for Casualty—Evidence.—A report of the city electrician, on file with the municipality, reciting arrangements made with him by an electric light and power company for the immediate cutting off of the current from any district desired on instructions telephoned to the power-house by the fire chief or city electrician is competent evidence for the company in a case where a casualty occurred in default of the company being advised of the danger. (pp. 210, 211.)

Frank H. Short and F. E. Cook, for the appellant.

Larkins & Feemster, for the respondent.

⁵⁸⁰ **HENSHAW, J.** This appeal is from the judgment and from the order denying defendant's motion for a new trial. The action is by the widow and minor child, heirs of Carl G. Pennebaker, for damages resulting from his death. Pennebaker was a member of the fire department of the city of Fresno. A fire occurred about 2 o'clock in the morning in a wooden building on the outskirts of the business portion of the city. Pennebaker, in the performance of his duty, went to the fire to help in extinguishing it. The complaint charged that an alarm of fire was turned into and given the fire department of the city, and at the same time, "so plaintiffs are informed and believe, and upon such information and belief allege the fact to be, an alarm of said fire was turned into and given said defendant at its electric substation in said city. That by said alarm, so plaintiffs are informed and believed, and upon such information allege the fact to be, defendant was notified of the existence and apprised of the location of said fire." The complaint further charged that ⁵⁸¹ wires, carrying powerful and deadly currents of electricity, were maintained by the defendant at and in the building which caught fire; that the fire continued to burn for the space of about forty minutes after the alarm was turned in. These wires were thus burned from their

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fastenings and fell to the ground soon after the alarm was given, continued to lie upon the ground during the greater part of the time that the fire was so burning, and while so lying upon the ground continued to be charged with electricity in dangerous and deadly quantities; that defendant neglected and carelessly permitted its wires so charged to lie upon the ground where it was necessary for persons to go and to be for the purpose of combating and extinguishing the fire. "That defendant, although notified of the existence, and apprised of the location of the fire, as aforesaid, and well knowing of the existence of its said wires at said place, and having the entire charge and control of said wires and of its said electricity and currents of electricity, and well knowing that its said wires were then and there charged with and carrying currents of electricity, and well knowing that said wires were, in the event of a fire, liable to be burned from their fastenings, and to fall to the ground and endanger the lives of people, and particularly of persons engaged in fighting the fire, and having full and ample time and opportunity to know and ascertain the condition of said wires at said time and place, and having ample and sufficient time and means to turn off said electricity and to cut said wires, and to render the same safe and harmless, negligently and carelessly failed to cut said wires, and negligently and carelessly failed to turn off said electricity, and negligently and carelessly failed to do anything, whatever, to render said wires, or any of said wires, safe and harmless during the time of said fire and while its said wires were down and lying upon the ground, as aforesaid." Issue was joined upon the material averments of negligence, and for an affirmative defense the contributory negligence of Pennebaker was charged. The cause was tried by the court without a jury, and the court gave judgment for plaintiffs, its findings conforming exactly to the allegations of the complaint.

The principal contention advanced upon this appeal is that the evidence introduced by plaintiffs, giving to it the fullest weight, utterly fails to show negligence upon the part of the ⁵⁸² defendant. Appellant contends, for its second proposition, that if the evidence of the plaintiffs be held sufficient to charge the defendant with negligence, it must be concluded from the same evidence that the deceased was guilty of contributory negligence, and, finally, it is urged that the court erred in its ruling refusing admission to certain evidence proffered by the defendant. A statement of the substance of plaintiffs' evidence is made necessary for a consideration of appellant's contention that it utterly fails to show negligence upon its part.

The evidence disclosed that defendant, an electric light and power corporation, was under contract to supply, and en-

gaged in supplying, light and power to the municipality of Fresno and to private users and consumers; that at 2 o'clock A. M. a fire was discovered in the building before mentioned. Alarms of fire from two boxes, Nos. 4 and 82, representing contiguous fire districts, were turned in well-nigh simultaneously. Automatically a signal was thus given in the fire department stations, and a more general signal by the blowing of a whistle at a substation of the electric company, about five blocks distant from the actual location of the fire. Each of these fire districts embraced territory of five or six blocks. So that a recognition and understanding of the signal as being from district 4 or district 82 would indicate that the fire was somewhere within one of the five or six blocks embraced respectively in such district. The signal would not, and did not, of course, indicate the building, and would not, and did not, indicate whether the defendant company had light or power wires that would be affected by the fire, though of course there would be imputed to the company knowledge that it had such wires within the district. The firemen arrived promptly at the scene of the fire and proceeded to fight it with water and chemicals. The building was a bicycle repair-shop, into which was conducted power used in operating a small lathe. The wires carried electricity which by no possibility could exceed two hundred and sixty volts; two hundred and sixty volts are not regarded as dangerous to human life, much less as deadly. These wires were burned and fell to the ground by reason of the fire, and lay upon the ground in the back yard of the premises. Certain of the firemen noticed these wires and saw by their sputtering that they ⁵⁸³ were "hot" and "carried juice." One or two of the firemen actually received shocks from these wires and jumped away. Discussion arose amongst the firemen as to whether the wires were dangerous. The fire chief testifies: "I went around in the back and there was quite a number of the boys [firemen] had been in the yard and they had come out, and of course they hadn't ought to come out, and they said the reason they came out was on account of the juice being in there. Others spoke up and said there was not enough in there to hurt anybody, and I went in there and it didn't bother me at all. I didn't feel it. I never got a particle of a shock at all." The fire being subdued in about three-fourths of an hour from the time the alarm was given, the chief gave orders to his men to carry out their hose and other paraphernalia and make ready to disperse. Pennebaker, in the performance of his duty, went into the yard, his feet touched and became entangled in the wires, and he pitched forward, unconscious. He was dragged out by his fellows, never recovered consciousness, and died within an hour. The chief of the fire

department testified that he saw one or more of the employees of the defendant at the fire, but it is not shown that they were on duty, were charged with any duty, were informed of or knew that the wires were carrying electricity, or even that they were there when the wires were carrying electricity, for in a very few minutes after Pennebaker was struck down the city electrician climbed the pole and cut the wires. The city was divided by the defendant into districts, and the light and power from these districts could be turned off at the substation. A man was maintained there day and night to do this, upon proper demand. No demand or request was made in this instance. The effect in turning out the light in any one of these districts would be to leave it entirely without electric light or power. Pennebaker was a vigorous man, in the prime of life.

The foregoing is a fair summarization of all the evidence upon the question of negligence presented by plaintiffs. It is the evidence to which the motion for nonsuit was addressed. It is to be noted that no knowledge was brought home to defendant that the fire had disturbed, or would in any way disturb, its wires; that if knowledge that there was a fire and the general location of that fire was imputable to defendant ⁵⁸⁴ by the blowing of the whistle, such knowledge, in the nature of things, could tell them no more than that it was in a district comprising five or six blocks. No knowledge was imputed or was imputable to defendant that the fire was even in a building containing its wires. It is to be noted, moreover, that the wires, whose detachment caused the fatal accident, did not fall upon any public way, but in the back yard of private property. Respondent contends, and the trial court took the view, that this uncontradicted evidence was legally sufficient to establish the negligence of defendant. If it did, it can be but upon one or another of two theories, both of which are advocated by respondent: First, that it was the duty of defendant to have disconnected its wires when the fire-alarm was sounded. Second, that it was the duty of the defendant to have an employee at the fire, either to disconnect the wires himself or to signal to the substation to have it done. A third theory of respondent, broader, perhaps, than either of these, is that by the very happening of the accident, under the indicated circumstances, the law imputes negligence to the defendant, and that therefore the nonsuit was properly denied. This is an invocation of the doctrine *res ipsa loquitur*.

1. In support of the first contention no authority is cited, nor do we think any can be. It would compel defendant, upon the one hand, to extinguish all light and power in a district, regardless of the necessity of so doing, or be held liable for any consequences that might follow its failure. It

takes no account of the fact that by so doing, in the case of a night fire, a district would be left in complete darkness, and that under such circumstances, following the alarm of fire, panic might ensue in hotels, lodging-houses and residences, and that the resulting damage might far exceed that which the extinguishment of the lights was designed to prevent. No such rule of law exists, nor, we take it, will ever exist, and the utmost that will be exacted by lighting companies in this regard is that they shall hold themselves in readiness to cut off the electricity when the necessity arises and they are informed of it by proper authority.

2. Nor is negligence imputable to the defendant because it did not have an employee at the fire, charged with the duty of disconnecting particular wires, or signaling for the disconnection ⁵⁸⁵ of the district. Any reasonable ordinance in this regard which a municipality might adopt would, of course, be upheld, and if injury resulted from the negligent failure of the light and power company to obey the terms of such ordinance, undoubtedly negligence could be predicated upon it. But here no such exactions were required by any ordinance, and it cannot be held that the defendant failed in any duty with which the law charged it in not having such employee in attendance at every fire. Indeed, in *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84, 102 N. W. 89, where an ordinance required electric companies to send one or more competent linemen to fires to report to the city engineer and remove or disconnect wires where directed, the court held that this imposed no further duty upon the company than that of so doing, and that the company was not liable, even when it was shown that the company's linemen invited the firemen to proceed to lower the ladders, declaring that the wires with which it thereupon came in contact, and which proved to be heavily charged, were "dead." The court ruled that his declaration to that effect, being entirely outside of the line of his duty, could not charge the defendant company; that defendant light company owed no duty to the firemen to warn them of danger either in ascending or descending the ladder or in removing it from between the wires after the fire was extinguished. This was a duty, if such duty existed, which, under the ordinance pleaded, devolved upon the officers of the city: See, also, *Trouton v. New Omaha Thomson-Houston Elec. Light Co.*, 77 Neb. 821, 110 N. W. 569. This same reasoning and authority answer the argument of respondent that employees of the defendant were at the fire that night, and saw the fire and "undoubtedly the flashing of the electricity and the condition of the wires, yet they did nothing." In addition to what has been said in this regard to the effect that they were not there in the

performance of any duty, and that it is not shown that they were there when the wires were charged with the electricity, respondent's argument, for a still further reason, is *felo de se*. For if defendant's employee, a mere bystander and looker-on, can be charged with knowing that electricity in dangerous quantities was escaping from his employer's wires, how much more is Pennebaker himself charged ⁵⁸⁶ with this knowledge, when he was a fireman, in the immediate vicinity of the wires, when some of his fellow-firemen had received shocks, when the matter had been discussed amongst them, when a cry of danger had been given, and when in the resulting conversation it had been argued that the wires were not carrying power enough to injure anybody. Clearly, if knowledge of a dangerous condition arising out of the presence of the electric current in the fallen wires was chargeable to an employee of defendant, under these circumstances, it was even more chargeable against Pennebaker, and the conclusion would be unanswerable that his own negligence, after such knowledge, proximately contributed to his death.

3. The third theory, and that perhaps most strongly relied upon by respondent, is that the facts proved established negligence *per se*. Herein much reliance is placed upon the decision of the supreme court of Missouri in *Gannon v. Laclede Gas Light Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505. This decision was rendered by a divided court. While there are expressions in the prevailing opinion in accord with the respondent's contention, the real question decided was quite different. The action, like the one under consideration, was to recover damages for the death of a husband and father, himself a fireman. The proof by plaintiff was merely to the effect that the deceased, while in the performance of his duty as fireman at a fire, was killed by coming in contact with heavily charged wires of defendant company lying in a public alley. In its essence the proof went no further than this. The defendant company showed that the wires were burned through, or their attachments burned down, through no fault of its own, by an accidental fire; that it received no notice, and, indeed, that there was no time between the falling of the wires and the accident in which it could have received notice so as to cut off the current. It made this proof full and complete by unimpeached witnesses and uncontradicted testimony. The verdict of the jury was for plaintiff. The supreme court was divided, not at all upon the question whether or not the defendant company had made full and complete defense. That was admitted; but upon the question whether or not the jury was bound to believe and decide in accordance with the evidence of the defense, a bare majority holding that the jury alone were triers of the fact, and that a court of appeals would ⁵⁸⁷ not reverse a case and override the verdict if the evidence

proved unsatisfactory to the jury, however satisfactory it might be to the court, the minority of the court holding that such a rule gave juries uncontrolled liberty to disregard and reject evidence, which, under the circumstances, it was their duty to have accredited.

This was the principal point of controversy between the members of that court. In the prevailing opinion, it is true, language is used, upon which respondent here relies, which would make not only electric light companies, but every other person using a street, saving foot-passengers, absolute insurers in case injury resulted to person or property. An instance of such a declaration is found in the following language: "It was a matter of the plainest duty for the defendant to see that the streets and alleys of the city, along which by permission it was suffered to place its overhead wires for its own private gain, were at all times maintained in the same condition as to safety from the danger of electricity as they were before its overhead use thereof was begun." Every added vehicle upon the street of a city increases the danger to pedestrians in the use of the street. Every street-car does the same. Every suspended sign has like effect. If it be true that in all these, and in the innumerable other instances which might be cited, the street must be as safe after as before the new use, then it must necessarily follow that the user becomes an absolute insurer. If that is what the supreme court of Missouri means, it must suffice to say that it stands alone in its opinion, without reason or authority in its support: 1 Thompson on Law of Negligence, sec. 802; 15 Cyc. 472. If, however, the supreme court of Missouri meant but to declare that where the wires of an electric light company, heavily charged with electricity, are shown to be lying upon a public street, and injury to a person lawfully upon the highway results from these wires, without negligence on his part, a presumption that the company is negligent thus arises, and the burden is cast upon it to overcome this presumption, the principle of law thus declared is one over which there need be no discussion, for it is not pertinent or applicable to the present case. Here, no wires were upon the public street. They were upon private property and were cast to the ground by the burning of the building upon that property. In the absence of ordinance ⁵⁸⁸ or statute changing the common-law rule in this regard, a fireman entering a building under imperative public necessity is but a licensee, who assumes the risks as he finds them, and to whom the owner of the premises owes no special duty to maintain those premises in a safe condition: New Omaha etc. Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89; Woodruff v. Bowen, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198; Hamilton v. Minneapolis etc. Co., 78 Minn. 3, 79 Am. St.

Rep. 352, 80 N. W. 693; 21 Am. & Eng. Ency. of Law, 2d ed., 475. We would not from this be understood as holding that in all cases where the owner is exonerated, an electric light or power company, using the building as a means of transmitting into or over it power in dangerous quantities, would also be exonerated. A broad distinction might often exist between the duty of the owner, who had no control over the dangerous current, and the responsibility of the company using the building for the transmission of the dangerous force, and whose duty, therefore, it was to control it in all proper ways. So, in the very case at bar, the owner, having perhaps little knowledge of the force, and less of methods of its control, might well be held nonliable where dereliction of duty might be charged against and consequent liability might be imposed upon the electric company, if, after knowledge of the dangerous condition, it failed promptly to remedy it. But, under the facts here stated, such knowledge was not brought home to it, and it was not chargeable with this knowledge as matter of law.

It should be repeated that in this case there is no question involved of deadly wires lying in a street, to the imminent danger of the traveling public. There is no question of faulty installation or operation. Moreover, the defendant, if chargeable with everything else, could not be charged with the maintenance of deadly wires, since, notwithstanding the fact that the current which they carried caused the death of Pennebaker, and in this sense they proved deadly, a defendant's conduct is to be judged by the ordinary knowledge of mankind, and it is in evidence that two hundred and sixty volts was the utmost which the wires could have carried, and that the shock of two hundred and sixty volts is not regarded as at all dangerous to human life. It is not shown, therefore, that the defendant in this case failed in any duty toward the ~~550~~ deceased which was imposed upon it by law. If it has not failed in such duty, it is not legally responsible for his death.

4. The court's ruling in rejecting offered evidence, of which appellant complains, was error. This evidence consisted of a report made by the city electrician of the city of Fresno to the board of trustees, showing that the water and light committee of the Fresno city council, "to which was referred the matter of having cut-off switches installed for controlling electric currents in case of fire, reported a meeting with the officers of the San Joaquin Power Company, at which they explained that every circuit in town could be controlled from the power-house, and that they had made arrangements with the telephone company whereby the fire chief, or city electrician, by asking the chief operator of the telephone company for the power-house, would be given the line immediately, and that the current could be shut off quicker and with a great

deal more safety in any district of the city by an attendant at the station." This report was by the trustees of the city adopted and placed on file. It was offered to be shown that the city electrician had, upon occasions of fire when the exigencies of the case in his judgment called for it, requested the cutting off of a district, and the request had always been promptly complied with. And it was offered to be shown, moreover, that the company always maintained a competent man at its substation for the purpose of doing this very thing, and that on the occasion of this fire no request so to do had been made. In fact, the electrician arrived at the fire, cut the wires himself, but, unfortunately, a few minutes after Pennebaker met his death. The evidence was rejected apparently upon the theory that it did not amount to a by-law or ordinance or regulation of the city, and so could not operate to change defendant's legal duty toward the deceased. In this view the court was clearly in error. If the converse of the proposition had been sought to be proved, namely, that with the existence of such an understanding the company had failed upon proper request to disconnect the wires, it would not be doubted that it would furnish strong evidence of the company's negligence. Here, if it be conceded that the understanding or arrangement or agreement or convention of the parties did not have the legal effect of a municipal by-law, it was competent, nevertheless, to show that it was an accepted ⁵⁹⁰ regulation by the municipal authorities of the duty of defendant in the matter of fires, that it was an agreement which had been put into force, and which had always been lived up to by the company. The evidence would certainly have a strong tendency to show that in this respect the company was not delinquent in the performance of its duty, and for this purpose and to this extent it should have been admitted and weighed.

These considerations cover all the matters called to the attention of the court, and for the reasons hereinbefore given, the judgment and order appealed from are reversed and the cause remanded.

Lorigan, J., and Melvin, J., concurred.

Hearing in bank denied.

Beatty, C. J., Dissented from the order denying a hearing in bank and filed the following opinion on December 17, 1910:

I dissent from the order denying a rehearing of this cause. It is here decided, among other things, that the superior court erred in sustaining the objection to the defendant's offer to prove the adoption by the board of trustees of the city of Fresno of the following report of the city electrician:

"To the Honorable, the Board of Trustees of the City of Fresno:

"Gentlemen—The undersigned, the city electrician of the city of Fresno, herewith submits for your consideration his report for the month of December 30, 1905, as follows, to wit:

"On the 13th the water and light committee met representatives of the Power Company in my office to decide on some safe and practical method of handling dangerous wires at fires. It was agreed that by giving the right of way over all others to the telephone lines, to the city electrician and fire chief, that the current could be shut off quicker and with a great deal more safety in any district of the city, by the attendant at the station. As with switches, it would be necessary to pull at least two to kill the line, and it would be necessary to climb the poles to do so. And besides, it is possible that the switch pole might be in range of the fire, in which case the switch would be useless.

"Respectfully submitted,

"C. T. McSHERRY,

"City Electrician."

If this report had been offered by the plaintiffs in support of their case, I think it would have been harmful error to have excluded it, for it would have proved in their favor that the necessity of providing "some safe and practical method of handling" the wires of the defendant carrying dangerous voltage in case of fires had been recognized and considered both by the city authorities and by the defendant—that it had been agreed that a proper measure of precaution in such case would be the cutting off of the circuit (i. e., the district) affected, and that the defendant's plan of cutting out the whole district at the substation had been adopted in preference to the alternative plan of providing local switches within the various districts. This, in connection with abundant evidence that the defendant's agent at the substation, knowing that a fire had started within five or six blocks of the station, and in a district to which its wires extended carrying a voltage which the event proved to have been deadly to a grown man in apparently sound health, had neglected for forty minutes after the alarm of fire to adopt the precaution suggested by defendant itself and claimed to be the safest and most practicable, would have made out a clear case of highly culpable negligence, unless the adoption of the electrician's report can be construed as a valid agreement exempting the defendant from any obligation to cut off the current from a circuit where a fire might be raging until its agent at the substation should be requested to do so by the city electrician or the chief of the fire department. This indeed seems to be the view of the court, and, as appears from the opinion, is the ground upon which the ruling of the superior court is condemned. It is from this view that I dissent. It is perhaps a just inference from the terms of the report that its author assumed it to be a part of the duty of himself and the fire chief to the public (but not to the defendant) to give prompt notice of the occurrence and locality of the fire to the persons in charge of the defendant's substation, but this did not exempt the defendant from the duty of acting promptly upon the same notice coming from any other person or in any other form. That they had such notice and neglected to act upon it with reasonable promptitude was, in my opinion, amply proved, and it was no error as to the defendant to exclude the electrician's report and proof

of its adoption, since it had no tendency to prove that the neglect to shut off the current at the station was excused by the failure of the fire chief and electrician to make the request.

I do not think this court can, on the evidence, set aside the finding of the trial court as to contributory negligence.

As to the status of a fireman who enters a burning building in a city in the vicinity of other buildings for the purpose of extinguishing the fire or saving life or property, it may be that the liability of the owner for any injury received by him while on the premises is no other or greater than it would be to a mere licensee, but the fireman is not there as a licensee of the owner; he is there in performance of his duty as a public servant under the authority and protection of regulations clearly within the police power of the state, and of superior force to the will of the owner of the premises; and he is entitled to the same indemnity for injuries caused by the culpable negligence of others as if he were on a public street.

As to the comparative harmlessness of less than five hundred volts *res ipsa loquitur*. Either these wires carried more than five hundred volts, or less than that voltage, though harmless to most men, is deadly to some—and those few are entitled to protection. And, finally, the argument based upon the serious dangers (of panic, etc.) involved in the cutting out of a circuit on an alarm of fire does not appear to consist very well with the choice of a plan of handling its dangerous wires suggested by the defendant itself and approved by the city trustees, which was nothing less than a means of transmitting prompt notice of the outbreak of a fire to the substation and the cutting out of the circuit.

Upon this view of the case the question presented by the appeal is not whether it can be held, as a matter of law, that it was culpable negligence on the part of the defendant to wait for official notice of the danger before adopting any precaution against it, but is, on the other hand, whether it can be held, as a matter of law, that under the facts disclosed by the evidence there was no culpable negligence. Negligence is a question of fact and not of law, except in those cases where upon the facts found or proved there can be no reasonable difference of opinion as to the absence of culpability. In this case the judge of the trial court, performing the function of a jury, has found that there was negligence. I do not think that his conclusion was unreasonable. At least I think the case is deserving of further consideration.

The Duties and Liabilities of Electric Corporations are discussed in the note to *Hebert v. Lake Charles Ice etc. Co.*, 100 Am. St. Rep. 515. See, also, *Gentzkow v. Portland Ry. Co.*, 54 Or. 114, 135 Am. St. Rep. 821.

The Owner or Occupant of a Building Owes No Duty, at common law, to keep it in a reasonably safe condition for members of a public fire department who may, in the exercise of their duties, have occasion to enter the building: *Hamilton v. Minneapolis etc. Mfg. Co.*, 78 Minn. 3, 79 Am. St. Rep. 350.

FOUNTAIN v. CONNECTICUT FIRE INSURANCE COMPANY.

[158 Cal. 760, 112 Pac. 546.]

FIRE INSURANCE—Clause Against Falling Building.—Where a policy provides that all insurance under it shall cease immediately in the event that the building in which the insured goods are, or any part of the building, falls, except as a result of fire, the test properly is not whether the effect or extent of collapse is such as to increase the fire risk but the event itself, provided what falls is a material or important part of the structure. (pp. 217, 218.)

FIRE INSURANCE.—A Clause in an Insurance Policy whose substance is within the law of California, "a policy may declare that a violation of specific provisions thereof shall avoid it," must be enforced by the courts of that state, whether it accords with justice or not. (p. 217.)

FIRE INSURANCE—Clause Against Falling Building.—Where a material part of the walls of a building tumble down by reason of an earthquake, and destruction is completed by a fire following thereupon but caught from a burning structure near by, recovery of insurance on the contents of the building cannot be had under a policy containing the clause: "If a building, or any part thereof fall, except as a result of fire, all insurance by this policy on such building or its contents shall immediately cease." (p. 218.)

A. B. Ware and T. C. Van Ness, for the appellant.

Thomas J. Geary, for the respondents.

760 **SHAW, J.** This is an action to recover upon a policy of insurance issued by the defendant, covering goods of the plaintiff contained in a two-story brick building situated in the city of Santa Rosa, known as the Shea Building. It had two storerooms on the ground floor, one of which was occupied by Fountain. The second floor was divided into rooms used and occupied for offices and one room which was occupied by **761** the society of "Eagles" as a lodgeroom. The defendant appeals from an order denying its motion for a new trial, after a verdict for the plaintiff.

The policy contained the following clause: "If a building, or any part thereof, fall, except as a result of fire, all insurance by this policy on such building or its contents shall immediately cease." The building referred to was the Shea Building aforesaid.

Upon the trial it was admitted by the defendant that it was liable to the plaintiffs for the loss to the full amount of the policy (\$1,000), "unless it could make good its defense based upon" the above-quoted clause thereof. The fire was on April 18, 1906, and it immediately followed the earthquake which occurred at fifteen minutes after 5 o'clock in the morning of that day. The evidence introduced by the defendant in support of the defense aforesaid showed that before the fire started the front wall of the Shea Building, from the roof

down to the second floor, had fallen down, leaving the roof unsupported in front, so that the front part of it dropped and rested upon the second floor at the top of the first story. This was the substance of the testimony of a number of witnesses who saw the building immediately after the earthquake. That this front wall was a substantial and important part of the building, and that the falling thereof would immediately terminate the policy by force of this clause, cannot be seriously disputed. The defense was therefore established, and the order must therefore be reversed, unless other evidence raised a substantial conflict on the subject.

We do not think the contention of the plaintiff that there was a conflict on that point can be sustained. The evidence of the defendant's witnesses on the point was clear, direct, positive and satisfactory. That on behalf of the plaintiff, which it is claimed creates a conflict, is in substance as follows:

The witness Burris said that he made an examination of the front and rear of the Shea Building, that the rear did not seem to be damaged, and that he did not see any break in the structure of the lower walls, nor any breaks in the structure of the Fountain storeroom. On cross-examination, he said that the "upper story seemed to be shook up quite a little; the windows were thrown out into the street in the debris." Referring ⁷⁶² to that and the other buildings included in the same row, he said that the upper stories were "shot up pretty badly and a great deal of brick and awnings and other things thrown down on the sidewalk and out on the street," and that he did not think any of them were clear out and down, but "there would be great chunks out of them," and that they could not have been occupied until repaired. He said nothing about the position of the roof, and apparently was not questioned concerning it. Hahman was in his own storeroom in the lower story of the adjoining building half an hour after the earthquake. He entered from the rear. He said the back walls of the Shea Building were intact, but he said nothing about the front wall. He said the Shea Building was burning at that time. King, another witness, occupied a storeroom in the adjoining building and he entered it from the rear. The front and side of that building were down. He said nothing about the walls of the Shea Building. Hoffer had an office in the Shea Building over the storeroom adjoining that occupied by Fountain. He went into his office ten or fifteen minutes after the earthquake. He said the side walls of the second story were standing on each side of his office, that the east wall of the Shea Building was up as far as the roof and the roof had slid over on to the front—"it kind of fell out that way and sort of dropped down in front" over his office. On cross-examination he said the front walls where he occupied were out, that Dr. Mallory's office was over Fountain's store

and that Mallory's office was out just like his. This evidence is wholly insufficient to disprove the contention that the part of the walls which had fallen was not an important and material part of the building. The witness most favorable to the plaintiff was Mr. Burris, and his testimony alone shows that a material part of the building had fallen. Other evidence established the fact that the second story had rather large bay windows in front, and these windows, he says, had fallen out into the street. And while he did not think that any of the upper stories in that row were clear out and down, they had "great chunks out of them," and the buildings could not be occupied until repaired. Clearly this was sufficient to constitute the falling of a material and substantial part of the building.

With regard to the time when the fire started, the theory ⁷⁶³ advanced is that, although there was no direct evidence on the subject, there were circumstances sufficient to justify the inference that the first effect of the earthquake may possibly have been to break some charged electric light wire in the building, so as to cause fire therefrom to begin before the shake had caused the wall or window to fall. We have not given the defendant's evidence on this point in detail but in substance it satisfactorily established the fact that the fire in the Shea Building was caused after the earthquake, by fire which originated in some other building or buildings, in the same row and did not reach the Shea Building until from fifteen to thirty minutes afterward. There was clear proof that very soon afterward fires were observed in two of these near-by buildings, and that there was none at that time in the Shea Building. A witness for plaintiff said that about a minute after the earthquake, from his house seven blocks away, he saw a column of smoke seventy-five to one hundred feet high and half as large as the courtroom at Santa Rosa, arising from the neighborhood of the Fountain store, that when he came down town he located that fire and it was somewhere in the rear of the Shea Building, or another building not adjoining, but that he did not know the exact spot where it was nor within forty feet of where it was; that he did not look to see what was burning. This vague and uncertain evidence is not sufficient to constitute a substantial contradiction of the other witnesses, some of them produced by the plaintiffs, who testified either directly that the Shea Building was not on fire at the time they reached it, or saw it, after the earthquake, or to circumstances about which they could not well be mistaken and which if true would render it extremely improbable, if not impossible, that the building could have begun to burn until at least fifteen minutes after the earthquake, and then only from fire communicated from the adjoining buildings. It thus being established that the building was not on fire im-

mediately after the quake, there is no basis for the supposed inference that the fire therein may have begun before the wall fell. The defense was established, the verdict was contrary to the evidence, and the new trial should have been granted for that reason.

One of the instructions was as follows: "It is not sufficient for defendant, in order to avoid its ⁷⁶⁴ policy, to establish the fact that the building described in the policy in suit had, before it began to burn, suffered some injury, or that any part of the walls of said building had fallen before the contents of the building were destroyed by fire, to avoid its policy herein; but the defendant must establish by a preponderance of evidence that such a material portion of the building had fallen before the fire started as would have increased the fire risk which defendant assumed by its policy on such building and its contents. That if the evidence does not establish the falling of such a material portion of the building, then I instruct you to find for the plaintiff."

In anticipation of a new trial it is proper to determine whether or not this instruction is correct.

Section 2611 of the Civil Code declares that "A policy may declare that a violation of specified provisions thereof shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy." We are bound by this statutory declaration of the law, whether it accords with justice or not. The clause of the policy on this subject is in substance the same as the provision of the code. To declare that, upon the happening of a given event, "all insurance shall immediately cease," is but another way of saying that, if the event happens, the obligation created by the policy shall become void. The effect of this section of the code, in connection with the fallen building provision of the policy, is that the question whether the falling of a part of the building increased the fire risk or not, is wholly immaterial, provided the part of the building which had fallen at the time the fire started was a material or important part of it. The instruction was erroneous in so far as it directed the jury that the effect of the falling of the part of the building must have been to increase the fire risk and that, if it did not, the defendant would be liable. The parties had the legal right to make the contract that in such an event there should be no necessity for any inquiry as to the increase of risk therefrom, and that the mere event should at once terminate the insurance, and having done so, the defendant is lawfully entitled to the advantage thereof. The instruction was imperative in its direction to the jury, and although other instructions given omitted the element of increase of risk, they merely caused a conflict and did not cure the error. It is impossible to say which instruction the jury obeyed.

⁷⁶⁵ The decision of the court in *Bastian v. British A. A. Co.*, 143 Cal. 287, 77 Pac. 63, 66 L. R. A. 255, was in substance based upon the principles above stated. The doctrine that the breach of an immaterial provision of the policy does not avoid it is not applicable, under the code, where the policy expressly declares that it shall avoid it. In *Clayburgh v. Agricultural Ins. Co.*, 155 Cal. 708, 102 Pac. 812, 18 Ann. Cas. 579, we were discussing the question of what was a sufficiently important "part" of a building, under the fallen building clause of a policy, to make the policy void if such part should fall. The instruction there considered was passed as substantially correct in effect, and this was put upon the ground, that, although it did refer to the increase of the fire risk as a result of the falling of the part of the building, it did not, when taken as a whole, declare that such increase must occur in order to avoid the policy, but only that the part fallen must be important enough to materially impair the usefulness of the building. In substance that decision was that to constitute an infraction of the fallen building clause, some material or substantial part of the building, as distinguished from a trivial, minute and unimportant part thereof, must have fallen. The question of a consequent increase of risk was not held to be essential to the avoidance of the policy, if the part which had fallen was a material and important part of the building.

The question involved in this instruction is of no practical importance upon a new trial, unless the evidence should be more favorable to the plaintiff than that given upon the trial under consideration. For there can be no doubt that the falling of even so much of the building as *Burris* testified had fallen would increase the risk of fire. It is proper to remark further that the evidence does not present the question whether or not the defendant would be liable if the fire had started in the building before any part of it fell, and before it reached plaintiff's goods a material part of the building had fallen as a result of the earthquake and not as a result of the fire.

Other questions are discussed in the briefs in this case, but the probability that they will arise upon a new trial is so remote that we do not deem it necessary to consider them.

The order denying a new trial is reversed.

⁷⁶⁶ *Angellotti, J., Sloss, J., Lorigan, J., Henshaw, J., and Melvin, J., concurred.*

The "*Earthquake*" Clause in Policies of Fire Insurance is the subject of a note to *McEvoy v. Security Fire Ins. Co.*, 132 Am. St. Rep. 437.

In *Pacific etc. Co. v. Williamsburg*, 158 Cal. 367, 111 Pac. 4, the policy of fire insurance sued on contained a provision that the insurance company should not be liable for loss caused directly or indi-

rectly by invasion, or by order of any civil authority; or for loss or damage occasioned by or through any earthquake. The court, in dealing with the policy, recognized the distinction made by it between loss caused "directly or indirectly" by certain means other than earthquake and "loss or damage occasioned by or through earthquake. "The omission of the words 'directly or indirectly,' from the clause dealing with earthquake," said the court, "justifies a limitation of that clause to loss occasioned directly, as well as proximately, by earthquake. Where the peril insured against is fire, and the peril not insured against is earthquake, the defendant is liable for a loss by fire although the earthquake was the remote cause of the loss; and it is not a defense to an action on a policy, such as the above, that on the day of the fire, an earthquake occurred which started a fire on other property, and that such fire subsequently spread from building to building until it involved and destroyed the property insured.

In Davis v. Connecticut Fire Ins. Co., 158 Cal. 766, 112 Pac. 549, the policy issued by the defendant company contained the following clause: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease"; and the whole defense to an action on the policy turned upon the question whether or not the fire attacked the goods before a part of the building had fallen. The jury answered that it did. The proof showed conclusively that an earthquake alone caused the fall of a sufficient part of the building to destroy its distinctive character as a building and to increase the risk from fire. The court, in construing such fallen-building clause, considered that the most reasonable interpretation of it is that it does not apply to the case of a building, or part thereof, falling after it has begun to burn, if the insurance is on the building, and perhaps even if it is only on goods therein, and that where goods only are involved, it does not apply where the goods have begun to burn before, and are burning at the time the fall occurs. "When the fire begins to burn the property insured, the thing insured against has happened, the liability has begun, some loss has become inevitable." "The better rule," said the court, "is to hold that the liability of the insurer, so far as this clause is concerned, is fixed by the conditions existing at the time the fire and consequent loss begins, and is not affected or changed by the fall of the building, or a part thereof, subsequently but before the destruction is complete."

CASES
IN THE
SUPREME COURT
OF
COLORADO.

CHAFFEE v. WIDMAN.

[48 Colo. 34, 108 Pac. 995.]

APPEAL—Nonappealable Judgment.—Appearance on appeal from a judgment which is not appealable may entitle the cause to be entered as pending on error. (p. 221.)

APPEAL—Nonappealable Judgment—Dismissed.—If a case is appealed which is not appealable, and the appellee does not enter an appearance, the appeal may be dismissed, and thus the party seeking to have a case reviewed in the supreme court may lose his right to a review. (p. 221.)

BROKER—When Entitled to Commission.—In order for a real estate broker to be entitled to commission he must have accomplished all that he undertook to do—found and produced a person ready, willing and financially able to purchase at the price and upon the terms and conditions fixed by his employer, and he must have been the procuring cause of the sale, and the means employed by him and his efforts must have procured the sale. (p. 223.)

BROKER—Commissions—Abandoned Negotiations—Subsequent Sale.—When a broker opens negotiations but fails to bring the prospective purchaser and owner together, and they are abandoned without fault of the owner, and the latter subsequently sells to the same party, without further effort on the part of the broker, the owner is not liable to the broker for commissions. (p. 224.)

PLEADING—Variance.—A Plaintiff must Recover, if at all, upon the contract alleged in his complaint; thus in an action to recover commissions under an express contract, the plaintiff cannot recover compensation for a different transaction. (p. 224.)

Charles M. Corlett and George Corlett, for the appellant.

James P. Veerkamp, for the appellee.

³⁵ **GABBERT, J.** Chaffee, as plaintiff, brought suit against Widman & Widman, as defendants, to recover the amount of commissions which he and one Ambler claimed to have earned in effecting a sale of land belonging to the Widmans. The trial resulted in a verdict and judgment in favor of defendants, from which plaintiff appealed to this court. We have no jurisdiction to entertain the appeal—Civil Code, sec. 388; as amended, Session Laws 1907, 278—but as
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the defendants have entered an appearance, we have directed, by virtue of section 388a of the code, that the cause be entered as pending on error, and shall consider it accordingly. The code provisions to which we have referred provide when the defeated party may appeal to this court, and they should be observed. If a case is appealed which is not appealable, and the appellee does not enter an appearance, the appeal may be dismissed, and thus the party seeking to have a case reviewed in this court may lose his right to a review: *Brady v. People*, 45 Colo. 364, 101 Pac. 340. We mention ³⁶ this for the reason that recently so many cases have been brought here on appeal which are not appealable, and can only be reviewed on error.

Numerous errors are assigned by counsel for plaintiff, but as the undisputed testimony establishes a state of facts from which it is apparent plaintiff was not entitled to recover a commission from the Widmans, it is only necessary to discuss that phase of the case.

Plaintiff lived in the state of Nebraska. He entered into an arrangement with a firm engaged in the real estate business in the San Luis valley, under the name of the Southern Colorado Land Company, by which he was to be allowed a share of the commissions earned by the land company, in effecting sales to parties whom he secured to purchase lands this firm had listed. Ambler, above named, was a member of this firm. In the spring of 1903 plaintiff brought Halsey L. Hawkins and Donald A. Gove to the valley for the purpose of selling them land. Accompanied by a member of the Southern Colorado Land Company these prospective purchasers and plaintiff visited the Widman ranch. Prior to this Thomas G. Hawkins, who also lived in Nebraska and was the father of Halsey L., had visited the ranch in question, and obtained from the owners the price at which they would sell. Through plaintiff and his associates, constituting the Southern Colorado Land Company, such negotiations were had that the Widmans agreed to sell for \$20 per acre, or \$16,000 for the ranch. Thereupon a written agreement was entered into between the Widmans and Thomas G. and Halsey L. Hawkins (the latter representing his father), by the terms of which the Widmans agreed to sell to the Hawkinses for the sum of \$16,000, \$500 being paid in cash, one-half of the remainder to be paid on or before March 1, 1904, at which time ³⁷ a note of the purchasers for the remainder of the purchase price secured by mortgage on the premises was to be executed, and the transaction closed. (Perhaps it is not entirely clear from the record whether the elder Hawkins was in Colorado at this time, but that is of no material moment.)

On the same day this contract was made the Widmans entered into a written agreement with plaintiff and his as-

sociates, the members of the firm of the Southern Colorado Land Company, regarding commissions. In this agreement the Widmans were designated parties of the first part and Chaffee and his associates parties of the second part. In stating the terms of this agreement, we shall, for convenience, refer to them accordingly.

By this agreement the Widmans employed the parties of the second part to procure a purchaser for the ranch in question for the sum of \$16,000. It then provides, so far as material to any question involved in this case, that "if the parties of the second part procure a purchaser for the ranch who shall, on or before March 1, 1904, pay or secure to the parties of the first part the sum of \$16,000," then the Widmans should pay the parties of the second part, as commissions, certain sums, and execute certain notes to the respective parties of the second part, aggregating \$3,200. The contract further provides that should the parties of the second part fail to procure a purchaser for the lands for the sum and within the time specified, then no commission is to be paid. Such, unquestionably, is the purport and meaning of the contract, although not so stated in express words. It was on this contract that plaintiff based his cause of action declared upon in his complaint in which he gave it the construction as to time within which he was to secure a purchaser, we have given it. He then alleges in his complaint that in ^{ss} pursuance of his employment as evidenced by the contract, he and his associates procured Thomas G. Hawkins and Donald A. Gove on or before March 1, 1904, to open negotiations with the Widmans to purchase their ranch, with the result that on the 18th of that month a deal for the premises was consummated in accordance with the terms and conditions of the contract upon which he bases his right to a recovery. He alleges that Ambler has assigned to him his share of the commission under this contract.

It is evident that the parties entered into this agreement in expectation that the contract which the Hawkinses entered into with the Widmans would be carried out and the commissions provided were based upon this contingency, and while it may be true that plaintiff and his associates would have been entitled to recover the compensation provided for in the event they procured some other purchaser for the lands within the time limited and upon the terms specified (this is evidently the theory upon which the complaint was framed), it becomes important to consider what follows, as it demonstrates beyond question that plaintiff failed to make the case declared upon in his complaint.

In January, 1904, he returned to Colorado evidently satisfied that it was doubtful if the Hawkinses would be able to purchase the ranch. He had a conversation with one of the

Widmans (a brother of the defendants) in which he asked him to assist in pushing the deal through before the contract expired, and requested that it might be extended beyond March 1st, in order to give him an opportunity to interest someone else in the purchase of the ranch. It does not appear that the request to extend the contract was granted, or that the defendants were requested to extend it. In the meanwhile, before it had expired, the Widmans urged plaintiff and one of his associates ³⁹ to complete the sale. They were not successful, and the result was, that the Hawkinses surrendered their contract. It does not appear that the Widmans or anyone else was responsible for this result, except that it was caused by the inability or refusal of the Hawkinses to consummate the purchase under their contract. Shortly after the time when this contract expired, one William A. Gove, who also lived in Nebraska, came to Colorado to look after a ranch he had purchased in the valley. While in Monte Vista he met another real estate firm, known as Graves, Ahrens & Blakey. Blakey had been one of the members of the firm known as the Southern Colorado Land Company, but it had been dissolved. Graves & Company endeavored to interest Gove in the Widman ranch, and to this end called in one of the Widmans, who offered to sell the ranch for \$15,500 on terms with respect to deferred payments much more favorable than those embraced in the contract with the Hawkinses. The proposition of Widman to sell was reduced to writing, and Gove carried it to Nebraska, and delivered it to Thomas G. Hawkins. The latter wrote a letter to one of the Widmans, saying he was unable to accept it. Not long after, Hawkins met Donald A. Gove, who, it will be remembered, was in Colorado when the contract between the Hawkinses and the Widmans was executed. He succeeded in interesting this Mr. Gove, who stated that if he, Hawkins, could get the ranch on the terms submitted by Widman, as embraced in the proposition delivered to William A. Gove, that he would go in with him and make the purchase. Accordingly, Hawkins wired Widman that he had reconsidered his letter declining to accept the proposition submitted him, and that he would come out and close the deal. A short time afterward Hawkins and Gove came to Colorado and purchased the ranch. ⁴⁰ This was about March 18, 1904. On this transaction the Widmans paid Graves and his associates a commission of \$1,600.

The general rule applicable to the case at bar is, that in order for a real estate broker to be entitled to commission he must have accomplished all that he undertook to do under his contract of employment; that is to say, he must have found and produced a person who was ready, willing and financially able to purchase the property which he was engaged to sell, at

the price, and upon the terms and conditions fixed by his employer, and must make it appear that he was the efficient agent or procuring cause of the sale, and that the means employed by him and his efforts resulted in a sale: *Wheeler v. Beers*, 45 Colo. 547, 101 Pac. 758; *Lawrence v. Weir*, 3 Colo. App. 401, 33 Pac. 646; *Babcock v. Merritt*, 1 Colo. App. 84, 27 Pac. 882; *Cole v. Thornburg*, 4 Colo. App. 95, 34 Pac. 1013; *Geiger v. Kiser*, 47 Colo. 297, 107 Pac. 267; 23 Ency. 914.

Thus tested, it is apparent that plaintiff was not entitled to a commission on the transaction declared upon. His contract of employment had expired by limitation, when the Widmans again began negotiations for a sale of their ranch. The contract of the Hawkinses with the Widmans had been abandoned at this time, and he was in no sense instrumental in bringing about the subsequent negotiations which finally culminated in a sale. They were begun and successfully carried to a termination by different parties, after the Hawkins contract had been abandoned and the contract in which plaintiff was interested had expired. The only circumstance upon which plaintiff could base any semblance of a right to a recovery is, that Thomas G. Hawkins, one of the purchasers, was a party to the original contract entered into with the Widmans; but, as we have seen, ⁴¹ this contract was abandoned, and so far as disclosed by the record, without any collusion between the Widmans and the Hawkinses, or bad faith on their part. When a broker opens negotiations but fails to bring the prospective purchaser and owner together, and they are abandoned without fault of the owner, and the latter subsequently sells to the same party, without further effort on the part of the broker, the owner is not liable to the broker for commissions.

It is said in the brief of counsel for plaintiff that it is not disputed that a binding contract was entered into between the Hawkinses and the Widmans. It is also said that where a binding contract was entered into, and it is found that the purchaser is unable to comply with the terms thereof, the purchaser is liable for commission at the suit of the agent. If we concede that by these claims it is meant to say that by the contract the Hawkinses agreed to purchase and the Widmans to sell their ranch, and the latter could have enforced it, and is, therefore, liable under the commission contract, even though the Hawkinses refused to purchase, it cannot avail plaintiff. He did not declare upon the Hawkins contract in his complaint, but on an entirely different transaction. A plaintiff must stand or fall by the case stated in his complaint. If he fails to establish the case thus stated, he cannot recover upon another.

According to the facts established by the undisputed testimony, plaintiff failed to establish a case; and it is not necessary to discuss the other questions urged upon our attention by his counsel.

The judgment of the district court is affirmed.

Chief Justice Steele and Mr. Justice White concur.

WHEN HAS A BROKER EARNED HIS COMMISSION.

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I. Right to Compensation.

- a. In General.—The foundation of a broker's claim to compensation must be a contract for its payment, express or implied, and the

whole service contracted for must be rendered before the right to compensation can attach: *Crosby v. St. Paul Lake Ice Co.*, 74 Minn. 82, 76 N. W. 958. One single sale of land for reward by one for another, taken alone, without anything to show that the former professed to follow or practice the business of a broker, buying or selling for others stocks, securities or other property for commission or reward, will not make him such broker, under section 2, chapter 32 of the West Virginia code. But where one promises to pay another for making a single sale of land, the consideration is sufficient to make the promise enforceable: *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575. And where a real estate broker agreed, before his commissions were earned, that they should be paid by the conveyance of lots of land, and selected the lots he would take, and a deed for them was duly tendered him, which he refused to accept, it was held that he could not maintain an action for the recovery of his commission in money: *Bailey v. Gardner*, 6 Abb. N. C. 147.

A mandate or procuration to sell land is gratuitous unless there is an agreement to the contrary under the Louisiana Civil Code, article 2991. Therefore, where real estate is placed in the hands of regular brokers for sale on commission, and they purchase the property from an agent of the owner, with power of attorney to sell, such agent has no legal right to retain commissions out of the price received by him, in the absence of a specific agreement to that effect: *Knotts v. Midkiff*, 114 La. 234, 38 South. 153. Where a real estate broker agrees to accept the commission in proportionate amounts, from time to time, as the deferred purchase money is paid, and default is made in payment of such purchase money and foreclosure is had, he becomes at once entitled to commission upon the amount realized from the foreclosure sale, not in excess of the balance due him, and whether the property is bought in by his principal or is sold to a stranger: *Crane v. Eddy*, 191 Ill. 645, 85 Am. St. Rep. 284, 61 N. E. 431.

A real estate broker who, having a purchaser for property of a particular kind, concludes, through an owner's agent, satisfactory arrangements and terms for the purchase of such property, which arrangements and terms result in a conveyance, is not entitled to commissions from the vendor, without proving an agreement that the vendor promised to pay commissions: *Addison v. Wanamaker*, 185 Pa. 536, 39 Atl. 1111. In *Strickland v. Fairfax*, 110 Va. 142, 65 S. E. 477, the evidence showed that the plaintiff volunteered and performed services toward leasing property, but before he leased it he told the defendant that he would not charge him a commission for his services. It was decided that the plaintiff was not entitled to compensation for the subsequent services in connection with the leasing of the property, because he had stated that he would not charge for them; and he was not entitled to recover for the services rendered prior to the leasing of the property, since they were rendered as a mere volunteer.

Where a land owner agreed with his agent, employed to take charge of and sell his lands upon commission, that he would allow the latter certain commissions on sales made by himself, he is liable only in case actual sales are made. A transfer of the lands by the owner to secure his debts will not entitle the agent to commissions: *Terry v. Wilson's Estate*, 50 Minn. 570, 52 N. W. 973. When a land agent volunteers to bring a purchaser to the owner of land, he is not

entitled to commissions, but if the land agent has been endeavoring to sell the land with the knowledge of the owner, and there is a promise to pay for his services when a purchaser is procured, the owner will be bound by the promise: *Dockery v. Mapple* (Tex. Civ. App.), 125 S. W. 631. So, too, where the conversation of the parties, their subsequent conduct, and the circumstances of the transaction show that the vendor must have known that the services were offered for his benefit—were to be employed in his behalf alone—and that they were being offered by the broker with the expectation of receiving the usual commissions, the acceptance by the vendor will imply an agreement for the employment of the broker as his agent, and will be sufficient to establish between them the confidential relation of principal and agent. It is customary for brokers to solicit employment: *Ballentine v. Mercer*, 130 Mo. App. 605, 109 S. W. 1037.

b. **Necessity of Proving Employment.**—To entitle a broker to recover commissions for effecting a sale of real estate, it is indispensable that he should show that he was employed by the owner, or on his behalf, to make the sale. A ratification of his act, where original employment is wanting, may, under some circumstances, be equivalent to an original retainer, but only where there is a plain intent to ratify. An owner cannot be enticed into liability for commissions against his will. A mere volunteer without authority is not entitled to commissions, merely because he has inquired the price which an owner asked for his property, and then has sent a person to him who consents to take it. A broker has no better claim to recover for voluntary services, rendered without employment, and not received and acted upon by the owner as rendered in his behalf, than any other volunteer. If, upon this proof, an owner is liable, and against his express refusal to employ the broker, then no man is safe in stating the terms upon which he will sell. It is not true that an owner may not declare his price to whom he will without the hazard of paying commissions to those who volunteer, unasked, to send him a purchaser upon his own terms: *Pierce v. Thomas*, 4 E. D. Smith (N. Y.), 354; *McVicker v. Roach*, 74 App. Div. 397, 77 N. Y. Supp. 501.

In *Bassford v. West*, 124 Mo. App. 248, 101 S. W. 610, the court says: "If it is true, as plaintiff swore, that the introduction to Taylor was solicited by defendant, it might be considered petty to use plaintiff in getting into a negotiation and refuse to pay a commission for the resultant sale. Nevertheless, merely seeking an introduction was not, in law, equivalent to employing plaintiff to sell the property, and where there is nothing more in his favor, that incident would have to be regarded as voluntary and insufficient to entitle him to a commission."

To entitle a real estate broker to commissions there must be an employment: *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718. In the absence of an employment, authorizing a real estate agent to find a purchaser for or to make a sale of real estate, by the owner, no commission for an attempted sale can be recovered: *Johnson v. Whalen*, 13 Okl. 320, 74 Pac. 503. A mere volunteer is not entitled to commissions, though he brings the parties together. Even a broker whose business it is to bring buyer and seller together must establish his employment as such, either by previous authority, or by the accept-

ance of his agency. The fact that a broker had previously made a sale of property and been paid a commission will not entitle him to a commission on a subsequent sale made by him on behalf of the same vendor without request or employment: *Samuels v. Luckenbach*, 205 Pa. 428, 54 Atl. 1091. Although a broker may effect or be the procuring cause of a sale, he cannot, unless he had authority to act as the agent of the owner in the matter, receive any commission or compensation from him: *Loomis v. Broadbuss* (Tex. Civ. App.), 134 S. W. 743.

"There is no warrant for the claim," says Mr. Justice Freeman, in *Morton v. Barney*, 140 Ill. App. 333, "that where a broker goes to an owner asking and receiving the price of a piece of property, he thereby becomes the agent of the owner entitled to commissions, if the owner subsequently disposes of the property. Nor can a broker, by letters of his own addressed to a possible purchaser, or by writing an owner that he has offered the property to such proposed purchaser, make a contract of employment for himself entitling him to commissions. It takes two to make a contract of that kind, and an owner is under no obligation to respond to every letter he may receive from a real estate broker whom he has not employed." And in *Miller v. Maclark Realty Co.*, 139 App. Div. 47, 123 N. Y. Supp. 837, an action to recover commissions, the court quoted with approval the language of Mr. Justice Hirschberg in *Haynes v. Fraser*, 76 App. Div. 627, 78 N. Y. Supp. 794, wherein he says: "The defendant certainly did not offer the property in question for sale in the first instance, either through the plaintiff's agency or otherwise. On the contrary, it is beyond dispute that the plaintiff's connection with the transaction was chiefly, if not wholly, in consequence of the fact that he had a customer who desired to buy, and that it was his efforts in his customer's behalf which finally resulted in inducing the defendant to sell at a mutually satisfactory price. The plaintiff, although known to the defendant to be a real estate broker, was known to him only as the agent of a prospective purchaser of the defendant's property; and his activity as an agent was developed wholly in buying the property and not in selling it." A broker, who is a mere volunteer, or the agent of the purchaser, cannot recover a commission from the owner for a sale effected. The broker's employment by the owner must be established as a condition to recovery: *Wilcox v. Andrews*, 150 Ill. App. 27.

c. **Ratification of Broker's Acts.**—A sale of land made by an agent on different terms than those directed by his employer will not bind the latter, although more advantageous than those called for by their contract. But a ratification by the principal of an agreement to sell the land on different terms is equivalent to a prior authority, and the principal will be bound for the amount of commission agreed upon. And he cannot relieve himself from liability by a refusal to consummate the sale, or by a voluntary act of his own disabling him from performance: *Nesbitt v. Helser*, 49 Mo. 383. So, also, if a broker, after making a sale of stock purchased by him for his customer, which sale was unauthorized for lack of notice of the time and place thereof, sends the customer an account of the sale, crediting him with the price realized, and he thereupon promises to pay the balance remaining due to the broker as shown by such account, and makes no objection to the sale or the want of notice, this is a ratification of the act of the broker, and entitles him to recover the sum due him for advances to

the customer: *Gillett v. Whiting*, 141 N. Y. 71, 38 Am. St. Rep. 762, 35 N. E. 939. The acceptance by the vendor of the offer actually made to the broker, and the consummated sale upon such terms, is a ratification of the broker's act, and makes the vendor liable to the broker for his commissions: *Levy v. Wolf*, 2 Cal. App. 491, 84 Pac. 313.

But ratification of an unauthorized contract, in order to be made effectual and obligatory upon the alleged principal, must be shown to have been made by him with a full knowledge of all the material facts connected with the transaction to which it relates: *Mechem on Agency*, par. 129. It follows, therefore, that the fact that an owner of land accepts the benefits of a real estate broker does not render the seller liable to the broker for commissions on the theory of ratification, where the seller did not know that the broker was working in his behalf, but to the contrary, the circumstances of the broker's endeavors indicated that he was working in the interest of the purchaser: *Downing v. Buck*, 135 Mich. 636, 98 N. W. 388. Ratification of a contract entered into by a person acting as agent, but without authority so to do, made by the person for whom he assumed to act as principal, cannot validate the contract so as to bind the other contracting party without his assent: *Atlee v. Bartholomew*, 69 Wis. 43, 5 Am. St. Rep. 103, 33 N. W. 110.

A principal's promise to pay for unauthorized services of a broker cannot be enforced on the theory of ratification, where the promise was based on the broker's false representations as to material facts: *Courtney v. Continental Land etc. Co.*, 17 Mont. 394, 43 Pac. 185.

In *Lyle v. Bennett*, 34 Misc. Rep. 476, 70 N. Y. Supp. 283, the evidence showed that the attorney of the mortgagee, without authority, informed real estate brokers that in the event of his client bidding in the property, on foreclosure, he would sell it. The attorney gave the brokers the key of the building. The brokers placed their bills on the building and found a purchaser, and the mortgagee bid in the property, and made a deed to the purchaser found by plaintiffs. It was decided that the acts constituted a ratification of the unauthorized acts of the attorney, and she was liable to the plaintiffs for commissions.

In *Hansen v. Boyd*, 161 U. S. 397, 16 Sup. Ct. Rep. 571, 40 L. ed. 746, it was decided that grain brokers employed by a dealer to buy and sell wheat for future delivery cannot recover commissions and advances, where they write to the dealer that a contract which he has for May can be changed to June delivery if he desires, to which letter the dealer does not reply, although he is in a situation to do so, and the brokers change the contract without his authorization; and the fact that the dealer received and retained a statement sent him by the brokers, showing such change of contract, does not show a ratification of the broker's act in making the change.

d. *Revocation of Broker's Authority.*—The efforts of a real estate broker to sell land after his authority from the owner to do so has terminated must be deemed to be voluntary, and are ineffectual to entitle him to commission on a sale made by the owner himself subsequent to the expiration of such authority: *Fairechild v. Cunningham*, 84 Minn. 521, 88 N. W. 15. But an owner of land cannot revoke the authority of an agent by a letter written after the agent had procured a purchaser to whom the owner sells, so as to deprive him of

his commissions: *Reishus-Remer Land Co. v. Benner*, 91 Minn. 401, 98 N. W. 186. If a broker employed to procure a tenant is dismissed before a lease is consummated, but a tenant with whom he negotiated is subsequently accepted, he is not entitled to a commission, when he does not show that the tenant offered to him, prior to his dismissal, substantially the terms ultimately accepted: *Cadigan v. Crabtree*, 179 Mass. 474, 88 Am. St. Rep. 397, 61 N. E. 37, 55 L. R. A. 77. And if a broker is employed to secure a tenant of property, the terms to be approved by the owner, and the broker procures an offer which the owner rejects, and subsequently, in good faith, revokes the authority of the broker and terminates his employment, the fact that the owner afterward changes her mind and effects a lease with the person first proposed by the broker does not entitle him to commissions on the lease made after his employment has ceased: *Cadigan v. Crabtree*, 186 Mass. 7, 104 Am. St. Rep. 543, 70 N. E. 1033, 66 L. R. A. 982.

It is the general rule of law that, as between the agent and his principal, the authority of the agent may be revoked by the principal at his will at any time, and with or without good reason therefor, except in those cases where the authority is coupled with a sufficient interest in the agent. And this is true even though the authority is in express terms declared to be "exclusive" or "irrevocable": *Mechem on Agency*, par. 204; *Cronin v. American Securities Co.*, 163 Ala. 533, 136 Am. St. Rep. 88, 50 South. 915.

In *Chambers v. Seay*, 73 Ala. 372, the question involved was as to the right of the principal to revoke the agent's authority to sell, under an agreement so as to deprive the broker of his commissions. The substance of the agreement was that the defendant, an owner of land, valuable for the iron ore it contained, placed the lands into the hands of the plaintiff for sale, subject to the defendant's ratification, if the defendant should "deem the price to be paid for said property sufficient to warrant a sale." The plaintiff agreed to undertake the sale of the land; he undertook and promised to transport specimens of ore to be taken from the land, to Birmingham, England, for inspection there; and also to advertise the property in a respectable paper in each of the cities of Birmingham and London. By way of compensation for his services and expenses, it was stipulated that the plaintiff should receive "an undivided one-fourth interest in the proceeds of sale when sold." About two years subsequent to the date of the agreement, the defendant revoked plaintiff's agency, and soon afterward the defendant sold the property. It was held that the agency of plaintiff was revocable at any time before it had been executed by his making a sale of the property; and that an interest in the proceeds of the sale did not constitute an interest in the agency. And inasmuch as his authority was revoked prior to the sale made by the defendant, the plaintiff was not entitled to recover any commissions. "The rule is not denied," says Justice Sommerville, "that, in ordinary cases, a principal, who has empowered an agent to sell, may at any time before sale revoke the agent's authority. It is equally true that the usual theory of commissions is, that the agent is to receive them only in the event of success: *Wood's Mayne on Damages*, Am. ed., para. 746, 747. It is argued that the present agreement does not come within this general rule, because it confers on the agent a power coupled with an interest, and that such power is irrevocable. It is a generally admitted proposition of law that a principal is not per-

mitted to revoke the authority of his agent, where such authority is coupled with an interest, or where it is necessary to effectuate a security: *Ewell's Evans on Agency*, marg. p. 83. These are the two established exceptions, which seem, indeed, to be essentially similar in principle. It is contended that the agency of the plaintiff, Chambers, comes within the influence of the first exception, as being coupled with an interest, and it was not competent, therefore, for Seay to revoke it. It is not any interest, however, that will suffice to render an agency irrevocable. An interest in the proceeds of sale, or money derived from the sale of property by an agent is not sufficient for this purpose: *Barr v. Schroeder*, 32 Cal. 609; *Hartley's Appeal*, 53 Pa. 212, 91 Am. Dec. 207; *Gilbert v. Holmes*, 64 Ill. 548. To be irrevocable, it seems now well settled that the power conferred must create an interest in the thing itself, or in the property which is the subject of the power. In other words, 'the power and estate must be united and coexistent,' and, possibly, of such a nature that the power would survive the principal in the event of the latter's death, so as to be capable of execution in the name of the agent: *Blackstone v. Buttermore*, 53 Pa. 266; *Bonney v. Smith*, 17 Ill. 531; *Mansfield v. Mansfield*, 6 Conn. 559, 16 Am. Dec. 76; *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. ed. 589; *Evans on Agency (Ewell)*, marg. p. 83, note, and p. 85; *Raleigh v. Atkinson*, 6 Mees. & W. 670. In *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. ed. 589, such a power was defined by Chief Justice Marshall to be one 'engrafted on an estate in the thing itself.' The power conferred on Chambers was not of this nature very clearly. He had no interest in the subject matter of his agency, the land itself. He was interested only in the money to be derived as the proceeds of the sale of the land, which could only be realized by the completion of his agency, or by some negotiation which was tantamount to it. He had parted with no money, or other value, for the security of which the power of sale was conferred in the agreement. He had risked in the venture of his agency only his personal services and the expenses incidental to its execution. The undertaking to transport specimens of iron ore to England and to advertise the lands there may be embraced as a part of the ordinary expense to be incurred in the usual course of such an employment. It is fair to presume that he risked this much in view of the large compensation to be reaped as commissions, in the event of a successful sale."

c. **Abandonment of Employment.**—When a broker opens negotiations, but fails to bring the prospective purchaser and owner together, and the negotiations are abandoned without fault of the owner, and subsequently the owner sells to the same person, without further effort on the part of the broker, the owner is not liable to the broker for commissions: *Chaffee v. Widman*, 48 Colo. 34, ante, p. 220, 108 Pac. 995; *Lipe v. Ludewick*, 14 Ill. App. 372; *Everett v. Farrelly*, 11 Ind. App. 185, 38 N. E. 872; *Moore v. Cresap*, 109 Iowa, 749, 80 N. W. 399; *Fairechild v. Cunningham*, 84 Minn. 521, 88 N. W. 15; *Enochs v. Paxton*, 87 Miss. 660, 40 South. 14; *Hay v. Platt*, 66 Hun, 488, 21 N. Y. Supp. 362; *Bouscher v. Larkins*, 84 Hun, 288, 32 N. Y. Supp. 305.

In *McCormack v. Henderson*, 100 Mo. App. 647, 75 S. W. 171, the evidence showed that plaintiff called on the defendant to secure the agency to sell his land. Plaintiff was told by the defendant that other agents were trying to sell it, but that if plaintiff would sell it or produce a customer, he would pay him a commission. Plaintiff procured

a purchaser, and while negotiating with him, the latter told plaintiff that he thought the property could be bought for less, and he requested the plaintiff to see the seller again, which the plaintiff refused to do. It was decided that the refusal of the plaintiff to see the seller again did not constitute an abandonment of the agency.

In *Jackson v. Parish*, 157 Ala. 584, 47 South. 1014, the evidence showed that the defendant owned a lot which she placed in the hands of plaintiff for sale at a stipulated price. Subsequently, she wrote, "Not hearing from you in reply to my letter of Thursday last, I wish to say that I now feel at liberty to withdraw, if I choose, from the proposition under consideration." The plaintiff replied that upon the receipt of her letter, he again interviewed the purchaser, but could not make the deal, and that it looked like the matter was closed, unless she would accept a lower offer. It was held that the broker's letter terminated his agency at the time of mailing, and he was not entitled to commissions on a sale of the lot which he negotiated the next day, the defendant having declined to ratify his subsequent sale.

In *Munson v. Mabon*, 135 Iowa, 335, 112 N. W. 775, the agreed statement of facts were as follows: One Bachel placed his lands in the hands of Mabon, the defendant, for sale. Subsequently the defendant turned the land over to Leuth, the intervener, to show it to purchasers, and have what there was in it if he made a sale. To this arrangement Bachel consented. The land was sold by the intervener, and before he received his commission, the plaintiff garnished both Bachel and Leuth as debtors of Mabon. It was decided that, having expressly waived all his rights to commissions by turning over the sale of land to the intervener, Mabon was estopped from claiming commissions adverse to the intervener Leuth, and as the plaintiff by his garnishment acquired no greater rights than his debtor Mabon had, he also was estopped by the waiver of Mabon; and that Leuth, the intervener, was entitled to the commissions.

II. Sufficiency of Broker's Services.

a. *In General*.—"The right of a commission for the sale of land," says Justice McClain, in *Jones v. Buck* (Iowa), 120 N. W. 112, "is dependent so much upon the terms of the agreement under which such commission is claimed that authorities applicable to one set of facts and language used in opinions with reference thereto may be entirely without application to facts which are entirely different." And in *Sullivan v. Milliken*, 113 Fed. 93, 51 C. C. A. 79, an action by a broker against his principal for commission for selling real estate, Justice Shelby says: "By considering what it is necessary for the plaintiff to prove in such case, we ascertain what must be alleged in the declaration. The issues to be tried involve the questions: (1) What did the broker undertake to do? (2) Has he completed the undertaking within the time and upon the terms stipulated. (3) If not, is his failure attributable to the fault or interference of the principal? If on investigation it be determined that the broker has performed his contract within the time and upon the terms agreed on, he is entitled to his commissions. If he has not, he has earned no commissions, unless performance by the agent was prevented by the fault or wrong of the principal. To entitle him to recover, he must prove, and therefore he must allege, (1) that he was employed as an agent or broker to sell the property; (2) that he sold it at the price

and on the terms fixed by his principal, or on other terms agreed to by him, or that he found a purchaser ready, willing and able to buy the property at the price and on the terms fixed or agreed to by the principal; and, if the sale was not made, that the failure to conclude the same was caused by some fault of the principal."

A broker employed to secure a loan of a certain amount of money has not earned his commission for procuring one willing to lend such amount, where the lender insists that the contract shall provide for the payment of principal and interest in gold, on account of which provision the borrower rejects the loan: *Caston v. Quimby*, 178 Mass. 153, 59 N. E. 653, 52 L. R. A. 785. In *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 349, the defendant employed a broker to sell certain real estate for a fixed compensation, advising him of his title; the broker found a customer, and brought him to the defendant, but no sale was effected on account of the defective condition of defendant's title. The property was afterward sold by the defendant at auction to a third person, at a higher price than the customer had once offered. It was held that the broker was entitled to no compensation on the contract for services.

A real estate broker, in order to earn a commission for finding a purchaser, must either obtain a contract from a proposed purchaser able to buy, whereby he is legally bound to buy on the authorized terms, or he must produce to his principal a proposed purchaser who is able, willing and ready to buy upon the terms authorized. It is not necessary that the principal and the purchaser actually be brought face to face, but the principal must be notified that such purchaser has been found and afforded a full opportunity to make a binding contract for the sale of the land on the authorized terms. If the broker complies with either of the conditions stated, he is entitled, in the absence of a contrary stipulation, to his commissions although no sale is finally consummated: *McDonald v. Smith*, 99 Minn. 42, 108 N. W. 291. But the securing of a preliminary or tentative agreement not shown to have resulted in a complete sale, and not binding on the proposed purchaser, is not sufficient to entitle a broker to commission: *Hale v. Kumler*, 85 Fed. 161, 29 C. C. A. 67. Nor is a broker entitled to commissions for the solicitation of orders for the output of another's business because he performed services which "tended" to obtain orders: *Ayres v. Thomas*, 116 Cal. 140, 47 Pac. 1013. In *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192, the owner of real estate agreed with a broker that if the latter would "find a purchaser or make a sale of said real estate," he would give the broker a certain sum as commission. The broker procured a person to enter into a legal and binding contract with the owner to purchase the real estate, but he afterward refused to perform. It was held that the broker was entitled to the sum agreed.

In *McGavock v. Woodlief*, 20 How. 221, 15 L. ed. 884, the evidence showed that the terms of sale as given by the vendor to the plaintiff, the broker, were one hundred and thirty thousand dollars—twenty thousand dollars in cash, and the remainder in five equal annual payments. The purchaser procured by the broker agreed to the terms, but when the parties proceeded to the execution of the contract of sale, the purchaser proposed a change to which the vendor would not assent. The change was substantial, and called for a new and distinct

agreement before the vendor could be bound. "As the terms of sale were explicit," says Justice Nelson, "the proposal to fulfill should have been equally so. Nothing should have been left to conjecture or speculation. There should have been as much certainty on the one side of the contract as upon the other. Certainty in the offer to fulfill is as important to the vendor as in the terms of the sale to the vendee, and equally necessary before the vendor can be put in fault. The broker must complete the sale; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on, before he is entitled to his commissions."

A writing, evidencing the commission to be paid to the plaintiff for procuring a purchaser for the defendant's land was directed to the plaintiff and signed and delivered by the defendant. It was to the effect that if the deal then pending between the defendant and a third party for an exchange of property was consummated, the defendant would pay the plaintiff one thousand dollars commission. It was held that no commission was due until the deal was brought to a completion by an actual transfer of the title of the property by an exchange of deeds: *Goodwin v. Siemen*, 106 Minn. 368, 118 N. W. 1008. An agent's commission for "effecting a sale or trade" of property is not shown to have been earned until a contract to sell or trade, binding upon the property owner, is proved as having been entered into through the procurement of the agent: *Jacobson v. Rotzien*, 111 Minn. 527, 127 N. W. 419, 856. This case is affirmed, on motion for reargument, in (Minn.) 127 N. W. 856.

b. Completion of Negotiations.—A real estate broker is entitled to the commission agreed upon for the successful negotiation of an exchange of property placed in his hands, if the terms of exchange are accepted by the owner. The obligation to pay the commission then becomes fixed: *Lockwood v. Halsey*, 41 Kan. 166, 21 Pac. 98. But if a loan broker made a contract with a customer to obtain a loan amounting to fifteen hundred dollars, for which he was to receive a commission of five per cent, and if he made an effort and failed to secure the loan, and so informed his customer, and if he was then notified by the customer that the latter needed a loan of sixteen hundred dollars, and a new agreement was made between them to the effect that the broker was to obtain a loan of that amount and was to receive five per cent thereof as his commission, and if he notified the customer that he had failed to negotiate the loan for sixteen hundred dollars, and thereupon the customer procured the money elsewhere, the broker would not be entitled to recover his commission, although he may have then negotiated so as to procure a loan of fifteen hundred dollars for his customer: *Davison v. Herndon*, 125 Ga. 385, 54 S. E. 92.

Where the principal of a real estate broker employed to sell property is ready to enter into a contract on conditions which he has authorized, and the purchaser produced by the broker, although he verbally agrees to buy the property, refuses to enter into a binding written contract, the broker fails to effect the purpose of his employment and his principal is not liable to commissions: *Platt v. Kohler*, 65 Hun, 557, 29 Abb. N. C. 366, 20 N. Y. Supp. 547.

A broker who is promised a commission which is to be paid on completion of the sale of bonds, is not entitled to it where the purchaser whom he procured made a conditional offer but subsequently with-

drew it: *Thompson v. City of Sea Isle City*, 28 Misc. Rep. 494, 59 N. Y. Supp. 596. In *Kronenberger v. Bierling*, 37 Misc. Rep. 817, 76 N. Y. Supp. 895, the evidence showed that the plaintiff, a real estate broker, brought an intending purchaser to the owner's agent, and the parties came to a complete understanding as to the price and terms, and the purchaser made a deposit; but no memorandum or receipt was signed by either party, and subsequently the purchaser refused to complete the contract. It was held that inasmuch as neither party was legally bound to carry the contract into effect, the broker was not entitled to his commissions.

In *Walker Mfg. Co. v. Knox*, 136 Fed. 334, 66 C. C. A. 160, the evidence showed that the plaintiff was employed to negotiate a contract for the sale of the defendant's output of electric street railway apparatus to a French syndicate, but the contract did not stipulate that he was to be the exclusive factor in accomplishing the object, nor the amount of compensation he was to receive. It was decided that he was entitled to recover the reasonable value of his services, although he did not do everything to promote the negotiations which resulted in the consummation of the sale.

In *Senior v. Fitzgerald*, 119 N. Y. Supp. 745, the evidence showed that the defendant authorized plaintiff to sell her property for forty thousand dollars, and that the best offer the plaintiff could obtain was thirty-eight thousand dollars. The property was subsequently sold by a third person for thirty-nine thousand dollars. It was held that the plaintiff did not produce a party who was willing, ready and able to purchase the property on the defendant's terms, and he was not entitled to commissions.

In *Friend v. Triggs Co.*, 147 Ill. App. the evidence showed that the defendants gave plaintiff a reasonable time to secure a certain party as a tenant for their building. Two weeks later the plaintiffs informed the defendant that they could not secure the party. Subsequently, the defendant rented the building to the party through the efforts of a third person. It was held that the plaintiffs could not claim commissions from the defendant. But when property is placed with a broker for sale, in the absence of a special agreement to the contrary, the broker is not bound to consummate a sale, or procure a customer ready and willing to purchase upon the terms agreed upon; but when he does succeed in doing either his commission is earned: *Walsh v. Hastings*, 20 Colo. 243, 38 Pac. 324.

III. Negotiation of Contract Different from One Authorized.

a. *In General.*—If a broker is employed to sell property at a certain price, he cannot recover commissions for effecting a sale at a lower price: *Williams v. McGraw*, 52 Mich. 480, 18 N. W. 227. In *Crombie v. Waldo*, 137 N. Y. 129, 32 N. E. 1042, the evidence showed that the plaintiffs, real estate brokers, were employed by the defendant to procure a lease of her premises from the school trustees for school purposes. The plaintiffs procured the execution of a contract between the parties by which the defendant agreed to erect, within a limited period, a building which was to have the approval of the superintendent of school buildings, and the lease to the building should be executed by the trustees when the building was completed and approved. When the parties entered into the contract, the plans for the building had not been prepared, and according to the plans

drawn subsequently it was found that the time for the erection of the building was insufficient. It was decided that the execution of the contract was not a lease within the meaning of plaintiff's employment; that neither party to the contract stood in any better position than he did before it was executed; and that the plaintiffs had not earned their commissions.

In *Steinfeld v. Storm*, 31 Misc. Rep. 167, 63 N. Y. Supp. 966, the defendant employed plaintiff, a real estate broker, to furnish a purchaser who would pay twenty-five thousand dollars cash for certain property owned by the defendant, but the plaintiff furnished a twenty thousand dollars purchaser. It was decided that the plaintiff failed to perform his contract and could not recover commissions.

In *Rake v. Townsend* (Iowa), 102 N. W. 499, it was decided that a letter by an owner of real estate to a broker, stating that he would sell certain property at a certain price, authorized the broker to sell for cash only, and that the production of a purchaser who, though willing to pay the price, asked for time within which to pay it, did not entitle the broker to commissions. In *Monson v. Kill*, 144 Ill. 248, 33 N. E. 43, it was held that the finding of a purchaser who was willing to pay the price at which the broker was authorized to sell, but asked for three months within which to pay, whereas the terms to the broker were cash, was no compliance with the terms of the agreement between the owner and the broker so as to entitle the latter to commissions. In *Stoutenburgh v. Evans* (Iowa), 120 N. W. 59, the defendants employed plaintiff to sell stock of a coal company for a cash payment "down" of seventeen thousand five hundred dollars, and the plaintiff accepted ten dollars as a cash payment. It was held that the plaintiff was not entitled to commissions.

But the commissions of a broker for the sale of real estate are due when he finds a purchaser who buys the property, and his right to such commission is not affected by any modification of the terms of payment or modes of security, or ultimate compliance with the conditions of such sale made between the buyer and seller, different from the terms first given by the seller to the broker: *McConaughy v. Mahannah*, 28 Ill. App. 169. And in *Glentworth v. Luther*, 21 Barb. 145, the court says: "There can be no doubt as to the extent of the duties to be performed by one who, as broker, is employed to sell real estate. In the nature of things he can do nothing more than find a party who will be acceptable to the owner and enter into a contract of purchase with him; unless the owner makes him more than a broker merely, by giving him a power of attorney to convey the property, and then the employee would cease to be broker merely, and become the attorney. . . . The law fixes the time as of the date when the broker produces to his principal a party with whom the owner is satisfied, and who contracts for the purchase at a price acceptable to the owner. That the commission (agreed) is due to the broker at that time is manifest from the fact that when this is done the broker has exhausted his power to act. . . . And having thus done all that is possible for him to do, he has certainly done all that he can be held to have contracted to do. The plaintiff had therefore earned his commission as soon as the defendant signed the contract."

And in *Koek v. Emmerling*, 22 How. 69, 16 L. ed. 292, the court says: "Where the vendor is satisfied with the terms, made by himself, through the broker, to the purchaser, and no solid objection can be

stated, in any form, to the contract, it would seem to be clear that the commission of the agent was due, and ought to be paid. It would be a novel principle if the vendor might capriciously defeat his own contract with his agent by refusing to pay him when he had done all that he was bound to do. The agent might well undertake to procure the purchaser; but this being done, his labor and expense could not avail him, as he could not coerce a willingness to pay the commission which the vendor had agreed to pay. Such a state of things could only arise from an express understanding that the vendor was to pay nothing, unless he should choose to make the sale."

In *Fischer v. Bell*, 91 Ind. 243, it was decided that an agreement between a real estate broker and a purchaser, which provided for a cash sale, and required that the purchase money should be paid upon the execution of the deed, with a further provision that in case the owner should desire to retain possession of the premises for a time, he could do so by paying rent and the purchaser should pay interest on the purchase money, sufficiently complied with the owner's authorization to the agent that the sale should be for cash, and the broker was entitled to recover, even though the owner refused to sell.

In *Martin v. Fegan*, 95 App. Div. 154, 88 N. Y. Supp. 472, it was held that where a broker was instructed to get an offer for the defendant's property, which the broker did, and the defendant sold the property to the purchaser procured by the broker, the latter could not be denied to recover his commission because the price for which the property was sold was less than the price at which the owner instructed the broker to sell. But in *Schmidt v. Chittenden*, 9 Cal. App. 50, 98 Pac. 48, it was held that if the owner of property authorized an agent to sell it for a gross sum specified, a contract of sale by the agent, without the consent of the owner, at a price per acre was beyond the authority conferred. And in *Jackson v. Badger*, 35 Minn. 52, 26 N. W. 508, it was decided that a contract made by agents providing for the payment of the purchase price on or before three years was unauthorized, when their authority was to make the money payable in three years.

b. Optional or Provisional Contracts.—Under an agreement between a land owner and a broker providing that the latter should sell the land for a share of the proceeds above the cost price of the property and expenses of selling it after all the land is sold, the acceptance by the owner of a purchaser procured by the broker with whom the owner entered into an executory contract for the entire tract is a sufficient performance of the agreement between the land owner and the broker, and the latter is entitled to a share of the profits: *Coward v. Clanton*, 122 Cal. 451, 55 Pac. 147. But if the owner of lands enters into an executory agreement with the prospective purchaser procured by the broker, which agreement is by its terms conditional upon the approval of the attorney of either of them, and the attorney for one of the parties fails to approve the agreement and consequently it is never carried out, the broker is not entitled to a commission: *Halprin v. Schachne*, 25 Misc. Rep. 797, 54 N. Y. Supp. 1103.

If an executor employs a broker to sell land belonging to an estate with the express provision that if the sale is not ratified by his co-executor it shall not be binding and the executor refuses to ratify

the sale, the broker is not entitled to commissions: *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 263.

A provisional contract for a sale, without any payment of cash, and a condition that if at the end of six months, all the cash is not paid, the vendors shall have the right to rescind the contract, is not a fulfilment of an authority to sell for, among other things, one million dollars cash: *Rand v. Cronkrite*, 64 Ill. App. 208. If a real estate broker contracts with an owner for a commission to sell his land, before the broker can recover for his services he must produce a purchaser ready and able to buy on the terms he was authorized to sell; and if the proposed purchaser makes an optional contract, and prefers to forfeit the earnest-money rather than accept the property, which he has a right to do under the agreement, and the contract is thereby annulled, the broker cannot recover a commission: *Aigler v. Carpenter Place Land Co.*, 51 Kan. 718, 33 Pac. 593. If a real estate broker is employed to sell land or to find a purchaser therefor, and his principal merely gives an option to the purchaser procured by the broker to buy the land, the broker is not entitled to commission: *Bunn v. Keach*, 116 Ill. App. 397.

c. **Illegal Transactions.**—Where a broker is privy to an unlawful design of parties to a contract for the sale of goods, to be delivered in the future, and brings them together for the purpose of entering into the illegal agreement, he is particeps criminis, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction: *Crawford v. Spencer*, 92 Mo. 498, 1 Am. St. Rep. 745, 4 S. W. 713. And in *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. Rep. 160, 28 L. ed. 225, Mr. Justice Matthews says: "It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is particeps criminis, and cannot recover for services rendered or losses incurred."

If, under a statute prohibiting contracts which constitute conspiracies in restraint of trade, a broker secures an agreement between competitors to maintain prices, he is not entitled to compensation for services rendered: *Street v. Houston Ice etc. Co.* (Tex. Civ. App.), 55 S. W. 516. But a contract with an agent to make or procure a sale to the government of articles needed by it is not rendered void, as against public policy, because at the time of the employment reference was made to the fact that the agent was of the same political faith as the party then administering the government, and that he had many acquaintances among the administration, and a good reputation at the place where the sale was to be made—all of which might bring about a sale. Such a case is to be distinguished from that where an interference with legislative action or executive clemency is the object, and wherein the agent does not profess to act upon commercial principles. Hence the agent may recover commissions under a contract by the terms of which he was to receive ten per cent of the price if he should dispose of certain steamers at

prices and conditions to be agreed on, where the evidence shows that his action in the matter did direct the attention of the purchasers to the steamers he had for sale, and led to the negotiations which resulted in the purchase of the steamers, although he himself did not actually make the sale and transfer: *Lyon v. Mitchell*, 36 N. Y. 235, 93 Am. Dec. 502.

In *Parsons v. Trask*, 7 Gray, 473, 66 Am. Dec. 502, it was held that a foreign contract against public policy in Massachusetts will not be enforced, even if the contract was valid where it was made. A sale of service, amounting to a form of slavery, comes within the rule, and no comity requires it to be enforced or will suffer it to be executed. In *Meyers v. Dean*, 9 Misc. Rep. 183, 29 N. Y. Supp. 578, it was decided that a commission is not earned by a broker for obtaining a lease of property from the city, where the only service he rendered was in preventing the attendance of competing bidders. But in *Goldshear v. Barron*, 42 Misc. Rep. 198, 85 N. Y. Supp. 395, it was held that the fact that the broker employed to effect a sale of the property of a corporation was one of its directors did not preclude him from recovering commission for effecting its sale, where the party who owned most of the stock consented to the transaction.

d. Contract in Excess of Authority.—Where an agent to sell land exceeds his authority by inserting in the contract of sale a stipulation that the vendor shall forfeit fifty dollars for each day's failure to make a deed after a specified date, the principal is not bound by the contract, and the agent cannot recover commission: *Evants v. Fuqua*, 102 Tex. 430, 132 Am. St. Rep. 892, 118 S. W. 132.

A contract placing property in the hands of real estate brokers for sale or exchange, the owner reserving the option as to whether the final disposition should be a sale or an exchange, and expressly agreeing to give the brokers all the assistance in his power in the transaction, confers on the brokers authority to negotiate, and does not constitute them mere middlemen to bring the parties together: *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541. But a real estate broker has no authority to change any of the terms imposed upon him by his principal: *Jones v. Holladay*, 3 App. D. C. 279; *Hoyt v. Shipherd*, 70 Ill. 309; *Monson v. Kill*, 144 Ill. 248, 33 N. E. 43; *Monson v. Jacques*, 144 Ill. 651, 33 N. E. 757; *Sleeper v. Murphy*, 120 Iowa, 132, 94 N. W. 275; *Breen v. Rives*, 16 App. Div. 632, 44 N. Y. Supp. 672.

A real estate broker employed to find a purchaser for land has no implied authority to execute a contract for its sale: *McCullough v. Hitchcock*, 71 Conn. 401, 42 Atl. 81; *Campbell v. Galloway*, 148 Ind. 440, 47 N. E. 818; *Balkema v. Searle*, 116 Iowa, 374, 89 N. W. 1077; *Larson v. O'Hara*, 98 Minn. 71, 116 Am. St. Rep. 342, 107 N. W. 821, 8 Ann. Cas. 849; *Bourke v. Van Keuren*, 20 Colo. 95, 36 Pac. 882; *Dickinson v. Updike* (N. J.), 49 Atl. 712; *Kilham v. Wilson*, 112 Fed. 565, 50 C. C. A. 454. A broker employed to sell land has no authority to execute a contract to convey it: *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. 758; *Ballou v. Bergvendsen*, 9 N. D. 285, 83 N. W. 10; *Halsell v. Renfrow*, 14 Okl. 674, 78 Pac. 118, 2 Ann. Cas. 286, 202 U. S. 287, 26 Sup. Ct. Rep. 610, 50 L. ed. 1032; *Carstens v. McReavy*, 1 Wash. 350, 25 Pac. 471. A real estate agent has only

limited powers. He who deals with him deals with him at his peril: *Halsey v. Monteiro*, 92 Va. 581, 24 S. E. 258.

IV. Time During Which Negotiations must be Completed.

a. **In General.**—The time during which a broker must complete a transaction before his right to compensation attaches is an important matter for consideration. In *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441, Mr. Justice Finch says: "Where no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject, of course, to the right of the seller to sell independently. But that having been granted him, the right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions. Thus, if in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of concluding the bargain without his aid, and avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal. But if the latter acts in good faith, not seeking to escape the payment of commissions, but moved fairly by a view of his own interest, he has the absolute right before a bargain is made, while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some extent, the seller might justly be said to have availed himself of the fruits of the broker's labor. . . . Any other rule would prolong a contract with a broker indefinitely. No man could know when he was freed from its obligations, and a liability would be imposed not contained in the terms of the contract, and essentially perverting its legitimate construction."

b. **When No Specific Time Limits Agency.**—Where there is no specific time named as limiting the agency, and a reasonable time elapses without a sale (circumstances considered), the owner may in good faith, without design to avoid payment of commission, revoke the agency and sell to the party with whom the agent has been negotiating: *Stedman v. Richardson*, 100 Ky. 79, 37 S. W. 259; *Fairchild v. Cunningham*, 84 Minn. 521, 88 N. W. 15; *La Force v. Washington University*, 106 Mo. App. 517, 81 S. W. 209; *Wylie v. Bank*, 61 N. Y. 415.

In *Hannon v. Espalla*, 148 Ala. 313, 42 South. 443, the evidence showed that the defendant employed plaintiff to purchase certain property. The defendant was accepted as a purchaser, and a deed evidencing a sale to him was promptly sent from the city of the owner's residence. Before the deed arrived, the defendant informed plaintiff that he withdrew his offer to purchase the property, and thereafter he made no bona fide effort to consummate the transaction. The defendant testified that subsequently to his signing of the certificate of employment of the broker it was understood that the deed

for the property was to be in his possession on a certain day. It was decided that if the defendant agreed with the plaintiff to negotiate for him a purchase of the property, the latter had a reasonable time within which to perform the service, and thus to earn the compensation. Also, that the broker's right to compensation did not depend upon the arrival of the deed on that day.

c. When Period of Time is Limited.—Where the authority conferred upon the broker by the contract is limited to a period of time within which he must procure a purchaser, he is entitled to his commissions if within that time he procures a purchaser with whom the owner enters into a binding contract. The fact that the actual conveyance is not made until after the time expired will not defeat his right to compensation for his services: *S. E. Crowley Co. v. Meyers*, 69 N. J. L. 245, 55 Atl. 305.

If a broker's authority is in force at the time the contract is consummated, he is entitled to his commissions, notwithstanding the fact that the deed did not actually pass until after the time limit within which he was authorized to procure a purchaser: *Hill v. McCoy*, 1 Cal. App. 159, 81 Pac. 1015.

d. Expiration of Contract of Employment.—Before a broker can be said to have earned his commission, it must be shown that he performed the duty assumed by him within the time limited in his contract, or within such extension of time as may have been granted by his employer. If he failed to do that, he is not entitled to the commission even though he made efforts to sell the property, and first called it to the attention of the party who subsequently made the purchase, unless the delay was caused by the negligence, fault or fraud of the owner: *McCurry v. Hawkins*, 83 Ark. 202, 103 S. W. 600; *Zenner v. Antisell*, 75 Cal. 509, 17 Pac. 642; *Wilson v. Sturgis*, 71 Cal. 226, 16 Pac. 772; *Title Ins. & Trust Co. v. Grider*, 152 Cal. 746, 94 Pac. 601; *Clark v. Cumming*, 77 Ga. 64, 4 Am. St. Rep. 72; *Farrar v. Brodt*, 35 Ill. App. 617; *Learned v. McCoy*, 4 Ind. App. 238, 30 N. E. 717; *Fultz v. Wimer*, 34 Kan. 576, 9 Pac. 316; *Hurst v. Williams*, 31 Ky. Law Rep. 658, 102 S. W. 1176; *Antisdel v. Canfield*, 119 Mich. 229, 77 N. W. 944; *Decker v. Klingman*, 149 Mich. 96, 112 N. W. 727; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Page v. Griffin*, 71 Mo. App. 524; *La Force v. Washington University*, 106 Mo. App. 517, 71 S. W. 209; *Loxley v. Studebaker*, 75 N. J. L. 599, 63 Atl. 98; *Satterthwaite v. Vreeland*, 48 How. Pr. 508; *Vanderveer v. Suydam*, 83 Hun, 116, 31 N. Y. Supp. 392; *Watson v. Brooks*, 11 Or. 271, 3 Pac. 679; *Neal v. Lehman*, 11 Tex. Civ. App. 461, 34 S. W. 153; *Ice v. Maxwell*, 61 W. Va. 9, 55 S. E. 899.

If a person employs a broker to sell property, or contracts for any other service without stipulating a time for performance, he is bound to allow the party employed a reasonable time in which to perform: *La Force v. Washington University*, 106 Mo. App. 517, 81 S. W. 209.

If a land owner vests real estate agents with exclusive authority to sell for a period of eight months, and agrees to pay them all that they may realize above one thousand dollars, he cannot deprive them of the right to sell during such time. And if he resumes control of the sale of his property during such period, the agents are entitled to recover any sum over one thousand dollars which they

prove they could have realized for the property had not the owner violated his contract: *Stringfellow v. Powers*, 4 Tex. Civ. App. 199, 23 S. W. 313.

e. Time not Essence of Employment.—Where an owner engages the services of an agent to sell or negotiate a sale of his real estate, and by the contract the agent's compensation is made dependent upon a consummated sale, and time is not of the essence of the contract, the agent is entitled to a reasonable time in which to conclude the sale after he has found a purchaser ready, willing and able to buy upon the terms stated by the owner; but no such duty devolves upon the owner toward a person whom he has not employed as his agent, and not in a case where the owner expressly limits the time in which a person not an agent may procure and pay over the purchase money. Hence where the owner merely states to a broker, not employed as his agent, the net price which he will accept within a limited time, and the broker procures an offer of such price within such time, but does not procure the execution of a binding contract, nor a purchaser ready to pay the purchase price within the time limited, and the owner refuses to allow further time, the broker cannot recover commissions: *Castner v. Richardson*, 18 Colo. 496, 33 Pac. 163.

f. Extension of Time of Employment.—When an owner of land employs a broker to procure, within thirty days, a purchaser of the same, and after the expiration of that time he writes to the broker asking as to the prospects of finding a purchaser, and directs him to sell within the next thirty days for a net amount, the contract of employment is thereby extended for a further period of thirty days: *Johnson Bros. v. Wright*, 124 Iowa, 61, 99 N. W. 103. But the fact that a principal expressed hope that the broker would sell the land within the time authorized, and stated he would assist him, does not show an authority to the broker to sell the property after the expiration of the time, where it was shown that the broker asked for an extension of time and the principal refused to grant it: *La Force v. Washington University*, 101 Mo. App. 517, 81 S. W. 209. If a real estate broker furnishes a purchaser ready, willing and able to buy, he is entitled to his commission, and the fact that he does not bring the owner and purchaser to terms within the time limit fixed by his contract of employment does not defeat his right to recover: *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 162, 42 N. E. 134; *Griswold v. Pierce*, 86 Ill. App. 406.

In *Michaelis v. Gahren*, 9 App. Div. 495, 41 N. Y. Supp. 563, the evidence showed that the defendant employed the plaintiffs, real estate brokers, to purchase certain lots. After several efforts made by one of the plaintiffs, the defendant and the agent of the owner of the lots were brought to accord respecting the terms of a contract. After the parties executed a binding contract, the defendant's attorneys objected to the title, and after two years' litigation the cloud from the title to the property was removed, and the lots were conveyed to the defendant. It was decided that the plaintiffs were entitled to commissions, although the transaction was not completed by the execution of a deed at the time contemplated by the parties. There was enough to show a continuous connection between the first step taken by the plaintiffs in the matter and the last one, consisting in the delivery of the deed by the vendors to the defendant.

In *Oullahan v. Baldwin*, 100 Cal. 648, 35 Pac. 310, it is held that the fact that on a day previous to the expiration of the time limited the purchaser obtained by the broker offered his check to the vendor for the first payment of the purchase money, and that the check was declined as not equivalent to the money, is immaterial where it appears that on the subsequent day, and before the expiration of the time limited, the purchaser attempted to pay the cash to the vendor, but was prevented by failure to secure a personal interview with the vendor, who waived the tender by eluding it and selling the land on that day to another purchaser.

In *Cody v. Dempsey*, 86 App. Div. 335, 83 N. Y. Supp. 899, it appeared that the defendant was the attorney in fact for his wife, who owned a tenement house. That the defendant met the plaintiff and requested him to make an effort to sell the house or to exchange it for some other property in such a way as to realize thirty-five thousand dollars or forty thousand dollars in ready money. As a result of the broker's efforts, the owner and a third person contracted for the exchange of their properties. The agreement contained a stipulation that the deeds should be delivered and exchanged on or before a certain date. The broker agreed to waive his right to commissions in the event of a failure to consummate the contract on the day agreed on. The contract was not consummated on that day, but subsequently the parties agreed to modify the terms of the original contract of exchange, and extend the time for the exchange. At the latter date, the exchange of property was effected between the original contractors. It was decided that the broker had merely agreed to waive his commission if the contract between the parties was not carried out, and the fact that the contract was subsequently modified by mutual agreement of the parties thereto, without consultation or further agreement on the part of the broker, could not operate to take from him the right to commissions.

In *Kinsland v. Grimshawe*, 146 N. C. 397, 59 S. E. 1000, the evidence showed that in April, 1903, the plaintiff was employed by the defendant to find a purchaser for defendant's land. Plaintiff introduced to defendant a purchaser, and on May 27, 1903, the defendant gave to the purchaser introduced by plaintiff a cash option for thirty days. The defendant extended the option to August 20, 1903. On August 21, 1903, defendant again extended the option two months. On December 16, 1903, defendant executed a contract with the same person, reciting the former option and extension, and again extending the time to complete the trade to February 20, 1904. On this last date the same person accepted the option and contracted to comply with its terms. One of the stipulations in the contract recited that if any providential hindrance should prevent the completion of the contract, further time was to be given. The time was again extended to April 20, 1904. The party to whom the option had been granted and who accepted the option transferred his interest to another, with whom the transaction was completed. It was decided that by extending the option and retaining the opportunity to sell upon the terms of the original option and finally selling the lands pursuant thereto, the agency continued in force, and the plaintiff was entitled to his commission for procuring a purchaser of the land.

g. Agency Coupled With an Interest.—Where an agency is created coupled with an interest, the principal may revoke it at any time, but he can do so subject only to the resulting liability of paying to the agent any damages suffered by reason of the termination of the agency contrary to the terms of the contract creating it: *Milligan v. Owen*, 123 Iowa, 285, 98 N. W. 792. In *McLane v. Maurer*, 28 Tex. Civ. App. 75, 66 S. W. 693, 1108, it is held that a contract of agency for the sale of real estate, by which the agent was authorized to subdivide and sell in parcels within a limited time, and agreed to devote his energies, time and attention to the hunting up of purchasers, for a specified commission, created an agency coupled with an interest, for the revocation of which the principal was liable in damages to the extent that it could be shown with reasonable certainty that the agent would have earned commissions by the sale of the land had the authority not been revoked.

In *Green v. Cole* (Mo.), 24 S. W. 1058, it was said that a contract of agency for the sale of real estate amounted to an obligation mutually entered into for the performance of labor in furtherance of the agreement on the part of the agent which furnished the considerations for the agreement of the principal. In *Stringfellow v. Powers*, 4 Tex. Civ. App. 199, 23 S. W. 313, the principal was held liable in damages for the revocation of a contract of agency for the sale of real estate by which he had placed his land in the hands of the agent for sale for a specified time, agreeing to send to the agent any purchaser who might apply to him within that time, thus vesting in the agent the exclusive authority to make the sale.

h. Exclusive Agency.—A broker given an exclusive agency for a specific time is entitled to a commission even though his efforts do not contribute to a sale made within that time: *Gregory v. Bonney*, 135 Cal. 589, 67 Pac. 1038; *Brown v. Lapp* (Ky), 77 S. W. 194; *Emerson v. Pacific Coast etc. Co.*, 96 Minn. 1, 113 Am. St. Rep. 603, 104 N. W. 573, 1 L. R. A., N. S., 445, 6 Ann. Cas. 973; *Lipscomb v. Cole*, 81 Mo. App. 53; *Moses v. Bierling*, 31 N. Y. 462; *Levy v. Rothe*, 17 Misc. Rep. 402, 39 N. Y. Supp. 1057; *Sylvester v. Johnson*, 110 Tenn. 392, 75 S. W. 923; *Harrell v. Zimpelman*, 66 Tex. 292, 17 S. W. 478. But a broker cannot claim an exclusive agency unless the contract of his employment, either expressly or by implication, gives him such right: *Cook v. Forest*, 116 Ala. 395, 22 South. 540; *White v. Benton*, 121 Iowa, 354, 96 N. W. 876; *Ward v. Fletcher*, 124 Mass. 224; *Kidman v. Howard*, 18 S. D. 161, 99 N. W. 1104. A real estate broker who has the exclusive agency for the sale of property until a certain date is not entitled to commissions for a subsequent sale made to a man to whom he showed the property, but who bought it through the efforts of another agent: *Farrar v. Brodt*, 35 Ill. App. 617.

i. Mis carriage of Notice of Sale to Principal.—In *Gibbons v. Sherwin*, 28 Neb. 146, 44 N. W. 99, the court says: "While the general proposition that a vendor, proposing the terms of sale of land, may choose his own terms, will not be disputed, yet, when such party has employed the services of agents to assist in making such sale, and the agent has contributed time, labor, and skill, in conformity with instructions, and in the act of successful negotiation, the vendor sets a limit of time within which the sale must be terminated, or the agency withdrawn, and adds the further condition that the sale shall

be closed and notice sent him, at a distant post, within a limited time, and the agent proceeds in good faith and without laches on his part, to consummate the sale, and closes it, so that information might be conveyed to the principal on the time limited, and promptly sends information of the fact by the usual channel, before the expiration of the time limited, and, by any casualty or failure of the public mails or telegraph, such information is miscarried, and not received by the principal, I do not consider that the miscarriage of the notice could deprive the agent of his right to recover for services actually performed on a quantum meruit."

V. Necessity of Broker Being Procuring Cause of Sale.

a. In General.—In order for a broker to be entitled to commissions he must have accomplished all that he undertook to do under his contract of employment. He must have found and produced a person who was ready, willing and financially able to purchase the property which he was engaged to sell, at the price, and upon the terms and conditions fixed by his employer, and must make it appear that he was the efficient agent or procuring cause of the sale, and that the means employed by him and his efforts resulted in a sale: Scott v. Patterson, 53 Ark. 49, 13 S. W. 419; Hunton v. Marshall, 76 Ark. 375, 88 S. W. 963; Zeimer v. Antisell, 75 Cal. 509, 17 Pac. 642; Ayres v. Thomas, 116 Cal. 140, 47 Pac. 1013; Babcock v. Merritt, 1 Colo. App. 84, 27 Pac. 882; Quinby v. Tedford, 4 Colo. App. 210, 35 Pac. 276; Duncan v. Borden, 13 Colo. App. 481, 59 Pac. 60; Whiterbee v. Walker, 42 Colo. 1, 93 Pac. 1118; Chaffee v. Widman, 48 Colo. 34, ante, p. 220, 108 Pac. 995; Hoadley v. Savings Bank of Danbury, 71 Conn. 599, 42 Atl. 667, 44 L. R. A. 321; Watts v. Howard, 51 Ill. App. 243; Neufeld v. Oren, 60 Ill. App. 350; Shannon v. Potts, 117 Ill. App. 80; Platt v. Johr, 9 Ind. App. 58, 36 N. E. 294; Boyd v. Watson, 101 Iowa, 214, 70 N. W. 120; Hunn v. Ashton, 121 Iowa, 265, 96 N. W. 745; Clements v. Stapleton, 136 Iowa, 137, 113 N. W. 546; Wells v. Hocking Valley Coal Co. (Iowa), 114 N. W. 1076; Marlatt v. Elliott, 69 Kan. 477, 77 Pac. 104; Collier v. Johnson, 23 Ky. Law Rep. 2453, 67 S. W. 830; Hopkins v. Mosely, 31 Ky. Law Rep. 1308, 105 S. W. 104; Taylor v. Martin, 109 La. 137, 33 South. 112; Hollyday v. Southern Farm Agency, 100 Md. 294, 59 Atl. 646; Groscup v. Downey, 105 Md. 273, 65 Atl. 930; Walker v. Baldwin, 106 Md. 619, 68 Atl. 25; Whitcomb v. Bacon, 170 Mass. 479, 64 Am. St. Rep. 317, 49 N. E. 742; Ellsmore v. Gamble, 62 Mich. 543, 29 N. W. 97; Douville v. Comstock, 110 Mich. 693, 69 N. W. 79; Hubbard v. Leiter, 145 Mich. 387, 108 N. W. 735; Reade v. Haak, 147 Mich. 42, 110 N. W. 130; Putnam v. How, 39 Minn. 363, 40 N. W. 258; Cathcart v. Bacon, 47 Minn. 34, 69 N. W. 331; Studer v. Byson, 92 Minn. 388, 100 N. W. 90; Taylor v. Barbour, 90 Miss. 888, 122 Am. St. Rep. 328, 44 South. 988; Pollard v. Banks, 67 Mo. App. 187; Locke v. Griswold, 96 Mo. App. 527, 70 S. W. 400; Bassford v. West, 124 Mo. App. 248, 101 S. W. 610; Northrup v. Diggs, 128 Mo. App. 217, 106 S. W. 1123; Frenzer v. Lee, 3 Neb. (Unof.) 69, 90 N. W. 914; Colwell v. Thompkins, 6 App. Div. 93, 39 N. Y. Supp. 478, 158 N. Y. 690, 53 N. E. 1124; Weinstein v. Golding, 17 Misc. Rep. 613, 75 N. Y. St. Rep. 84, 40 N. Y. Supp. 680; Markus v. Kenneally, 19 Misc. Rep. 517, 43 N. Y. Supp. 1056; Randrup v. Schroeder, 21 Misc. Rep. 52, 46 N. Y. Supp. 943; Wykoff v. Bissell, 24 App. Div. 66, 48 N. Y.

Supp. 1018; *Barrows v. Standard Oil Co.*, 109 App. Div. 593, 96 N. Y. Supp. 370; *Southwick v. Swavienski*, 114 App. Div. 681, 99 N. Y. Supp. 1079; *Peace v. Ross*, 123 App. Div. 611, 108 N. Y. Supp. 48; *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718; *Glasscock v. Van Fleet*, 100 Tenn. 603, 46 S. W. 449; *Nance v. Smyth*, 118 Tenn. 349, 99 S. W. 698; *Ross v. Moskowitz* (Tex. Civ. App.), 95 S. W. 86, affirmed in 100 Tex. 74, 100 S. W. 768; *Gray v. Carroll* (Tex. Civ. App.), 105 S. W. 214; *Newton v. Conness* (Tex. Civ. App.), 106 S. W. 892; *West Bros. v. Thompson*, 48 Tex. Civ. App. 362, 106 S. W. 1134; *Gault v. Bradshaw*, 48 Wash. 364, 93 Pac. 534; *Bowe v. Gage*, 127 Wis. 245, 115 Am. St. Rep. 1010, 106 N. W. 1074; *Burd v. Webster*, 128 Wis. 118, 107 N. W. 23.

The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, at the price and terms on which it is to be made, and, until this is done, his right to commissions does not accrue: *Garcelon v. Tibbetts*, 84 Me. 148, 24 Atl. 797; *Lewis v. McDonald*, 83 Neb. 694, 120 N. W. 207; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441. But if the transaction a broker is authorized to negotiate is finally consummated as the direct result of his efforts, he is entitled to his commission: *Dexter v. McClellan*, 116 Ala. 37, 22 South. 461; *Duncan v. Kearney*, 72 Conn. 585, 45 Atl. 358; *Singer etc. Stone Co. v. Hutchinson*, 83 Ill. App. 668, affirmed in 184 Ill. 169, 56 N. E. 353; *Stauffer v. Bell*, 99 Iowa, 545, 68 N. W. 817; *Rounds v. Alee*, 116 Iowa, 345, 89 N. W. 1098; *Dexter v. Campbell*, 137 Mass. 198; *Henninger v. Burch*, 90 Minn. 43, 95 N. W. 578; *McCormack v. Henderson*, 100 Mo. App. 647, 75 S. W. 171; *S. E. Crowley Co. v. Meyers*, 69 N. J. L. 245, 55 Atl. 305; *Smith v. Patrick* (Tex. Civ. App.), 43 S. W. 535; *Bell v. Siemens & Halske Electric Co.*, 101 Wis. 320, 77 N. W. 152. All that is required, to entitle an agent to his commission for selling land, is employment, for a compensation, to make the sale, and the production of a purchaser, ready, able and willing to take the property at the price named: *Donohue v. Padden*, 93 Wis. 22, 66 N. W. 804.

In *Clifford v. Meyers*, 6 Ind. App. 633, 34 N. E. 23, the evidence showed that the defendants listed with plaintiffs, real estate brokers, a piece of property to sell at a certain price. One of the defendants informed plaintiffs that they would consider a smaller offer; that the property had been in the hands of other real estate agents for sale, but they were not doing anything with it, and he wanted plaintiffs to take hold and sell it. He also told plaintiffs that they need have no hesitancy in telling inquirers the names of the owners, and the defendants would see that plaintiffs are protected in their right to commissions, in case they should find a purchaser. The plaintiffs entered the property on their books for sale, and advertised it at their own expense. One Mrs. Robertson called at their office in answer to the advertisement, when the property was shown to her and the price quoted. She asked the name of the owner and it was given to her. Shortly after (after the interview with the broker) she called at the office of the owner and he was out. She, however, told her mission to a partner in business with the owner but who had no interest in the property. He took her to the property, and she made an offer, which was accepted at a figure less than the one quoted to her by plaintiffs. The plaintiffs notified the defendants before the property was conveyed that they would claim

a commission, as Mrs. Robertson was their customer. The transaction between the owner and Mrs. Robertson was subsequently completed and the owner paid a commission to the one who showed her the property subsequent to the interview she had with plaintiffs. It was decided that the plaintiffs were the procuring cause of the sale and as such entitled to commissions, and that the payment of commissions to the other party did not affect plaintiff's claim.

In *Stauffer v. Bell*, 99 Iowa, 545, 68 N. W. 817, the evidence tended to show that the defendant owned a farm and informed the plaintiff, a real estate broker, that if he would sell it at a certain price he would pay him a commission. A few days later plaintiff met one Noteboom, who wished to purchase the farm, and the plaintiff told him the price at which it was held. After they had conversed about it, the defendant was seen in the street. Noteboom was introduced to the defendant by plaintiff, who stated that Noteboom wanted the farm and wished to look at it. Accordingly, the three went together to look at it. A sale was effected with the aid of plaintiff. It was decided that his right to compensation could not be defeated by a showing that prior to the time when the defendant sold the farm it had been in the hands of another agent with whom Noteboom had negotiated with the view of purchasing it.

b. *Necessity for Being Successful.*—In the absence of a contract, express or implied, or conduct of the seller preventing the completion of the bargain, an action by the broker for commissions will not lie until it is shown that he has effected, or procured, a sale of the property, and it is not enough that the broker has devoted his time, labor or money in the interest of his employer, as unsuccessful efforts, however meritorious, offer no ground of action, and that, where his acts effect no agreement or contract between his employer and purchaser, the loss must be his own. In such case he loses his efforts and labor which he staked upon success, and if there is no contract there is no reward, as his commissions are based upon the contract of sale: *Hill v. Jebb*, 55 Ark. 574, 18 S. W. 1047; *Rockwell v. Newton*, 44 Conn. 333; *Daniel v. Columbia Heights Land Co.*, 9 App. D. C. 483; *Garcelon v. Tibbetts*, 84 Me. 148, 24 Atl. 797; *Loud v. Hall*, 106 Mass. 404; *Viaux v. Old South Society*, 133 Mass. 1; *La Force v. Washington University*, 106 Mo. App. 517, 81 S. W. 209; *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718; *Duval v. Moody*, 24 Tex. Civ. App. 627, 60 S. W. 269; *Newton v. Conness* (Tex. Civ. App.), 106 S. W. 892.

c. Negotiations Direct With Principal.

1. *In General.*—A real estate broker performs his duty and is entitled to his commission when a purchaser is introduced who is ready, willing and able to buy on the terms authorized by the principal. The completion of a valid and binding written contract is not required in case the principal is in a situation to execute it himself. For it may, and often does, happen that the purchaser prefers to deal directly with the owner. Hence the broker is entitled to his commission if he is the procuring cause of negotiations which result in a sale, even though the negotiations are conducted and concluded by the principal in person: *Gellatt v. Ridge*, 117 Mo. 553, 38 Am. St. Rep. 683, 23 S. W. 882. In a suit by a real estate agent to recover commissions from his principal, it is sufficient to make out a case for recovery, for the plaintiff to show that he was employed

by the defendant to sell the land in which the latter had an interest, that he procured a customer ready and able to buy, and that the defendant interfered and completed the sale himself, without the intervention of the agent: *Gresham v. Connally*, 114 Ga. 906, 41 S. E. 42. Where a broker employed to sell property brings about the introduction of a buyer and a negotiation, resulting in a purchase, ensues on that foundation, the owner and buyer cannot, by any arrangement, disappoint the claim of the agent for remuneration: *Somers v. Wescoat*, 66 N. J. L. 551, 49 Atl. 462.

It is sufficient, to entitle a broker to compensation, that the sale was effected through his agency as its procuring cause; and when his communications with the purchaser have been the cause or means of bringing the purchaser and his principal together, and the sale has resulted in consequence thereof, his right to compensation is perfect; and when the principal assumes exclusive charge of the negotiations, dispensing with the further efforts of the broker, and sees fit to vary the terms originally proposed, the circumstance that the sale is made upon the substituted terms will not defeat the broker's right to compensation: *McMillin v. Beves*, 147 Fed. 218, 77 C. C. A. 444. A principal cannot defeat a broker's right to commission by simply ceasing to recognize him in the transaction after the principal has been put in communication by the broker with a prospective purchaser; nor can the broker's right to commission be defeated by the fact that he at one time expressed the belief that the prospective purchaser had given up the deal, when as a matter of fact the principal carried on independent negotiations with the purchaser to escape the payment of a commission: *Gibson v. Hunt* (Iowa), 94 N. W. 277.

2. Duty of Principal to Notify Broker.—A principal who obtains knowledge from his broker that an intending purchaser procured by the broker is a person of whom he has learned from another source as being a possible purchaser, owes to the broker the duty of either terminating the agency or notifying him that he intends personally to carry on future negotiations; and if he fails to do so, the broker is entitled to commission, although the sale is completed by the principal himself: *Carroll v. Pettit*, 67 Hun, 418, 22 N. Y. Supp. 250.

3. Agreement to Pay Commission.—An agreement by the owner of land not to sell it except through the agency of a real estate broker within a limited time, and that in case of a sale made by the owner within such time, or within a further period, to one whom the broker had recommended the property, he would pay the broker his full commission, though a hard bargain, is valid, in the absence of fraud; and where the owner, within the time provided, sold for a less sum to one from whom the broker had obtained a larger offer, which was not accepted, the owner is liable for the broker's commission: *Gregory v. Bonney*, 135 Cal. 589, 6 Pac. 1038; *Taylor v. Barbour*, 90 Miss. 888, 122 Am. St. Rep. 328, 44 South. 988.

In *Long v. Herr*, 10 Colo. 380, 15 Pac. 802, an owner of property gave brokers the following memorandum: "I have this day placed in the hands of Theodore W. Herr & Co. for the period of three months, and until withdrawn by written notice, the following described property to be sold or exchanged by them at a price ; they to have as compensation for their time, trouble, advertising, etc. If sold or exchanged in the meantime without

their agency, one-third of above compensation to be paid." It was decided that upon the sale of the land within the period of three months by another agent, and upon proof of the diligence and good faith of the first brokers, they were entitled to one-third of the commissions called for in the memorandum.

It was also decided that where a broker, on receiving a piece of real estate from the owner for sale, being apprehensive that an adjoining owner may purchase it, proposes to the principal that if the adjoining owner does purchase it the broker shall be entitled to his commissions, as such prospective purchaser is unfriendly to him, and will not purchase from or through him, to which proposition the principal assents, and the property is subsequently sold to such adjoining owner, the broker is entitled to his commissions from the principal, although the property was sold by another firm of brokers and the first broker had nothing to do with the sale: *Emberson v. Dean*, 46 How. Pr. (N. Y.) 236. But when a broker claims commissions under a special agreement, the purchaser produced by him must be a client of his own, and not one sustaining that relation to another broker under a like employment. Hence where an owner employs several brokers at the same time, and agrees to pay one of them commissions in the event that the property is sold by some other agency, the broker will not be entitled to commissions under the agreement when the evidence shows that the purchaser produced by him refused to pay the price and purchased other land. That some months afterward the same party, through the efforts of another agent, purchased the same land at a less price than the one quoted to the former broker: *Tinsley v. Scott*, 69 Ill. App. 352. And in *Powell v. Anderson*, 15 Daly, 219, 4 N. Y. Supp. 706, the plaintiff alleged the following special agreement: "In consideration of plaintiff's special efforts . . . the defendant promised and agreed to pay plaintiff . . . provided either the plaintiff or the defendant made the sale." The evidence showed that the plaintiff was employed to sell the property for not less than forty-nine thousand five hundred dollars. But he did not find a purchaser at that figure, nor did the defendant. The property was sold by the defendant through a third party for forty-five thousand dollars. It was decided that the plaintiff was not entitled to recover commissions, as he could not be said to have performed his contract as originally entered into by him.

4. When Broker has Been Instrumental in Sale.—If an owner of property contracts with an agent or broker not that the latter shall effect a sale, but that he shall assist the owner in procuring a purchaser and bringing about a sale, and if the agent shall be instrumental in bringing about such a sale at not less than a stipulated amount, he shall receive a commission, whether it is consummated by him or by the principal; and if the agent agrees to perform certain services in this connection, and in fact does so, and is the efficient cause of procuring a purchaser and bringing him and the owner together, and through his efforts a sale is effected for as much as the price named in the agreement, he will be entitled to his commission, although the actual consummation of the transaction is effected between the owner and the purchaser: *Indiana Fruit Co. v. Sandlin*, 125 Ga. 222, 54 S. E. 65.

In *Kiernan v. Bloom*, 91 App. Div. 429, 86 N. Y. Supp. 899, the evidence showed that it was agreed between the plaintiff and the de-

fendant that the defendant's business should be advertised for sale in the plaintiff's name; that the correspondence and inquiries occasioned by the advertisement should be attended to by the plaintiff, and the defendant would pay the plaintiff's commissions if a sale resulted. A sale was made by the defendant to one who had his attention drawn to the advertisement inserted by plaintiff, but without the latter's aid. The matter of the purchase and sale had not been discussed between the defendant and the purchaser prior to the time when he noticed the advertisement, and no other agency at any time intervened to induce the purchaser to open negotiations with the defendant. The plaintiff did not introduce the purchaser to the defendant nor was the former present when the sale was consummated. It was decided that the advertisement of the plaintiff was the cause and means of bringing the purchaser and the defendant together, and a sale resulted in consequence of his efforts. The plaintiff was therefore entitled to his commissions. The facts that the purchaser had seen the property prior to the advertisement, that the plaintiff did not negotiate the sale, and was not present when the sale was effected, were of no consequence.

d. When Purchaser Refuses or is Financially Unable to Perform.—In the absence of an express warranty of the financial ability of the purchaser procured by the broker, the broker does not lose his commission where a binding contract of sale is effected through his agency, because the purchaser is financially unable to carry out his contract: *Moore v. Irwin*, 89 Ark. 289, 131 Am. St. Rep. 97, 116 S. W. 223, 20 L. R. A., N. S., 1168. And if a broker employed to sell real estate procures a purchaser, the owner cannot after repudiating the sale on some other ground than the purchaser's financial inability to complete the purchase, defeat an action for the broker's commission on the last mentioned ground, unless that ground is made an element of the contract between the broker and the owner: *McFarland v. Lillard*, 2 Ind. App. 160, 50 Am. St. Rep. 234, 28 N. E. 229.

But in *Iselin v. Griffith*, 62 Iowa, 668, 18 N. W. 302, in an action by a broker for commissions, the court says: "We think that, in order to entitle plaintiffs to recover, something more than a mere offer to purchase should be shown by them. Such an offer could be made by one without means, and who is in no condition to comply with the terms of the sale, and against whom a claim for damages, resulting from a failure to perform the contract of purchase, could not be enforced. An offer from such a one ought not to be considered as constituting the performance of plaintiffs' undertaking to negotiate the sale of the land. As the pecuniary responsibility of the purchasers was or ought to have been known to plaintiffs, and as upon it depended the performance of their contract with defendant, the burden rested upon them to show it." In *Blackledge v. Davis*, 129 Iowa, 591, 105 N. W. 1000, it was decided that a broker, employed to secure a purchaser of land for a fixed price, or any other price below that consented to by his principal, must prove that he procured a purchaser with whom his principal reached an agreement of sale or exchange, and that such purchaser was able and willing to carry out the agreement, in order to recover the commissions agreed upon.

If the principal accepts the purchaser procured by the broker and enters into a binding contract with him, it will be presumed, in the absence of evidence to the contrary, that the purchaser is able to per-

form the contract: *Springer v. Orr*, 82 Ill. App. 558; *Stauffer v. Linenthal*, 29 Ind. App. 305, 64 N. E. 643; *Goss v. Broom*, 31 Minn. 484, 18 N. W. 290; *Grosse v. Cooley*, 43 Minn. 188, 45 N. W. 15; *Parker v. Eastbrook*, 68 N. H. 349, 44 Atl. 484; *Hart v. Hoffman*, 44 How. Pr. (N. Y.) 168; *Fairly v. Wappoo Mills*, 44 S. C. 227, 22 S. E. 108, 29 L. R. A. 215. In *Colburn v. Seymour*, 32 Colo. 430, 76 Pac. 1058, 2 Ann. Cas. 182, it was decided that a broker must prove not only that the purchaser procured by him is willing to purchase, but that he is able to do so. In *Kirwin v. Barney*, 29 Misc. Rep. 614, 61 N. Y. Supp. 122, it was decided that the broker must prove that the purchaser procured by him, who was an officer of an organization, had authority to contract for the organization, failure of which does not entitle the broker to commission.

Where the owner of a tract of land entered into a written agreement with real estate agents, authorizing them to find a purchaser for the land, and stipulating that if the owner should himself make a sale within the life of the agreement, the brokers would be allowed a commission upon the amount of the sale, a subsequent contract by the owner, made within the life of the agreement, to sell the property to a third party for a fixed price at any time within a specified period, under the terms of which part of the purchase money was received, and possession of the property given to the purchaser and he was granted the privilege of selling any portion of it, constitutes a sale sufficient in law to create a liability in favor of the broker under the agreement, although the purchaser afterward surrendered the contract and delivered up possession of the land: *Shainwald v. Cady*, 92 Cal. 83, 28 Pac. 101.

And where a broker is employed to procure a purchaser for property, and presents to his principal a purchaser, it is for the principal then to decide whether the person presented is acceptable; and if, without any fraud, concealment, or other improper practice on the part of the broker, the principal accepts the person presented, and enters into an enforceable contract with him, the broker is entitled to compensation for his services, although it subsequently turns out that the purchaser is not able to comply with his contract, and on that account the sale is not consummated by a transfer of the property: *Scully v. Williamson*, 26 Okl. 19, 108 Pac. 395, 27 L. R. A., N. S., 1089.

e. When Several Brokers are Employed.—When a principal employs more than one broker, and the several brokers act independently, and with knowledge of this fact, the one who first completes a sale is entitled to the commissions: *Scott v. Lloyd*, 19 Colo. 401, 35 Pac. 733; *Daniel v. Columbia Heights Land Co.*, 9 App. D. C. 483; *Farrar v. Brodt*, 35 Ill. App. 617; *Mears v. Stone*, 44 Ill. App. 444; *Platt v. Johr*, 9 Ind. App. 58, 36 N. E. 294; *Higgins v. Miller*, 109 Ky. 209, 58 S. W. 580; *Kice v. Dugan* (Ky.), 137 S. W. 240; *Ward v. Fletcher*, 124 Mass. 224; *Francis v. Eddy*, 49 Minn. 447, 52 N. W. 43; *Vreeland v. Vetterlein*, 33 N. J. L. 247; *Dreyer v. Rauch*, 3 Daly, 434; *Baker v. Thomas*, 12 Misc. Rep. 432, 33 N. Y. Supp. 613; *Jennings v. Trummer*, 52 Or. 149, 132 Am. St. Rep. 680, 96 Pac. 874, 23 L. R. A., N. S., 164; *Glascoc v. Vanfleit*, 100 Tenn. 603, 46 S. W. 449.

Where two or more brokers have engaged in bringing about a sale of real property, a recovery of commissions cannot be supported in favor of one of them who does not show that his services were the efficient means of bringing about the actual sale. There cannot be a

recovery in favor of both, though both have rendered services meritorious and essential in producing the result, and without which it would not have been accomplished. A discrimination must be made between them to ascertain whose services must be deemed the efficient and effective cause of the sale: *Whitcomb v. Bacon*, 170 Mass. 479, 64 Am. St. Rep. 317, 49 N. E. 472.

"It is certainly true," says Chief Justice Beasley, in *Vreeland v. Vetterlein*, 33 N. J. L. 247, "as a rule of law, that, under ordinary circumstances, where a broker, employed to sell property, brings about an introduction of a buyer, and when a negotiation, resulting in a purchase, ensues on that foundation, the owner and the buyer cannot, by any arrangement, disappoint the claim of the agent for remuneration. If this could be done, it is obvious the agent would, in all cases, be in the power of his employer, who, by taking matters into his own hands, could at will defeat the just expectations and equitable rights of the broker or middleman. In this class of cases, the question then always is, whether, under the peculiar conditions of the given case, the agent was the efficient cause of the sale. . . . But it appears to be equally obvious that another principle must be applied to cases in which several agents are avowedly employed by the owner. Under such circumstances, it would be impracticable to resort to the same rule as when a monopoly to sell is given to one. In the latter case, the implied understanding is, that the seller will not take advantage of the endeavors of the agent, and that no other person is authorized to do so. But in the instance of a number of agents, the agreement of noninterference is not so wide, for it extends to the act of the seller only. Where the property is openly put in the hands of more than one broker, each of such agents is aware that he is subject to the arts and chances of competition. If he finds a person who is likely to buy, and quits him without having effected a sale, he is aware that he runs the risk of such person falling under the influence of his competitor—and in such case he may lose his labor. This is a part of the inevitable risk of the business he has undertaken. On the other hand, if fortune should be propitious, a bidder for the property on sale, who has been solicited by his rival, may come to him, and by his means effect the bargain. Now, in this competition, the vendor of the property is to remain neutral; he is interested only in the result. But when either of the agents thus employed brings a purchaser to him, and a bargain is struck at the required price, on what ground can he refuse to complete the bargain? Can he say to the successful competitor, this purchaser was first approached by your rival, and you should have refused to treat with him on the subject? There is no legal principle upon which such a position could rest. It is contrary to the usages of every-day commerce. Every advertisement of a stock of goods for sale has a tendency to carry off the customers of rival dealers. And if, therefore, it should be known to the vendor of the property that the agent, who introduces a purchaser to him has, by the usual arts of competition, taken such purchaser out of the hands of his rival, I am not aware of anything in the law which would justify such vendor in a refusal to complete the contract. The task would be difficult and the risk great if vendors were called upon to decide between the claims of contestants. How would it be possible for such vendor to say whose influence it was that produced the sale, where the purchaser has been solicited by both agents? It would be

at variance with all practical rules to require the party selling to pronounce, under the penalty of paying double commissions, upon the metaphysical question, which agent, under such circumstances, was the efficient cause of the sale. In the absence of all collusion on the part of the vendor, the agent, through whose instrumentality the sale is carried to completion, is entitled to the commissions."

But in *Crielly v. Young*, 152 Ill. App. 72, the defendant was the owner of a building which he advertised for sale or for exchange. A firm of real estate brokers saw the advertisement and sent one of their employees to plaintiff's office to submit a proposition with a view to inducing plaintiff's client to exchange a farm for it. After negotiations in which the plaintiff and defendant met the deal fell through. Plaintiff went to California and subsequently his clients sold their farm. On his return he again sought the defendant with a view to effecting a sale of the property to the same parties for whom he had endeavored to negotiate the exchange. He did not mention the names of his clients to the defendant, but he obtained the selling price from the defendant, and an agreement that he should have a commission if the sale was consummated. Subsequently the defendant sold the property to plaintiff's customer. After the sale was effected, but before the defendant paid the agreed commission to plaintiff, the brokers who had first attempted to effectuate an exchange were demanding commissions, and the defendant refused to pay commission to the plaintiff unless he would give him an indemnity bond, and the plaintiff refused. "The evidence in the case," says Mr. Justice Mack, "abundantly justified the finding of the jury, under the instructions of the court, that the plaintiff was the procuring cause of the sale. This is one of those unfortunate cases in which the defendant may by his acts have made himself liable to pay double commissions. In any event, the fact that this court has upheld the verdict of the jury in a suit by the other brokers for commissions on this very transaction does not justify the court in holding that the jury in this case should not, under the evidence, have found the plaintiff to be the procuring cause of the sale."

If a broker who has the exclusive agency for the sale of property commences negotiations with a purchaser, he is entitled to his commission, even though the sale is consummated between the same vendor and purchaser through the agency of another broker. If the law were otherwise every agent who is instrumental in bringing property to sale might be defeated of his compensation if the principal sells, even if the sale is to a party with whom the agent has been negotiating: *Sylvester v. Johnson*, 110 Tenn. 392, 75 S. W. 923.

VI. Failure of Negotiations Through Defect in Title.

a. **In General.**—Whether or not a broker is entitled to commission when the failure of his negotiations is due to a defect in his principal's title to the property depends upon whether the broker knew of the defect when he undertook the negotiations. "There is no duty," says Justice Whitney in *Ranger v. Leo*, 66 Misc. Rep. 144, 121 N. Y. Supp. 328, "on the part of a real estate owner to inform a broker as to whether there are covenants as to nuisances in his chain of title, unless he is asked about it. It is the duty of the broker to ask, if he wants to know. . . . The employment of a broker is nearly always . . . at the broker's own suggestion. . . . To hold that

silence about them on the owner's part is equivalent to fraudulent concealment of them from the broker would be to establish a rule without sufficient reason and would probably result in fraud and imposition." It was held in this case that the broker was not entitled to commissions for failure of the negotiations with the purchaser whom he procured. But in *Church v. Wilkeson-Tripp Co.*, 58 Wash. 262, 137 Am. St. Rep. 1059, 108 Pac. 596, 109 Pac. 113, it is decided that where the promoters of a mining corporation employ a broker to sell its bonds, and he, obtaining a purchaser, demands that they perfect their title to the property intended to secure the bonds and deliver them, which they fail to do, he may rescind the contract and sue for damages.

b. Ignorance of Broker of Defects in Title.—When a broker procures a customer with whom his principal is willing to contract and does make a binding contract of sale, but the sale is not consummated because of defects in the title of which the broker was ignorant when he procured the customer, he is entitled to his commission or compensation: *Phelps v. Prusch*, 83 Cal. 626, 23 Pac. 1111; *Davis v. Lawrence*, 52 Kan. 383, 34 Pac. 1051; *Cheek v. Nicholson* (Tex. Civ. App.), 133 S. W. 707; *Hammond v. Crawford*, 66 Fed. 425, 14 C. C. A. 109. Although it is incumbent on the plaintiff to show that he had procured a person ready, willing and able to purchase on the terms prescribed by the defendant, yet if the plaintiff in fact procured a person, who was recognized, either expressly or tacitly, by the defendant as answering all these requirements, and the failure to complete the sale was due solely to the inability to make a good title to the land, the plaintiff would be entitled to his compensation as if the sale had actually taken place: *Davis v. Morgan*, 96 Ga. 518, 23 S. E. 417.

The duty of a broker, who is employed to sell real estate, is to find and produce to the vendor a purchaser who is ready, willing and able to complete the purchase as proposed. This he must do before he is entitled to any commissions. If the vendor rejects the purchaser so produced, the broker is bound to show that such purchaser was willing, ready and able to perform the contract according to the proposed terms. If the principal accepts the purchaser thus presented, either upon the terms previously proposed or upon modified terms then agreed upon, and a valid contract is entered into between them, the commission is earned. In such case the broker has earned his commission although the sale is never actually completed, if the failure of the purchaser to complete the sale results from the inability of the vendor to make a good title, and is without fault on the part of the broker: *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 102, 42 N. E. 134.

In *Hynes' Ex. v. Brettelle*, 70 Mo. App. 344, the right of the broker to commissions turned upon the question whether or not he knew of the imperfection of the title to the property at the time he made the sale, and the court says: "If at that time he had no knowledge of the Sells claim, he is entitled to his commission, for it was not his fault that the sale was not completed, but the fault of the defendant in failing to disclose to him the true condition of his title; nor would the fact under such circumstances that he merely said to Mrs. Morrison that she was not compelled to accept an imperfect title, after he discovered this defect, deprive him of his right to commission." And in *Peet v. Sherwood*, 43 Minn. 447, 45 N. W. 859, the court says:

"The rights and duties of a broker employed to secure a loan depend upon the same principals which govern the broker who undertakes to find a purchaser for property, and no substantial distinction can be made. The inquiries in each case are, What did the broker undertake to do? Has he completed his undertaking? And if not, is the difficulty attributable to his own act, or that of the party by whom he was employed? The loan broker is entitled to his commission when he has procured a lender who is ready, willing and able to lend the money upon the authorized terms. This done, his duty is performed, and he is entitled to compensation whether the loan is consummated or not, unless his right thereto is, by special agreement, made to depend upon conditions which the law does not annex to his engagement as a broker. He assumes no greater or different obligation in respect to title in case of a loan than when employed to make a sale. The borrower, when employing a broker to procure or make a loan for him, always does so upon the implied conditions (if there be no express stipulation in respect to the matter) that he has the ability to and will make or tender to the lender a title free from infirmity. It is not the broker's duty and no part of his engagement to remove encumbrances, or to cure defects in title, and if the loan is not effected in consequence of an encumbered or defective title, he is entitled to his commissions."

c. **Knowledge by Broker of Defects in Title.**—Where the owner of land authorized real estate agents to sell lands purchased by him, and informed them that he had no deed for the same but held it under contract, and the agents made a contract for the sale of the land, which the purchaser refused to complete because the vendor had only a contract of purchase, the agents are not entitled to recover the agreed commissions on the sale, as the sale proved abortive without any fault on the part of their principal: *Hoyt v. Shipherd*, 70 Ill. 309. If a broker, at the time he contracts, or at the time he performs the work for which he asks compensation, knows of the matter which ultimately defeats his efforts, he is not entitled to recover compensation: *Berg v. San Antonio St. Ry. Co.*, 17 Tex. Civ. App. 291, 42 S. W. 647, 43 S. W. 929.

In *Hough v. Baldwin*, 50 Misc. Rep. 546, 99 N. Y. Supp. 545, the evidence showed that the plaintiff brought the parties together and was the procuring cause of the contract; also, that as a result of plaintiff's efforts the parties fully agreed upon the terms of the contract the day before it was signed, and that it was subsequently signed. The contract contained a provision that if the vendee should reject the title of the vendor because of "bay window or stoop ledge encroachment," the deposit should be returned and received in full for all claims. The title was rejected on the ground of the foregoing stipulation in the contract, and the written contract was canceled by mutual consent of the parties, and the deposit was returned. "The plaintiff himself knew," says the court, "of this provision of the contract, and must have appreciated the possibility of the exchange not going through and the natural disinclination of Baldwin to pay commissions unless the exchange was effected. At or about the time of the signing of the contract of exchange, he signed a writing in which he agreed to wait for his commissions until after the title closed. This document, while perhaps not enforceable as an agreement for lack of consideration, is strong evidence to show that the

plaintiff as well as the defendant regarded the contract of exchange as a mere option and not an absolute enforceable contract of exchange. Having obtained a customer who was willing merely to make a conditional contract of exchange and not an absolute contract, I think the plaintiff did not earn any commissions."

But in *Martin v. Ede*, 103 Cal. 157, 37 Pac. 199, it was said that to entitle plaintiff to recover his commissions under the agreement, it was only necessary to show that in pursuance of his employment, and within the time specified therein, he found a purchaser ready and willing to purchase the property on the terms specified in the authorization. With the title or ownership of the property he had nothing to do, and his knowledge as to the title, or the equitable estate of a third person therein, was of no consequence; and his right to the compensation contracted for did not in any way depend on the validity or invalidity of the defendant's title to the property. "It is matter of common knowledge," says the court, "that, in the business world, men do frequently obtain what are termed options upon real property—that is to say, the right to purchase—and then employ brokers to negotiate at an enhanced price, the title being all the while in others. Brokers sell tons of wheat for future delivery on account of principals who do not or may not own a kernel of that commodity, yet, in the absence of law prohibiting such sales they are entitled to their commissions, and knowledge of the nonownership of their principals does not defeat their right to recover. A may possess such knowledge as justifies him, in his judgment, in contracting to sell, or in contracting with a broker to sell for him, or to find a purchaser for, property which he does not own. If he does so, without so guarding his agreement as to save himself, in case of failure to secure title to the thing he has authorized to be sold, he cannot be heard to complain of the result of his own folly or lack of foresight."

If a broker has knowledge at the time he undertakes to procure a purchaser that some of the vendors are minors, who can only convey the property and vest the same in a purchaser under and by virtue of an order of court, even though he is erroneously informed that such order has already been obtained, he is not entitled to a commission by the production of a purchaser who objects to taking title under such an order: *Folsom v. Lewis*, 14 Misc. Rep. 605, 36 N. Y. Supp. 270.

VII. Bringing Parties Together.

If a broker brings his principal and the prospective purchaser together, and a sale results, the broker is entitled to his commission, even though the principal effects the sale without the aid of the broker: *Clark v. Morris*, 30 App. D. C. 553; *Dean v. Archer*, 103 Ill. App. 455; *Henry v. Stewart*, 135 Ill. 448, 57 N. E. 190; *Wright v. McClintock*, 136 Ill. App. 438; *Gibson v. Hunt* (Iowa), 94 N. W. 277; *Dreisback v. Rollins*, 39 Kan. 268, 18 Pac. 187; *French v. McKay*, 181 Mass. 485, 63 N. E. 1068; *Willard v. Wright*, 203 Mass. 406, 89 N. E. 559; *Reishus-Remer Land Co. v. Benner*, 91 Minn. 401, 98 N. W. 186; *Knochs v. Paxton*, 87 Miss. 660, 40 South. 14; *Myers v. Dean*, 10 Misc. Rep. 402, 31 N. Y. Supp. 119; *Holmes v. Neafie*, 151 Pa. 392, 24 Atl. 1096; *Canadian Improvement Co. v. Cooper*, 161 Fed. 279. But if a broker is notified by his principal that he will pay no commissions, and after receipt of such notice the broker continues the negotiations for the sale, it will be presumed that he is acting for the purchaser, and

is looking to the purchaser for his commissions: *Synnott v. Shaughnessy*, 9 Supr. Ct. 609, 130 U. S. 572, 32 L. ed. 1038.

A broker whose undertaking merely is to find a purchaser at a price fixed by the seller, or at a price which shall be satisfactory to the seller when he and the purchaser meet, is in reality only a middleman, whose duty is performed when the buyer and seller are brought together: *Johnson v. Hayward* (Neb.), 107 N. W. 384. And it is not necessary that the principal and purchaser actually be brought face to face, but the principal must be notified that such a purchaser has been found and afforded a full opportunity to make a binding contract with him for the sale of the land on the terms authorized: *McDonald v. Smith*, 99 Minn. 42, 108 N. W. 291.

VIII. Compensation from Both Parties.

A broker who simply brings the parties together, and has no hand in the negotiations between them, they making their own bargain without his aid or interference, can legally receive compensation from both of them, although each is ignorant of his employment by the other: *Montross v. Eddy*, 94 Mich. 100, 34 Am. St. Rep. 323, 53 N. W. 916. And in *Calvin v. Langlow*, 55 Wash. 385, 104 Pac. 610, it was decided that an agent to procure a loan may act for both parties, where the parties have full knowledge of the facts and consent thereto. In *Dartt v. Sonnesyn*, 86 Minn. 55, 90 N. W. 115, it was decided that where a real estate broker is employed by the owner of lands to exchange the same for other property, and a third person, having information thereof from the broker, communicates through him with the owner of the land, and effects a sale, the relation of principal and agent between the broker and the owner forbids any legal inference and there is an implied promise by such third party, based upon benefits from the trade, to pay the broker a commission.

Ordinarily, however, if each of the parties to the transaction is entirely ignorant of the broker's relation to the other, such double service on the part of the broker will defeat his right to recover commission from either of them: *Green v. Southern States Lumber Co.*, 141 Ala. 680, 37 South. 670; *Tegarden v. Big Star Zink Co.*, 71 Ark. 277, 72 S. W. 989; *Deutsch v. Baxter*, 9 Colo. App. 58, 47 Pac. 405; *Hanesley v. Monroe*, 103 Ga. 279, 29 S. E. 928; *Hafner v. Herron*, 165 Ill. 242, 46 N. E. 211; *Simonds v. Hoover*, 35 Ind. 412; *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541; *Webb v. Paxton*, 36 Minn. 532, 32 N. W. 749; *Chapman v. Currie*, 51 Mo. App. 40; *Rosenthal v. Drake*, 82 Mo. App. 358; *Dennison v. Gault*, 140 Mo. App. 444, 124 S. W. 43; *Strawbridge v. Swan*, 43 Neb. 781, 62 N. W. 199; *Knauss v. Gottfried Krueger Brewing Co.*, 62 Hun, 46, 16 N. Y. Supp. 357; *Robinson v. Clock*, 38 App. Div. 67, 55 N. Y. Supp. 976; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *Capener v. Hogan*, 40 Ohio St. 203; *Cannell v. Smith*, 142 Pa. 25, 21 Atl. 793, 12 L. R. A. 395; *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458; *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268; *Meyer v. Hanchett*, 39 Wis. 419; *Robbins v. Sears*, 23 Fed. 574. To be secretly acting in the service of the buyer, while ostensibly acting for the seller, is a fraud upon the latter: *Van Vlissingen v. Blum*, 92 Ill. App. 145; *Sullivan v. Tufts*, 203 Mass. 155, 89 N. E.

239. But where a broker introduces the parties and they enter into a contract without the broker's aid, he is not precluded from recovering a commission on the ground that he was the broker of the purchaser also: *Flattery v. James Cunningham*, 125 Mich. 467, 84 N. W. 625.

IX. When Right to Commission Depends on a Sale.

Where the agreement of the real estate broker is to make a sale, his commission is earned when a contract is entered into which is mutually obligatory upon the vendor and vendee, even though the vendee afterward refuses to execute his part of the contract of sale or purchase. But an oral agreement upon the part of the purchaser would not be a valid agreement; and if he refuses to complete the sale of land after such an oral agreement, without fault upon the part of the seller, the obligation of the broker would not be fulfilled, and he could not recover his commission: *Planz v. Humburg*, 82 Ohio St. 1, 91 N. E. 863, 29 L. B. A., N. S., 533. A broker, however, is entitled to his commission on a sale made by him for an owner of real property, though the purchaser never enters into any enforceable contract of sale, if, as a matter of fact, the purchaser is willing to comply with his oral contract which was void by the statute of frauds, and the purchaser's compliance was prevented by the refusal of the owner to receive the purchase price and make a conveyance of the property: *Holden v. Starks*, 159 Mass. 503, 38 Am. St. Rep. 451, 34 N. E. 1069. In *Keys v. Johnson*, 69 Pa. 42; Justice Sharswood says: "Brokers are persons whose business it is to bring buyer and seller together. They need have nothing to do with the negotiations of the bargain." Therefore, it was decided that when a broker authorized to sell at private sale has commenced a negotiation, the owner cannot pending the negotiation take it into his own hands and complete it, either at or below the price and then refuse to pay the broker his commissions. In *Chilton v. Butler*, 1 E. D. Smith, 150, Justice Woodruff says: "If vendors were permitted to employ brokers to look up purchasers, and call the attention of buyers to the property which they desired to sell, limiting them as to the terms of sale, and then while such purchasers were negotiating, take the matter into their own hands, avail themselves of the labor, services and expenses of the broker in bringing the property into market, and accomplish a sale by an abatement in the price, and yet refuse to pay the broker anything, the business of a broker would not be worth pursuing, gross injustice would be done, every unfair and illiberal vendor would limit his property at a price slightly above the market, and make use of the broker to bring it into notice, and then make his own terms with the buyers who were in reality procured by the efforts of the agent. In *Middleton v. Thompson*, 163 Pa. 112, 29 Atl. 796, it was decided that it is not essential to the right of a loan broker to his commissions that he should enter into a binding contract with the lender.

X. Calling Broker by Mistake.

In *Shapiro v. Shapiro*, 117 App. Div. 817, 103 N. Y. Supp. 305, the evidence showed that Barnet Shapiro owned houses which were for sale. One Leder, of the brokerage firm of Leder & Zellermeier, called the houses and the price to the attention of one Michel, of the firm of Michel & Scott. Michel made a memorandum, including the owner's name, and went to look at the houses. Some months after Michel and

Scott, attempting to call the owner, Barnet Shapiro, to the telephone, called up another Barnet Shapiro, a broker, who truthfully answered that he was Mr. Shapiro, and said that he knew about the houses, and finally made an appointment to bring Michel and Scott and the owner Shapiro into personal communication. The owner Shapiro agreed to sell the premises to Michel and Scott, who told the owner that they were purchasers, and not brokers. When the time of closing the contract came, Michel and Scott admitted to the owner that they represented one Busch, whose name they then signed to the contract, giving their own check on account of the purchase. The premises were thereafter conveyed to Busch. The broker Shapiro then sued the owner Shapiro for commission. It was decided that the broker called up by mistake was not entitled to commission for his services. "If the buyers were in fact Michel and Scott," says Mr. Justice Jenks, "they were in possession of the particulars, knew the name of the owner, and were actually seeking him, when the accident of name and surname permitted the broker Shapiro to get wind of the project, and to proffer his services, which were really nothing more than to secure what telephonic communication might have brought to pass, if the right Shapiro had been found under the wrong Shapiro's telephone number."

HEERT v. RIDENOUR-RAYMOND GROCER COMPANY.

[48 Colo. 42, 108 Pac. 968.]

TRIAL.—Province of Jury.—Where from the Evidence different conclusions may be reached, the question should be left to the jury. (p. 262.)

SALE.—The Delivery of Goods to a Carrier by the seller, pursuant to instructions of the purchaser, passes title to him and renders him liable for the purchase price, even though the goods are lost in transit. (p. 262.)

SALE.—Delivery to Carrier.—Prepayment of Freight by the seller, but without intent to retain the title, on delivery of goods to a carrier, does not affect the purchaser's liability for the purchase price in case the goods are lost in transit. (p. 262.)

SALE.—Voluntary Payment for goods lost in transit from the seller to the purchaser cannot be recovered by counterclaim or otherwise. (p. 262.)

Alfred Muller, H. H. Hindry and Arthur F. Friedman,
for the appellant.

Davis & Whitney, for the appellee.

⁴² **MUSSER, J.** The issues in this case were on a counterclaim of the appellant, who was defendant below, against the appellee as plaintiff. In the year 1903, the defendant was engaged in the tobacco business in Denver. During the summer, he spent most of his time in the mountains, and his busi-

ness was conducted by his bookkeeper, who ordered goods, drew checks, and appears to have had general authority, subject to such instructions as were given him by defendant, who came down once or twice a month. During the same spring, the defendant, personally and by his bookkeeper, had purchased from the plaintiff several ⁴³ shipments of tobacco, called drop shipments. The plaintiff took the orders and sent them to the manufacturer. The latter shipped the tobacco, consigned to the defendant at Denver, and prepaid the freight. It was the understanding in such cases that what the parties termed a bill of lading would be sent to plaintiff, and by it delivered to the defendant. The manufacturer offered to purchasers of such shipments premiums in cigars. Certificates of such premiums were sent to the defendant, who surrendered such certificates to the plaintiff, and received the premiums. About June 1st, the defendant purchased from the plaintiff a drop shipment of tobacco. The evidence indicates that this purchase was made by the bookkeeper. The plaintiff sent the order to the manufacturer. The latter delivered the tobacco to a railroad company at St. Louis, consigned to the defendant at Denver, and prepaid the freight. The shipment was lost in a flood, in transit, and never reached the defendant. In July, the bookkeeper filed a claim against the railroad company for this shipment of tobacco, and the defendant afterward ratified the filing of this claim. The defendant could not remember whether he had received a bill of lading for this particular shipment, though there was evidence from which the jury might believe that he had received the usual bill of lading, in due course, and had filed it with his claim against the railroad company.

About the 1st of July, the plaintiff presented its monthly bill for June to the defendant, which included the lost shipment. The amount of this shipment was taken out by defendant, and the balance paid. The plaintiff again included this lost shipment in its July bill, presented in August, and it was paid. The defendant testified that he instructed his bookkeeper not to pay for this lost shipment, but contrary ⁴⁴ to such instruction, the bookkeeper did pay it. He further testified that, as soon as he came to Denver in September and ascertained that it had been paid, he notified the plaintiff that it had been paid by mistake, and against instructions, and demanded back the money. The bookkeeper testified that the defendant concluded he would have to pay for the lost shipment, and instructed the bookkeeper to pay it. The defendant testified that he did not know whether he received and accepted the premium cigars for this particular shipment or not, but there was evidence that would warrant the jury in believing that he had obtained them. The defendant testified that this particular shipment was to be delivered at

Denver. It is now claimed that this testimony as to the place of delivery stands uncontradicted in the record. Of course if there was a special agreement to deliver the tobacco at Denver, the plaintiff could not recover the purchase price of defendant until it was so delivered to him. It is true that this testimony is the only direct testimony in the record as to the place of delivery. However, on the other hand, the salesman who made the sale for plaintiff, in his testimony claims to state all that was said at the time of the sale, and there is no mention in his testimony that any particular place of delivery was designated. The defendant was away most of the time, did not make this particular purchase, and did not appear to have been present. The jury may have thought that he was not in a position to state facts; that what he did say was a conclusion drawn, and that while he may have been honest in his conclusion, he might be mistaken. The claim of defendant against the railroad company persistently followed up, short of a suit, is at variance with defendant's testimony, for if the lost goods had not been delivered to him as agreed upon, he had no claim against the ⁴⁵ railroad company. The testimony of the bookkeeper that the defendant directed payment for the lost shipment, is at variance with defendant's testimony that the goods were to be delivered to him at Denver, for if the goods were to be delivered to him at Denver, why should he pay for them before delivery, and at a time when it was certain they would not be delivered? All these facts and circumstances, and others that might be mentioned, tended in some degree to overthrow or weaken the testimony of defendant as to the place of delivery.

Some authorities say that the prepayment of the freight affords some evidence that the manufacturer intended to retain title to the tobacco until it reached its destination: *McLaughlin v. Marston*, 78 Wis. 670, 47 N. W. 1058; *Neimeyer Lumber Co. v. Burlington & M. R. R. Co.*, 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534.

This evidence, however, may have been overcome in the minds of the jury by other facts and circumstances. For instance, these drop shipments were special sales at special prices, for a limited period, and were fully explained to the defendant and his bookkeeper. It appears from the evidence that, in addition to the prepayment of freight, the manufacturer offered to the purchaser of drop shipments, premiums in cigars, and the purchaser obtained the tobacco, the freight and the premium cigars for the special price named. The prepayment of freight seems to have been made, not for the purpose of retaining title in the manufacturer or the plaintiff, but for the same purpose as the premium cigars, namely, to induce a purchase. It was also thoroughly under-

stood that when the tobacco was consigned by the manufacturer to the defendant, the plaintiff would have no control over it, and under no circumstances was it to be diverted to the plaintiff, yet it was the plaintiff who was to pay the manufacturer ⁴⁶ for it. When the manufacturer consigned it, as agreed upon, the plaintiff lost all control of the tobacco and was liable to the manufacturer for its price. On the whole, therefore, the evidence as to the place of delivery, and when the title passed to the defendant, if it did pass, leaves that question in doubt, and it was properly for the jury. The jury were the sole judges of the weight of the evidence and the credibility of the witnesses. From the evidence, they could conclude that there was no special agreement as to the place of delivery; that the prepayment of the freight was not for the purpose of retaining title; that the tobacco was delivered to a common carrier at St. Louis, consigned to the defendant without specific directions, or contract differing from ordinary uses, and that a bill of lading was sent to the plaintiff for the defendant and received by the latter. If the jury so concluded, there was presented a situation whereby the delivery of the tobacco to the railroad company at St. Louis was, in law, a delivery to the defendant, and he then became the owner thereof: *Cary v. Williams*, 47 Colo. 256, 135 Am. St. Rep. 219, 107 Pac. 219; *Westman Merc. Co. v. Park*, 2 Colo. App. 545, 31 Pac. 945; *Neimeyer Lumber Co. v. Burlington & M. R. R. Co.*, 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534; *Lake Shore etc. Ry. Co. v. National Livestock Bank*, 178 Ill. 506, 53 N. E. 326; *Kelsea v. Ramsey & Gore Mfg. Co.*, 55 N. J. L. 320, 26 Atl. 907, 22 L. R. A. 415; *Benjamin on Sales*, 7th ed., sec. 181.

There is another phase of the evidence upon which the jury was instructed and from which it could fairly conclude that a situation existed at variance with the allegations of defendant's counterclaim and with his testimony, and that is with reference to the payment for the tobacco. According to the testimony of the bookkeeper, defendant paid for the lost shipment voluntarily, with full knowledge of all the facts and circumstances, and at a time when he knew it was lost. If a person pays a disputed ⁴⁷ bill under such circumstances, he cannot recover the money back by counterclaim or otherwise: *Lewis v. Hughes*, 12 Colo. 208, 20 Pac. 621; *Steck v. Northern Colorado Irr. Co.*, 4 Colo. App. 323, 35 Pac. 919; 22 Ency. of Law, 2d ed., 609; 30 Cyc. 1298.

Upon conflicting evidence, therefore, the jury found against the contentions of the defendant, and their verdict is conclusive. In his brief, the defendant objects to several instructions given by the court, mainly on the grounds that some of the instructions were not based upon any evidence in the case, and that several of them were based alone upon

the evidence favorable to plaintiff. It would not be profitable to analyze these instructions and go at length into the evidence to show that these objections are not well taken. A mere reading of the record discloses that the instructions are based upon evidence. That the theory of the case from the viewpoint of defendant and the evidence in his behalf were fully covered by the instructions, will be disclosed by reading all the instructions given.

Finding no error in the record against the defendant, the judgment is affirmed.

Chief Justice Steele and Mr. Justice Bailey concur.

That the Delivery of Goods by the Seller to a carrier may be equivalent to delivery to the buyer, so that title then passes to him, see Cary v. Williams, 47 Colo. 256, 135 Am. St. Rep. 219, and cases cited in the cross-reference note thereto.

GALBREATH v. WALLRICH.

[48 Colo. 127, 109 Pac. 417.]

APPEAL—Direction for Particular Judgment—Power of Trial Court.—Where the mandate of an appellate court directs a specific judgment to be entered, the tribunal to which such mandate is directed must yield obedience thereto. No modification of the judgment so directed can be made by the trial court, nor can any provision be ingrafted upon or taken from it. (p. 266.)

APPEAL—Direction for Particular Judgment.—Relief from Changed Conditions or rights accruing pending the appeal on which the entry of a specific judgment is ordered can be had only by resort to some sort of original proceeding by which appropriate relief may be secured. It cannot be by way of defense to the judgment directed. (p. 266.)

APPEAL—Direction for Particular Judgment.—Relief Against Execution of a specific judgment directed by an appellate court may be granted in an independent action, where something has occurred which would render it inequitable to carry out the judgment directed. (p. 267.)

Hayt, Dawson & Wright and Jesse C. Wiley, for the appellant.

Richardson & Hawkins, for the appellee.

¹²⁷ GABBERT, J. Galbreath v. Wallrich, 45 Colo. 537, 102 Pac. 1085, was an appeal from a judgment rendered in an action brought by Charles A. Galbreath and Wilmot E. Broad, as copartners, against Christian Wallrich, J. H. Kellogg and Charles A. Galbreath, to recover the balance of the purchase price for property which Galbreath and Broad

claimed to have sold to Wallrich and his codefendants. The latter, by way of defense, sought to have the contract of purchase rescinded upon the ground that they had not received the principal part of the property they had bargained to purchase. The trial court sustained this contention and rendered judgment rescinding the contract of sale, and for the purchase money which defendants had paid plaintiffs. The latter appealed, with the result that the judgment of the district court was reversed and ¹²⁸ the cause remanded, with directions to enter judgment in favor of plaintiffs for the balance of the purchase money remaining unpaid. It will be observed that Galbreath was a vendor, as well as vendee. This arises from the fact that plaintiffs were conducting the business, and owned the property, as a firm, and in this capacity sold to the defendants, with whom Galbreath was associated as a purchaser.

It appears that when the suit was brought by plaintiffs (although not mentioned in the opinion, because not material to any question involved in the appeal), they secured the appointment of a receiver, who took possession of the property which was the subject of sale and purchase. After the cause was remanded to the trial court Wallrich and Kellogg presented their supplemental answer and cross-complaint in which they charged, in substance, that after the original judgment was rendered by the trial court, the plaintiffs filed a petition for the discharge of the receiver; that they secured his discharge, and thereby secured possession of all the property involved in the litigation, and have ever since had the use and benefit of such property, have wasted and disposed of a large part of it, and have refused to account to Wallrich and Kellogg therefor. They further allege that, pursuant to the order discharging the receiver, plaintiffs elected to, and did, receive all of such property, and have resumed full and complete control thereof; and hence should not have a judgment for the balance of the purchase price as directed by the supreme court. Based on these allegations the defendants prayed that plaintiffs be adjudged not entitled to any judgment whatever, and that they, the defendants, recover from plaintiffs the amount of the purchase price paid, or, if this relief is denied, that plaintiffs be required to account for the property by them received, and "that any amount or amounts for ¹²⁹ which the plaintiffs should, in equity and good conscience, be held responsible, shall be considered and taken to be a credit upon the judgment ordered to be entered herein, and that the proceeds arising from such judgment be ordered to be held in the registry of this court by the clerk or other officer thereof, as security for any amount or amounts so found due under said accounting, and that only the balance,

if there be any balance, at the end of such accounting be turned over to the plaintiffs, and if there be no such balance in favor of the plaintiffs, but a balance in favor of the defendants, Wallrich and Kellogg, that a judgment be entered for such balance."

Broad has departed this life, and subsequent to the judgment directed by this court, and before the issuance of a remittitur, which has since been duly issued and filed in the district court, an order of this court was obtained, permitting Galbreath to continue the cause as surviving partner of the firm of Galbreath & Company. Plaintiff Galbreath, as the surviving partner of the firm of Galbreath & Company, also obtained an order of the district court allowing him to proceed in his own name, and in this capacity objected to the filing of this supplemental answer and cross-complaint, and requested and moved the court to enter judgment in accordance with the mandate of this court, as directed by the remittitur then on file. Upon this motion the court entered the following order: "It is ordered that said defendants be, and they are hereby, allowed to file said supplemental answer and cross-complaint; and it is further ordered that the plaintiff's motion asking that judgment be entered herein be, at the present time, refused."

Later plaintiffs filed a motion to strike the supplemental answer and cross-complaint, based upon the ground that the matters and things therein alleged must be determined in an independent action,¹³⁰ and that the authority of the trial court in the premises was limited to the rendition of the judgment which the supreme court had directed. This motion was denied.

Thereafter plaintiff presented to this court his petition setting forth the foregoing facts, requesting an order commanding the district court to forthwith enter a judgment in accordance with the opinion and mandate of this court, as directed in Galbreath v. Wallrich, 45 Colo. 537, 102 Pac. 1085. On this petition a rule to show cause why the prayer thereof should not be granted was issued and served. By the pleading filed on behalf of the respondents, and the briefs of counsel, the sole question presented for our consideration is, whether or not the district court should be peremptorily ordered to enter the judgment directed by this court, thus remitting Wallrich and Kellogg to the remedy of an independent action against the plaintiff, instead of permitting them at this time to reduce the judgment ordered by this court in such sum as the allegations in their answer and cross-complaint, if established, would entitle them to, or to annul it, as they evidently seek to do. In thus speaking of the matters and things set up in the answer and cross-complaint we must not be understood as expressing any opinion

as to whether or not any cause or causes of action are thereby stated.

As applicable to the facts before us, the rule is, that where the mandate of an appellate court directs a specific judgment to be entered, the tribunal to which such mandate is directed must yield obedience thereto. No modification of the judgment so directed by the appellate tribunal can be made by the trial court, nor can any provision be ingrafted upon or taken from it: Elliott on Appellate Procedure, sec. 576; 3 Cyc. 481; Washburn & M. Mfg. Co. v. Chicago Wire ¹³¹ Co., 119 Ill. 30, 6 N. E. 191; Patten Paper Co. v. Green Bay & Miss. Canal Co., 93 Wis. 283, 66 N. W. 601, 67 N. W. 432; Keller v. Lewis, 56 Cal. 466; Wadhams v. Gay, 83 Ill. 250; Hughes' Appeal, 90 Pa. 60; Reems v. Dielman, 116 La. 945, 41 South. 217.

The reason for this rule is obvious. When a particular judgment is directed by the appellate court, the lower court is not acting of its own motion, but in obedience to the order of its superior. What that superior says it shall do, it must do, and that alone. Public interests require that an end shall be put to litigation, and when a given cause has received the consideration of this court, its merits determined, and then remanded with specific directions, the court to which such mandate is directed has no power to do anything but to obey the mandate; otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of that authority over inferior tribunals with which it is invested by our fundamental law. By permitting the filing of the supplemental answer and cross-complaint the trial court is proceeding contrary to what we directed. True, by this pleading none of the issues settled by the judgment we directed are to be relitigated, but that is not the question. We directed a particular judgment, and nothing is left for the trial court to do but to enter it. By the supplemental answer and cross-complaint it is sought to show that because something has happened since the original judgment was entered, and which was not in issue in the case, the judgment we have directed should not be rendered. To pursue this course is to ignore our mandate. Rights which may have accrued since the rendition of the original judgment, not in issue in the action in which it was rendered, are not adjudicated therein, but the trial court has no power to open or interfere with the judgment of this court in order to ¹³² settle such rights. If, since the original judgment something has occurred which would render it inequitable to carry the judgment this court has directed into execution, resort must be had to some form of original proceeding by which appropriate relief can be secured. It cannot be done by way of defense to the entry of the judgment we have

directed: *Mackall v. Richards*, 116 U. S. 45, 6 Sup. Ct. Rep. 234, 29 L. ed. 558; *Ex parte Story*, 12 Pet. 339, 9 L. ed. 1108; *Young v. Thrasher*, 123 Mo. 308, 27 S. W. 326; *Watson v. Avery*, 3 Bush, 635; *Morgan v. Hart*, 9 B. Mon. 79; *Pearson v. Carr*, 97 N. C. 194, 1 S. E. 916; *Burnett v. Curry*, 42 Ind. 272; *McClellan v. Crook*, 7 Gill, 333; *Fortenberry v. Frazier*, 5 Ark. 200, 39 Am. Dec. 373; *Tourville v. Wabash R. R. Co.*, 148 Mo. 614, 71 Am. St. Rep. 650, 50 S. W. 300; *Wabash R. R. Co. v. Tourville*, 179 U. S. 322, 21 Sup. Ct. Rep. 113, 45 L. ed. 210; *Keller v. Lewis*, 56 Cal. 466.

Cases are cited by counsel for respondents which they contend hold contrary to the rule we have announced. Perhaps some of them do, or they may be distinguished from the question we have under consideration; but however this may be, the great weight of authority sustains our conclusions on the questions presented. To permit a trial court to disobey in the least respect the mandate of this tribunal would inevitably mar the harmony of our whole judiciary system, bring its parts into conflict, and produce disorganization, disorder, incalculable mischief and confusion, by allowing judgments which we have directed, to be modified, or questions injected into the case, after being remanded, the purpose of which would be to annul or modify the judgment which this court had directed should be rendered.

The case of *People v. Carpenter*, 29 Colo. 365, 68 Pac. 221, cited by counsel for respondents, is not in point. What was said in that case to the effect that trial courts are required to yield an intelligent and not a ¹³³ blind obedience to the mandates of an appellate court, referred to the authority of the trial court to ascertain, by an appropriate application, from which it appeared there had been a change of parties and interests, subsequent to the original judgment, in whose favor the decree directed by this court should be entered. No question of that character is involved in the case at bar, and viewed in the light of the facts presented by the two cases, nothing is said here, or intended to be said, contrary to what was decided in the *Carpenter* case.

We have no doubt but that counsel and the court have acted in the utmost good faith; and that the presentation of the supplemental answer and cross-complaint, and the order of the court allowing it to be filed, is the result of a mistaken idea with respect to the authority of the trial court, and was not prompted by any desire or intention to disobey the order regarding the judgment which we directed should be entered. To allow this course, however, to be pursued would be contrary to the law and practice. In an independent action the trial court would have authority to grant such relief against the execution of the judgment as

would be just, until the subject matter of the independent action was adjudicated. The application of the petitioner is, therefore, granted, and a writ will issue, directing the trial court to strike the supplemental answer and cross-complaint, and to forthwith, in due course, render judgment in favor of Charles A. Galbreath, as surviving member of the firm of Galbreath & Company, in accordance with the directions contained in the opinion in *Galbreath v. Wallrich*, 45 Colo. 537, 102 Pac. 1085.

Writ allowed.

Chief Justice Steele and Mr. Justice White concur.

When a Case is Remanded With Directions to Enter a Particular Judgment, the entry of that judgment in the lower court is a purely ministerial act, and the lower court has no judicial discretion in the premises. It has no power to enter any other judgment, or to consider or determine other matters not included in the duty of entering the judgment as directed: *Tourville v. Wabash R. R. Co.*, 148 Mo. 614, 71 Am. St. Rep. 650; and no judgment or order different from or in addition to that directed by the appellate court can have any effect, though it may be such as the appellate court ought to have directed: *Cowdery v. London etc. Bank*, 139 Cal. 298, 96 Am. St. Rep. 115.

MORRIS v. COLORADO MIDLAND RAILROAD COMPANY.

[48 Colo. 147, 109 Pac. 430.]

ELECTORS—Damages for Loss of Vote.—The weight of authority is to the effect that where a qualified voter is prevented from exercising his right to vote, there is no cause of action, unless the act of the party so preventing was sinister. (p. 269.)

ELECTORS—Nature of Right to Vote.—The right of a qualified elector to vote is neither a property right nor right of person, nor an asset of commercial value. It is a political privilege as distinguished from a property or personal right. (p. 270.)

ELECTORS—Damages for Loss of Vote.—It is only where the right to vote has itself been assailed and denied, with a pernicious purpose, that a cause of action arises. The wrong then is primarily against the public and not against the individual, and the damages awarded are punitive and to deter others from the commission of like offenses. (p. 270.)

ELECTORS—Damages for Loss of Vote.—Malice is the gist of an action for damages for being deprived of the right to vote. (p. 270.)

ELECTORS—Damages for Loss of Vote.—The mere fact that one has been unable to enjoy a political right, as the unintentional result of the negligent conduct of another, gives no right of action, although the loss may be a natural consequence of such conduct. (pp. 270, 271, 272.)

Thomas B. Stuart, Charles A. Murray and Robert M. Work, for the plaintiff in error.

Rogers, Cuthbert & Ellis and Pierpont Fuller, for the defendant in error.

¹⁴⁸ BAILEY, J. The action is for an alleged breach of a special contract, on the part of the defendant railway company, in failing to carry the plaintiff from Denver to Glenwood Springs, and return him to the former place in time to meet certain business engagements on November 8, 1904, and to vote at the general election then holden. Damage is laid in the sum of sixteen dollars and thirty-five cents for loss of time and money necessarily expended because of delay, and at ten thousand dollars for being deprived of the privilege of voting. There is no claim or proof of other special damage.

At the close of the plaintiff's evidence the court instructed a verdict for sixteen dollars and thirty-five cents, declining to allow the jury to consider the question of the loss of plaintiff's vote as an element of damage, no willful or malicious motive having been either alleged or proven.

Inasmuch as the defendant does not seek a reversal of this judgment, on the ground that there was no special, specific agreement to get plaintiff back at a time certain, let it be assumed, for the purposes of this decision, that there was such agreement, though we do not so hold, it being unnecessary in this case to determine that question.

Is the fact that the plaintiff lost his vote, because of the negligent manner in which the defendant operated its road and conducted its train, to be reckoned as an element of damage in his favor and ¹⁴⁹ against the company as for breach of contract? The question is whether, where one has, as the incidental and indirect result of an unintentional, though negligent, fault of another, been deprived of his vote; the latter can be mulcted in damages, on account of such loss, there being no pretense of improper motive in the transaction. The deprivation complained of was, according to the proofs, clearly the result of accident, not of design; indeed there is no contrary contention.

The weight of authority is to the effect that where a qualified voter is prevented from exercising his right to vote, there is no cause of action, unless the act of the party so preventing was sinister: *Carter v. Harrison*, 5 Blackf. 138; *Perry v. Reynolds*, 53 Conn. 527, 3 Atl. 555; *Morgan v. Dudley*, 18 B. Mon. 693, 68 Am. Dec. 735; *Caulfield v. Billock*, 18 B. Mon. 494; *Miller v. Rucker*, 1 Bush, 135; *Jenkins v. Waldron*, 11 Johns. 114, 6 Am. Dec. 359; *Weckerley v. Geyer*, 11 Serg. & R. 35; *Isaacs v. McNeill*, 44 Fed. 32, 11 L. R. A. 254; *Patterson v. D'Auterice*, 6 La. Ann.

467, 54 Am. Dec. 564; *Dwight v. Rice*, 5 La. Ann. 580; *Bevard v. Huffman*, 18 Md. 479, 81 Am. Dec. 618; *Friend v. Hamill*, 34 Md. 298; *Gordon v. Farrar*, 2 Doug. 411; *Pike v. Megoun*, 44 Mo. 491; *Wheeler v. Patterson*, 1 N. H. 88, 8 Am. Dec. 41; *State v. Smith*, 18 N. H. 91; *Peavy v. Robbins*, 48 N. C. 339; *Rail v. Potts*, 8 Humph. 225; *State v. Porter*, 4 Harr. (Del.) 556; *Griffin v. Rising*, 11 Met. 339; *Ashby v. White*, 1 Smith Lead. Cas. 9th ed., 464.

At an early day a different rule was adopted in Massachusetts, and followed in the states of Ohio and Wisconsin, but in all other states, where there has been judicial expression upon the subject, and in England, a rule contrary to that in Massachusetts prevails. Even where the Massachusetts rule obtains it is held that only nominal or slight damage ¹⁵⁰ should go, except wrongful conduct be charged and proven: *Lincoln v. Hapgood*, 11 Mass. 350; *Jeffries v. Ankeny*, 11 Ohio, 372; *Gillespie v. Palmer*, 20 Wis. 544.

The right of a qualified elector to vote is neither a property right nor right of person: *Anderson v. Baker*, 23 Md. 531; 15 Cyc. 280, par. 2, and authorities cited. It can in no sense be said to be an asset of commercial value. It is a privilege bestowed by law, which, although of paramount importance, is not such a privilege as can be measured by or paid for in dollars and cents, or speculated upon for pecuniary gain. It is a political privilege, as distinguished from a property or personal right. It is only where the right itself has been assailed and denied, with a pernicious purpose, that a cause of action arises. The damage is then of an exemplary or punitive nature, visited on the evildoer for his misconduct, rather than as compensation to the party who has suffered the loss. The wrong primarily is against the public, not the individual. The damage is for general protection, to deter others from the commission of like offenses. In this case there is neither averment upon which to base, nor proof to support, exemplary damage, and there is no proof to show actual damage, other than the bare fact that the vote was lost. In general, where one is injured in respect of property or person, as the result of negligence by another, however unintentional the injury, the law implies damage, and permits recovery. It is otherwise where one loses his vote, through the fault of another, unless the loss is occasioned by design. In such case the law implies damage only where malice is shown, that is, malice is the gist of the action. Not only must the party have been deprived of his vote, but such result must be brought about through vicious motive. The mere fact that ¹⁵¹ one has been unable to enjoy a political right, as the unintentional result of the negligent conduct of another, gives no right

of action, although the loss may be a natural consequence of such conduct.

We have been unable to find a single reported case, in which a vote has been lost through alleged breach of contract, where an attempt has been made to have the loss included as an element of damage, in suit for such breach, nor has the diligence of vigilant counsel been able to discover one. While this fact is not conclusive of the right, it is at least persuasive to the belief that it does not exist, and surely not where the loss was not deliberately and willfully occasioned. Cases cited, except one hereinafter discussed, involved actions against election officers, and if in those malice is an essential to give a cause of action, all the more should this be true where the suit is against a party, in a purely private capacity.

The case most nearly in point is that of *Griffin v. Rising*, 11 Met. 339, where assessors failed to assess property of the plaintiff, and thus kept him off the list as a qualified voter. The result was that the plaintiff lost his vote, as the indirect, though logical and natural, result of the failure of the defendants to assess his property. He brought suit for this loss, alleging failure and neglect on the part of the assessors to perform their duties. In the face of its former decisions, holding election judges liable for incorrectly rejecting a vote, although done without malice, the court sharply distinguishes this case, and denied liability on the part of the assessors. The court, speaking through Chief Justice Shaw, said:

"The case of a suit against selectmen, for refusing the vote of a qualified voter, and that of assessors, neglecting to tax a citizen, by means of which he is deficient in one of the qualifications of a voter, are manifestly quite distinguishable. In the former, ¹⁵² the selectmen act directly upon the party's claim of right to vote, which is regarded as a valuable personal right; and if his vote is refused, supposing him entitled to vote, it is regarded in law as a direct violation of this personal right. But although assessors owe a duty to their constituents and to the public, to assess a tax on every one liable to taxation, yet the right of an individual to be taxed is not *prima facie* a beneficial right to him, and by omitting him they do him no direct wrong. If it operates indirectly to deprive him of a privilege, before it can be charged as a personal injury to him, it must be shown to be done for that or some other sinister or wrong purpose. The court are therefore of opinion that the assessors are not liable to an action by an individual, who in fact was liable to taxation for his property or poll, for simply omitting to tax him, unless it be shown affirmatively that they

omitted to tax him, willfully, purposely, or with design to deprive him of his vote, or unless they had actual knowledge of his liability to taxation, so plain and obvious, that a sinister purpose, and willful omission to tax him, in pursuance of such purpose, may be reasonably inferred by a jury. In such case it would be proper to leave the evidence to a jury, with directions to find for the plaintiff, if they should find that the assessors willfully omitted to tax the plaintiff, knowing him to be liable to taxation, for the purpose of depriving him of his right to vote, or otherwise to injure and oppress him."

The foregoing case is a close parallel to the one at bar. There the plaintiff, as a natural result of the failure and neglect of the defendants to assess his property, lost his vote, the court holding, that unless it affirmatively appear that the defendants purposely and willfully omitted plaintiff from the tax-roll, with the intent to deprive him of his vote, there can be no ¹⁵³ recovery. So here, although it was agreed that plaintiff would get defendant home in time to vote, unless it be shown that the failure to do so was brought about by design, with the willful and malicious object of depriving him of that privilege, there is no cause of action.

On principle and authority we are persuaded that, in computing damages for the alleged breach of contract counted upon in this suit, the loss of plaintiff's vote may not be included as an element. His right to vote was not questioned. No humiliation or indignity was offered him. The defendant, purely through accidental happening, failed to return plaintiff in time to exercise this right. No money damage was thereby occasioned, and none may, therefore, on this score, be recovered, for it has not been, neither can be, shown that plaintiff has suffered, either in reputation, property or person.

The trial court was right in excluding from the consideration of the jury, under the circumstances of this case, plaintiff's loss of vote, as an element of damage for the breach of the contract complained of; and as there is no other question involved, which need be determined, the judgment is affirmed.

Chief Justice Steele and Mr. Justice White concur.

The Right to Vote is a Political, not a civil, right: United States etc. Co. v. Hobson, 132 Iowa, 38, 119 Am. St. Rep. 539. It is merely a political privilege: Chamberlain v. Wood, 15 S. D. 216, 91 Am. St. Rep. 674; Gougar v. Timberlake, 148 Ind. 38, 62 Am. St. Rep. 487. .

That No Action for Damages will Lie Against the Inspectors of an Election for refusing the vote of a person legally qualified to vote, in the absence of fraud or malice on the part of the officers, see Bevard v. Hoffman, 18 Md. 479, 81 Am. Dec. 618.

MELCHER v. BEELER.

[48 Colo. 233, 110 Pac. 181.]

APPEAL.—Failure to Object in the Trial Court and afford it an opportunity to correct an alleged error will, as a general rule, preclude its being urged on appeal. (p. 274.)

LIBEL.—Prior and Contemporaneous Publications of similar import to those for which damages are claimed in an action for libel are competent to show malice. (p. 275.)

EVIDENCE Admitted for Particular Purpose.—Caution to the Jury should be given where evidence is admitted for a particular purpose only, even though not requested. (p. 275.)

LIBEL.—Where Prior Publications of Similar import are admitted in evidence for the purpose of showing malice, and the jury is not cautioned to consider them for that purpose only, an instruction to the effect that the jury may award such damages as in the exercise of its reasonable judgment, "under all the evidence in the case," it may think the plaintiffs should have by way of compensation, etc., is erroneous. (pp. 275, 276.)

INSTRUCTIONS—General Exception.—The rule that when an instruction embraces several distinct propositions of law, some of which are correct, a general exception to the whole instruction is not good, does not apply where the instruction authorizes the wrong application of that which is correct. (pp. 276, 277.)

INSTRUCTIONS—Request to Cure Erroneous Instruction.—Where the court has given an erroneous instruction, the party against whom it operates is not required to propose or request a correct instruction on the point. (p. 277.)

LIBEL.—Privileged Communications—Social or Moral Duty.—A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains incriminatory matter which, without this privilege, would be actionable; and this though the duty is only a moral or social duty of imperfect application. (p. 278.)

LIBEL.—Privileged Communications.—The Falsity of Statements of a privileged communication is not sufficient of itself to raise the inference that they were maliciously inspired. (p. 278.)

LIBEL.—Privileged Communications—Questions for Jury.—The questions of the good faith of the defendant in making privileged communications, his belief in the truth of his statements and whether or not they were inspired by malice, are for the jury. (p. 279.)

LIBEL.—Privileged Communications—Establishing Malice.—That a person was actuated by malice in making a defamatory communication which is privileged cannot be established alone by introducing other privileged communications, nor is the latter admissible for this purpose until there has been some other testimony tending to prove the malice of the person making the privileged communication. (p. 279.)

LIBEL.—Damage Presumed.—Where the Words Charged as libelous are actionable per se, the law presumes damages. No special evidence concerning them is required. It is for the jury to determine what amount by way of compensation shall be allowed for the injury. (p. 279.)

PARTNERSHIP.—Failure to File Affidavit.—Statute (Laws 1897, p. 248; Mills' Stats., Rev. Supp., sec. 3387a; Rev. Stats., sec. Am. St. Rep., Vol. 189—18

4778) requiring the filing of an affidavit showing the names of members of partnership, etc., applies only to suits for the collection of debts due the firm doing business, to which it applies. It does not apply to suits for torts. (p. 280.)

PARTNERSHIP—Libel of Firm by Libel of Member.—Partners may maintain a joint action for libel or slander which tends to injure the business of their firm, even though the defamatory words refer to or concern but one of its members. (p. 281.)

LIBEL—Communication Invited by Plaintiff.—Alleged defamatory statements invited or procured by a plaintiff or person acting for him will not support an action for libel. (p. 282.)

Stokes & Sherman, for the appellant.

John W. Helbig and R. D. Rees, for the appellee.

²³⁵ GABBERT, J. Appellees, as plaintiffs, brought an action against the appellants, as defendants, to recover damages resulting from alleged libelous letters and publications which, it was charged, the defendants had composed and published of and concerning them. The complaint contained three counts. The first was withdrawn from the consideration of the jury. On the remaining two a verdict was returned, in the sum of one thousand dollars, in favor of the plaintiffs, on which judgment was subsequently entered. From this judgment the defendants have appealed.

The verdict of the jury was to the effect that they found the issues for plaintiff on the second and third causes of action, and assessed their damages in the sum of one thousand dollars. On behalf of the defendants it is claimed this verdict is erroneous, for ²³⁶ the reason that it does not appear what amount was assessed in the way of damages upon each of the two causes separately. In support of this contention it is urged that as the jury failed to designate separately the damages assessed upon each cause of action, it is impossible to tell whether or not the damages returned were determined by the unanimous verdict of the jurors. Whether or not there is any merit in this contention, is not properly here for our consideration. No such objection or exception was taken to the verdict of the jury at the time it was rendered, neither was the question now presented raised in the trial court by a motion for a new trial. The general rule applicable is, that a question not presented for the determination of the trial court will not be considered for the first time on appeal. If counsel for defendants were dissatisfied with the verdict for the reasons which they now assign, they should have called the attention of the trial court to its alleged defects by the objection which they now urge upon our attention. When counsel neglect to point out alleged errors occurring at the trial in such time and manner as will afford the trial court an opportunity for their correction, they will not, as a general rule, be heard to com-

plain of such errors in a court of review: *Denver etc. R. Co. v. Ryan*, 17 Colo. 98, 28 Pac. 79.

Plaintiffs were copartners doing business under the firm name and style of the Colorado-Texas Commission Company, and were engaged in carrying on a general commission business in the city of Denver, and in buying and selling and otherwise disposing of, consignments of produce, as wholesale commission merchants. At the trial the plaintiffs offered, and the court admitted in evidence over the objections of the defendant, two letters reflecting upon the business integrity of the plaintiffs, which were not counted upon in the complaint as constituting libels ²³⁷ for which damages were claimed. Prior and contemporaneous publications of similar import to those for which damages are claimed in an action for libel are competent to show malice; hence, in the case at bar, the letters objected to were competent for that purpose and the general objection to their admission was properly overruled. They were admitted, however, without any caution to the jury to the effect that they could only be considered on the question of malice. Counsel for the defendants at the time the letters were introduced made no request for a cautionary instruction limiting the purpose for which the letters were competent; but, notwithstanding this omission upon their part, we think the better practice is that when testimony is competent only for some particular purpose, that the court should so advise the jury, at the time of its introduction; but by this suggestion we must not be understood as holding that it is error for the court not to do so when counsel objecting to its reception failed to make a request of the court to advise the jury for what purpose it is competent. We notice the omission in this instance for the purpose of bringing out more clearly the error which the court committed in giving instruction No. 14. This instruction was to the effect that when language is used concerning merchants which, from its nature, will, as its natural and proximate consequence, occasion them a pecuniary loss, its publication constitutes prima facie a cause of action for which general damages may be recovered without any evidence of damage other than that which is implied from the fact of publication. The instruction then proceeds as follows: "The law does not restrict you to any calculation of damages done in the way of dollars and cents, or to a calculation of damages on a pecuniary basis, but you are at liberty, in determining this question, to award ²³⁸ the plaintiffs, if entitled to recover herein, such damages as in the exercise of your reasonable judgment, under all the evidence in the case, you may think the plaintiffs should have by way of compensation for the injuries done to them in their capacity as merchants or

traders, not exceeding, however, the amount demanded in the respective counts of the complaint herein."

It will be observed that the instruction fails to caution the jury not to increase the damages on account of the letters to which objections were interposed, and advised that such damages may be assessed as, in their judgment, from all the evidence, the plaintiffs should have for the injury suffered by them in their capacity as merchants and traders. For the purpose of showing malice, the letters under consideration were competent, but no damages for their publication could be awarded, because none were claimed on that account. They were only proper to consider in determining whether or not the letters which were charged to be libelous and declared upon in the complaint, were actuated by malice of the defendants toward the plaintiffs, but not in aggravation of damages: *Beardsley v. Bridgman*, 17 Iowa, 290. No such caution was given the jury; and when they were told that language concerning merchants and traders calculated to occasion them a pecuniary loss as the result of its publication constitutes a cause of action for which general damages may be recovered, followed with the further statement to the effect that in awarding damages they were at liberty to award such sum as in their judgment from all the evidence in the case they might think the plaintiffs should have by way of compensation for the injury done to them in their capacity as merchants and traders, it is evident that they could consider the letters for which no damages were ²³⁹ claimed as causing injury which they could take into consideration in estimating the sum which should be awarded the plaintiffs. In other words, under this instruction, in the absence of any caution to the jury at the time the letters were received directing their attention to the fact that they could only be considered for the purpose of determining whether or not the defendants were actuated by malice in publishing the letters declared upon, or any instruction limiting their effect to this one question, the jury, in estimating damages, were at liberty to take into consideration all four of the letters instead of limiting them to those set up in the complaint. This was erroneous, for the simple reason that it is error to so instruct a jury as to permit them to consider matters in estimating damages which cannot be considered for that purpose: *Letton v. Young*, 2 Met. (Ky.) 558; *Taylor v. Moran*, 4 Met. (Ky.) 127.

On behalf of the plaintiffs it is urged that as the instruction correctly stated what would constitute a libel against merchants, and also stated correctly that damages for such libel are not restricted to a calculation of damages on a pecuniary basis, that a general exception thereto was not good because it did not designate what was incorrect by separating it from that which was correct. The rule that when an instruction em-

braces several distinct propositions of law, some of which are correct, a general exception to the whole instruction is not good, does not apply where the instruction authorizes the wrong application of that which is correct. In the case at bar, conceding that the portions thereof referred to by counsel for plaintiffs are correct, it authorizes the jury, in estimating damages, to consider letters which could not be considered for that purpose.

It is further urged by counsel for plaintiffs that inasmuch as the court, by previous instructions, ²⁴⁰ stated in substance that the second and third causes of action were based upon the letters described therein, the jury understood that they were limited in estimating damages to the letters. The suggestion is not tenable. By one instruction the jury were told that the plaintiffs seek to recover upon certain letters; by the other, all letters could be taken into consideration in estimating damages.

It is also urged by counsel for plaintiffs that if defendants desired an instruction to the effect that the letters which were only competent for the purpose of establishing malice could not be considered as substantive grounds for damages, it was the duty of their counsel to have tendered a correct instruction on that point. In the circumstances of this case that proposition is clearly untenable, for the obvious reason that it would impose upon counsel, where the court had given an erroneous instruction, the burden of tendering a correct one; otherwise, they would be precluded from assigning error on the one which was incorrect.

It is next urged that the court erred in not directing a verdict for the defendants on the causes of action upon which the verdict was based. In support of this contention it is claimed that the letters sued on were privileged communications; and for this reason the case should not have been submitted to the jury, as it was the duty of the court, and not of the jury, to decide whether the communications were privileged or not. The letters complained of were written by the defendants in response to inquiries received from parties asking for information regarding the responsibility and standing of the Colorado-Texas Commission Company. The response to these inquiries reflected upon the honesty and business integrity of that partnership.

Every one owes it as a duty to his fellowmen to ²⁴¹ state what he knows about a person, when inquiry is made; otherwise, whether or not men were honest could not be ascertained except by experience. But for such inquiries, it would often occur that parties about to enter into business relations with others would be unable to ascertain in advance their character with respect to integrity or capability. The interest of society demands and requires that inquiries may be made respecting

such matters, and that answers thereto may be given without subjecting the party answering such inquiries to an action for libel or slander, for the opinion furnished in response to such inquiries; hence, where a party to whom an inquiry is addressed regarding another communicates bona fide without malice to the person making inquiry facts regarding the person inquired about, it is a privileged communication; and so it follows that a party is justified in giving his opinion in good faith of the integrity and standing of a tradesman in answer to an inquiry concerning him: *Townshend on Slander and Libel*, sec. 241a; *Rude v. Nass*, 79 Wis. 321, 24 Am. St. Rep. 717, 48 N. W. 555; *Denver P. W. Co. v. Holloway*, 34 Colo. 432, 114 Am. St. Rep. 171, 3 L. R. A., N. S., 696, 7 Ann. Cas. 840; *Harrison v. Bush*, 5 El. & B. 344.

As was said, in substance, in the case last cited, a communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains incriminatory matter, which, without this privilege, would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect application. But the person to whom such an inquiry is addressed cannot abuse his privilege in answering it. If he knowingly makes a false charge against the person inquired about he cannot claim ²⁴²immunity, because, in response to an inquiry it is not his duty to circulate a falsehood: *Odgers on Libel and Slander*, p. *198. If the testimony bearing on the question of whether or not a communication is privileged is not conflicting, the question of its character in this respect would be one of law for the court. On the other hand, if there was an issue on the subject as to whether or not it was privileged, it would be one of fact for the jury to determine under appropriate instructions: 18 Ency. 1050; *Townshend on Libel and Slander*, secs. 287, 288.

But, even though a communication be privileged, the question of good faith, belief in the truth of the statements made, and the existence of actual malice, remain for the jury to determine when, under the issues and testimony, it is in issue, and the burden of establishing the facts which would render a privileged communication actionable rests upon the plaintiff—*Denver P. W. Co. v. Holloway*, 34 Colo. 432, 114 Am. St. Rep. 171, 3 L. R. A., N. S., 696, 7 Ann. Cas. 840—but the falsity of the statements of a privileged communication is not sufficient of itself to raise the inference that they were maliciously inspired: *Fowles v. Bowen*, 30 N. Y. 20; *Ritchie v. Arnold*, 79 Ill. App. 406.

So far as advised from the present record, it appears the letters declared upon were privileged in the sense that they

were written in response to what the defendants believed were bona fide inquiries regarding the business integrity of the plaintiffs; and if the court submitted to the jury the question of whether or not they were privileged, it was error. What the instructions might disclose on this subject it is not necessary to determine, for the reason that at another trial if the facts presented are substantially the same as now, this error can be avoided. The plaintiffs charged that the letters upon which they base their right to damages were inspired by malice; ²⁴³ that the statements therein were false and injurious; and as there was some testimony tending to prove this charge, it was proper for the court to submit to the jury the question of the good faith of the defendants, their belief in the truth of their statements, and whether or not they were inspired by malice in making them. If these questions were resolved in favor of the defendants from the testimony, then the verdict should be for them, even though it should develop that the statements made were untrue: *Rude v. Nass*, 79 Wis. 321, 24 Am. St. Rep. 717, 48 N. W. 555.

In this connection we notice the contention of counsel for the defendants, that the letters referred to in discussing instruction No. 14, and which we said were competent for the purpose of proving malice, were not admissible for that purpose. The reason assigned in support of this contention is, that these letters were also privileged, and, therefore, were not admissible to prove actual malice in writing the letters declared upon. That a party was actuated by malice in making a defamatory communication which is privileged, cannot be established alone by introducing other privileged communications, nor would the latter be admissible for this purpose until there was some other testimony tending to prove the malice of the party making a privileged communication; but where there is some testimony tending to prove actual malice, then other communications, although privileged in their nature, are competent for the purpose of corroborating or establishing it.

There was no evidence that the plaintiffs were known in the community where the letters declared upon were published, and it is, therefore, urged by counsel for defendants that plaintiffs were not entitled to recover general damages. It appears to be conceded that these letters contained such reflections upon the honesty and integrity of the plaintiffs that ²⁴⁴ they were actionable per se, unless the letters were privileged. Where the words charged as libelous are actionable per se, the law presumes damages. No special evidence concerning them is required. It is for the jury to determine what amount by way of compensation shall be allowed for the injury: *Republican Pub. Co. v. Conroy*, 5 Colo. App.

262, 38 Pac. 423; Republican Pub. Co. v. Mosman, 15 Colo. 399, 24 Pac. 1051; 18 Ency. 1082.

By virtue of the provisions of the laws of 1897, page 248, (3 Mills' Stats., Rev. Supp., sec. 3387a; Rev. Stats., sec. 4778), it is made the duty of any person or persons trading or doing business in this state, under the name of manager, or in any other representative name, and any person or persons using as a part of the business name the words "& Company," to file for record with the clerk and recorder of the county in which such business or trading is carried on, an affidavit setting forth the full Christian and surname, and addresses of all the parties who are so represented. Failure to comply with this provision is made a misdemeanor, and persons, partnerships, and associations trading and doing business under the name mentioned on failure to file the affidavit required "shall not be permitted to prosecute any suits for the collection of their debts until such affidavit shall be filed."

At the time of the alleged libels, the plaintiffs had not complied with this statute, although they did comply with its provisions prior to the commencement of their action. On behalf of the defendants, an instruction was requested and refused, which mentioned the statute, and stated that "in default of such affidavit the persons so trading are prohibited from instituting or defending any suit"; and continuing, was to the effect that if it appeared the plaintiffs were carrying on their business at the time ²⁴⁵ the letters declared upon were written under the name of the Colorado-Texas Commission Company, and no affidavit as required was filed until after such letters were written, the plaintiffs were violating the law, and would not be permitted to complain that the defendants believed plaintiff John F. Beeler was the only person interested in the firm; and further, that if these letters were written by the defendants in good faith, without actual knowledge that the plaintiff, Mrs. Beeler, was connected with the firm, and the facts set forth in such letters were true, as to the plaintiff, John F. Beeler, then the verdict should be for the defendants.

The statute only applies to suits for the collection of debts due the firm doing business to which it applies. It does not apply to suits for torts. The action by plaintiffs is one for tort, and hence, it was not within the statute. For this reason the instruction was erroneous, because it, in effect, advised the jury that the failure to file the affidavit inhibited the plaintiffs from maintaining their action: *Pedroni v. Eppstein*, 17 Colo. App. 424, 68 Pac. 794; *Ralph v. Lockwood*, 61 Cal. 155.

Independent of these considerations, the instruction was not the law. Its last paragraph is to the effect that if the letters were written in good faith, without knowledge that

Mrs. Beeler was a member of the partnership, doing business under the firm name and style of the Colorado-Texas Commission Company, and that the charges in such letters were true as to John F. Beeler, then the verdict should be for the defendants. The action was by the firm. The libel charged was a libel of the firm, doing business under the name and style mentioned. Libelous letters, although naming but one member of the firm, might result in injury to the partnership, so the mere fact that Mrs. Beeler was not named in either of the ²⁴⁶ letters, or the defendants were not aware that she was a member of the partnership, would not justify a verdict in their favor if it appeared that, from the letters written, the partnership was damaged. Partners may maintain a joint action for libel or slander which tends to injure the business of their firm, even though the defamatory words refer to, or concern, but one of its members: 18 Ency. 1055; Taylor v. Church, 1 E. D. Smith (N. Y.), 279.

One of the letters declared upon was written to A. E. Finn, at Littleton, in this state. As a separate defense the defendants pleaded that the inquiry received by them from Finn which caused the writing of the letter to him was written at the instigation of the plaintiffs, for the purpose of securing a letter with the premeditated purpose of bringing an action for libel thereon. Finn testified in substance that he was a janitor at the courthouse at Littleton, where he had been employed for a year and a half previous to the letter written to the defendants; that he was never in the produce business there or elsewhere; that he was not contemplating on that date the shipment of any produce to Denver; that he had been engaged in the hotel business at Littleton, since which time he had been employed as janitor at the courthouse, with the exception of a period when he tended bar. He further stated that the letter which he addressed to the defendants was written at the request of a party named Sherrer; that he (the witness) dictated the letter which was written by Sherrer; that he wrote the letter to the defendants simply because Sherrer requested it; that he was not acquainted with either the plaintiffs or the defendants; that Sherrer requested him to send the answer to an address in Denver, which he gave him; and that when the answer came, he sent it to Sherrer at the address given.

²⁴⁷ At the trial Sherrer could not be found, and his evidence could not be obtained. Beeler testified that he received the Finn letter through the mail, but did not know who sent it.

The defendants requested an instruction to the effect that if the plaintiffs procured the writing of the letter complained of with the view of bringing an action thereon, that the defendants are guilty of no wrong against them, and that pro-

curing the letter in such circumstances could not be made the basis of an action. This instruction should have been given. The circumstances under which the letter to the defendants was written and the fact that it was sent to Sherrer who had requested Finn to write the letter which called forth the response subsequently mailed to plaintiffs are suspicious, to say the least. Finn was not engaged in the produce business. He had no interest whatever in ascertaining what the standing of the plaintiffs might be. He did not contemplate engaging in the produce business, and had never been so engaged. And although there is no direct testimony connecting the plaintiffs with this transaction, the inference that they procured Sherrer to induce Finn to write the letter to the defendants and turn over the answer to them, is very strong. Who Sherrer was is not disclosed. It does not appear he had any interest to protect, either present or prospective, which would induce him to make any inquiry regarding the plaintiffs. Finn wrote the letter at his suggestion. He requested the answer to be mailed to him, which was done. Plaintiffs obtained it through the mail. Beeler says he did not know who sent it. On this state of facts, unless satisfactorily explained, the jury might have determined that Sherrer was acting for the plaintiffs when he procured Finn to write the letter of inquiry. Alleged defamatory statements invited or procured ²⁴⁵ by a plaintiff or a person acting for him will not support an action for libel. In such circumstances the party claiming to have been libeled by a letter in response to a request regarding him has invited the commission of a wrong, and will not be heard to complain that he was libeled: 18 Ency. 1018; Howland v. Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656; Sutton v. Smith, 13 Mo. 120.

If the defendants were guilty of no wrong against the plaintiffs with respect to the Finn letter except a wrong invited and procured by them to be committed for the purpose of making it the foundation of an action, it would be unjust to permit them to profit by it. He who thus acts values money more than character.

The judgment of the district court is reversed and the cause remanded for a new trial.

Chief Justice Steele and Mr. Justice White concur in reversal upon the grounds stated, except those stated in discussing instruction No. 14, and as to those, express no opinion.

ON PETITION FOR REHEARING.

GABBERT, J. In support of their petition for rehearing, counsel for appellees contend that we have ignored section 10 of our Bill of Rights, which provides, in substance, that in suits and prosecutions for libel, the truth thereof may be given

in evidence, and that the jury, under the direction of the court, shall determine the law and the facts. This is inconsistent with the position assumed by counsel in their original brief; but aside from this, the question of the applicability ²⁴⁹ of the section of the Bill of Rights referred to has not been in any wise determined. The question does not appear to have been raised below; it was not urged upon our attention in the original brief; and we have not expressed any opinion whatever on that subject.

The petition for a rehearing is denied.

A Communication, in the Law of Libel, is Privileged, though made by one who has no interest therein, and no duty to perform in making it, if made to one having an interest in and a right to know and act upon the facts stated. If a person is so situated that it becomes right, in the interests of society, that he tell a third person the facts, then if he, bona fide and without malice, tells them, it is a privileged communication: *Rude v. Nass*, 79 Wis. 321, 24 Am. St. Rep. 717. The privilege of libelous statements in the nature of information relative to personal or business affairs is discussed in the note to *Holmes v. Clisby*, 104 Am. St. Rep. 143-147.

In the Law of Libel, It is for the Court to Determine whether the subject matter to which the alleged libel relates, the interest in it of the author, or his relations to it, are such as to furnish an excuse: *Rude v. Nass*, 79 Wis. 321, 24 Am. St. Rep. 717; *Denver Public Warehouse Co. v. Holloway*, 34 Colo. 432, 114 Am. St. Rep. 171.

Justification in Slander and Libel is the subject of a note to *Rutherford v. Paddock*, 91 Am. St. Rep. 285.

In the Law of Libel, the Question of Good Faith, belief in the truth of the statements, and the existence of actual malice must be submitted to the jury: *Shadden v. McElwee*, 36 Tenn. 146, 6 Am. St. Rep. 821; *Rude v. Nass*, 79 Wis. 321, 24 Am. St. Rep. 717; *Holmes v. Clisby*, 121 Ga. 241, 104 Am. St. Rep. 103.

What Words are Libelous Per Se is the subject of a note to *Nichols v. Daily Reporter Co.*, 116 Am. St. Rep. 802. As to libelous nature of words in relation to business, see *Dallavo v. Snider*, 143 Mich. 542, 114 Am. St. Rep. 684.

That a Corporation may Maintain an Action for Slander and Libel upon it in the way of its business or trade, see *Gross Coal Co. v. Rose*, 126 Wis. 24, 110 Am. St. Rep. 894.

The Falsity of a Libel is Sufficient Evidence of Malice: *Crane v. Bennett*, 177 N. Y. 106, 101 Am. St. Rep. 722.

KEITH v. ATKINSON.

[48 Colo. 480, 111 Pac. 55.]

INNKEEPER—Liability for Baggage Represented by Check.—

One who becomes the guest of a hotel, by giving his baggage checks into its possession, places the goods they represent into its custody, so far as to make the innkeeper responsible for goods which, by means of the possession of such checks, his representative or agent receives, although the baggage is never brought within the walls of the hotel. (p. 285.)

INNKEEPER—Authority of Servant—Presumptions.—

A guest at a hotel has a right to assume that the authority of its manager, bookkeeper, cashier, porter and bellboys is the same as that prevailing generally in all other hotels of the same class and character. (p. 286.)

INNKEEPER—Custom and Usage—Loss of Baggage.—

A guest of a hotel has a right to rely upon prevailing customs, and where a custom for guests to deliver their baggage checks to bellboys for delivery to the clerk is shown, the hotel is constructively in possession of the baggage by such delivery to the bellboy and responsible therefor. (p. 286.)

Frank England, for the appellant.

Harris & Price, for the appellees.

⁴⁸⁰ HILL, J. It appears that the appellant and his wife came to the hotel of the appellees about 11 P. M. on August 20, 1902, registered and were shown a room, which they occupied that night. The appellant claims that the following morning he rang for a bellboy, and when he came gave him his railroad check for his baggage (a trunk which had been checked from Salt Lake City), and told him to give it to the clerk so as to have the baggage brought up from the depot; that the boy received the check and agreed to deliver it as instructed. The trunk did not come. On inquiry at the office the appellant claims a Mr. Hamilton, the assistant manager, advised him the check had been received there and delivered to a transfer company. ⁴⁸¹ This evidence (as to the receipt of the check at the office) was denied by Hamilton; search was made by both the appellant and the assistant manager, at the hotel, the transfer company's office, the depot and other hotels in the city, to locate the missing trunk. The trunk was never found; the check was never returned to the appellant and this action was brought to recover the value of the trunk and its contents; judgment was in favor of the appellees, from which this appeal is prosecuted.

The ancient rule was that so soon as the goods of the guest were brought within the precincts of the inn, the responsibility of the innkeeper for their safekeeping began. The application of the principles of the common law has been modified from time to time, with changing conditions under which business is transacted and obligations are entered into. In this

country the baggage of travelers is transported in cars separate from those in which its owners ride; such owners receive from the carrier checks, a kind of receipt, upon surrender of which the baggage is given to whomsoever so equipped calls for it. In consequence of this, it has become a frequent custom for travelers, upon their arrival at hotels, or the stations in the cities where they are situate, to hand their baggage checks to a representative of some hotel, who assumes the duty and responsibility of having the baggage delivered from the station to the hotel for the guest. It has consequently now been repeatedly held that one who becomes the guest of a hotel, by giving his baggage checks into its possession, places the goods they represent into its custody, so far as to make the innkeeper responsible for goods which, by means of the possession of such checks, his representative or agent receives, although the baggage be never brought within the walls of the hotel: 5 Thompson on Negligence, sec. 6668; Dickinson ⁴⁵² v. Winchester, 4 Cush. 114, 50 Am. Dec. 760; Sasseeen v. Clark, 37 Ga. 242; Coskery v. Nagle, 83 Ga. 696, 20 Am. St. Rep. 333, 10 S. E. 491, 6 L. R. A. 483.

But two other questions are necessary in the determination of this case. First, whether the delivery of the check to the bellboy with instructions to take it to the office was a sufficient delivery to the appellees to make them liable; and, if it was, then it was the duty of the appellees to either surrender the baggage to the plaintiff or return to him his check therefor; having done neither and on account thereof, the plaintiff (although having exercised reasonable diligence to secure the trunk) suffered the loss of it, the defendants would be liable: Carhart v. Wainman, 114 Ga. 632, 88 Am. St. Rep. 45, 40 S. E. 781; Coskery v. Nagle, 83 Ga. 696, 20 Am. St. Rep. 333, 10 S. E. 491, 6 L. R. A. 483; Williams v. Moore, 69 Ill. App. 618.

In several instructions complained of, the court, in substance, included the phrase that the check must be delivered to the defendants or to some servant within the scope of whose employment is the getting of baggage and the delivering of it to the guest. In other instructions the court stated that before the plaintiff could recover he must show, etc., that he delivered to the defendants a baggage check calling for the baggage in question, etc., or delivered such baggage check to an employee of the defendants, whose duty it was to receive and deliver baggage to the guest of the hotel. The court further instructed the jury that if they found from the evidence that the plaintiff delivered the check in question to the bellboy, etc., but if they should further find that it was not the duty of such bellboy to secure baggage and deliver the same to the guest at the hotel, then such act on the part of the plaintiff and the bellboy would not be binding upon the

defendants unless they should further find that such baggage check was afterward delivered to the defendants personally, or to some employee or agent of the defendants within the scope of whose employment ⁴⁸³ it was to obtain baggage and deliver the same to the guest.

During the trial the plaintiff attempted to show by a witness with eighteen years' experience in the hotel business, familiar with the customs concerning the operation and management of hotels, what the custom was concerning the delivery of checks calling for baggage in such cases; also what the duty of bellboys was, and what the employees of a hotel consist of. He was prevented in part from doing so by objections made and sustained, that the only question involved in this case was what was done at this hotel in relation to this transaction and its customs and regulations, and that such questions were incompetent and immaterial. One of the defendants, over objection, was allowed to testify as to what their custom was and the authority and duty of the bellboys at this particular hotel. In both the instructions given and the rulings on this line of evidence, we think the trial court erred. When the plaintiff became a guest at defendants' hotel he had a right to assume that the authority of its manager, bookkeeper, cashier, porter and bellboys was the same as that prevailing generally in all other hotels of the same class and character, and he had a right to rely upon the prevailing customs, if any such existed, until the contrary was brought to his knowledge: *Robinson v. United States*, 13 Wall. 363, 20 L. ed. 653.

The question concerning the bellboy was not whether it was his duty to secure baggage and deliver the same to the guests at the hotel, but whether it was within the apparent scope of his authority or duties to receive from the guest and transport to the office the check for the baggage with the message intrusted to him by the guest concerning the disposition of the check; if it is the custom, after the bellboy has been given the key to your room, and by instructions from ⁴⁸⁴ the clerk or by common custom takes your hand-baggage for the purpose of showing the room to you to thereafter be given your check for your baggage for the purpose of having it (the check) taken to the office in order to have your trunk brought from the depot and delivered to your room at the hotel, then it was within the apparent authority of the bellboy to receive the check for the purpose of taking it to the office, and if such was the general custom, then the appellant had a right to rely upon this uniform usage or custom in delivering his check to the bellboy, and the proprietor will be responsible upon account of any loss occasioned thereby. It is true, a usage or custom, to be adopted as a rule of law, should be certain and general in the branch of a trade or business in regard to which it is set up, so as to authorize the presumption that

it is known to those dealing or concerned in that branch of trade or business. And, under the circumstances of this case, if such a system or custom was in general use, and such an undertaking was consistent with what a traveling guest had a right to expect, in accordance with the rules and usage prevailing generally at similar hotels, and no notice was brought to the attention of the guest to the contrary, then he was justified in making such disposition of his check and should have been allowed to show that such a general usage and custom prevailed, and it was error to exclude this testimony, or to give the instructions complained of, or to limit the scope of this inquiry to the hotel of the defendants only.

It is true that an issue was made as to whether the bellboy ever received the check from the plaintiff at all, and the evidence was conflicting upon this subject; but inasmuch as the verdict of the jury may have been rendered upon the theory that the check, if delivered to the bellboy, was given to a person ⁴⁸⁵ who had no right to receive it, instead of upon the theory that the boy never received it, and the evidence and instructions upon the former not being proper, call for a reversal of the cause; for which reasons the judgment is reversed and the cause remanded.

Chief Justice Steele and Mr. Justice Gabbert concur.

The Liability of Innkeepers for injury to, or loss of, the property of their guests, is the subject of a note to Johnson v. Chadbourn Finance Co., 99 Am. St. Rep. 577.

The Delivery of a Baggage Check to an Innkeeper by a Guest is prima facie equivalent to a delivery of the baggage; and the guest makes out a prima facie case of liability against the innkeeper when he shows the delivery of his railroad baggage check to the innkeeper's servant, within the scope of whose employment is the getting and delivering of baggage to guests, and that the innkeeper refuses to deliver to him the baggage or the check: Carhart v. Wainman, 114 Ga. 632, 88 Am. St. Rep. 45; and see Coskery v. Nagle, 83 Ga. 696, 20 Am. St. Rep. 333, as to an innkeeper's liability for the act of his porter in delivering a baggage check to one not a representative of the hotel; and Baehr v. Downey, 133 Mich. 163, 103 Am. St. Rep. 444, showing that the acts of a hotel clerk bind the proprietor. As to an innkeeper's liability for the loss of baggage by negligence, see, also, Dickinson v. Winchester, 4 Cush. 114, 50 Am. Dec. 760.

DUNCAN v. EAGLE ROCK GOLD MINING AND REDUCTION COMPANY.

[48 Colo. 569, 111 Pac. 588.]

CORPORATIONS—Proof of Existence and Citizenship.—The introduction of a certified copy of articles of incorporation of a corporation showing it to be duly organized and existing under the laws of Colorado is sufficient proof of its existence and of the citizenship of its stockholders. (p. 289.)

MINING CLAIMS—Citizenship of Original Locators.—In an action to determine adverse claims to a mining claim, brought by a grantee of an original locator, the right of the original locator, such as citizenship or declaration of intention to become a citizen, must be shown by the grantee. (pp. 291, 292.)

MINING CLAIMS.—Proceedings to Obtain Title to mining property are in the nature of "inquest of office." The sovereign is a party to the proceeding, which is a direct one for the procurement of title, and the objection of alienage is based solely upon the right of the government to interpose the fact of alienage as a bar to procuring or holding an interest in realty. (p. 292.)

MINING CLAIMS—Adverse Proceeding—Essential Evidence. In a proceeding to determine an adverse to a mining claim it is incumbent upon the plaintiff to clearly establish the segregation from the public domain and the appropriation of the particular territory claimed. Production in evidence of certificates of location, in accordance with law, covering or including the particular territory in dispute is essential. (p. 293.)

MINING CLAIMS—Location Certificates.—Certainty of Description is required in a location certificate, and in locating the claim that for which the certificate calls must alone be used. (p. 297.)

MINING CLAIMS—Assessment Work—Group Claims.—To make work done outside the surface boundaries of a claim apply to it, the work must have been done for the express purpose of benefiting such claim, and for its development, and the question of such intent is a material issue. (pp. 298, 299.)

MINING CLAIMS—Group Claims.—Apportionment of Work intended to aid in the development of a group of claims cannot be made between the several claims. The improvement constitutes a distinct entity. (p. 299.)

MINING CLAIMS—Adverse Proceeding—Issues and Burden of Proof.—In adverse proceeding the parties must bring forward proof of every material fact necessary to sustain the validity of their respective claims, including the doing of the requisite assessment work. (p. 300.)

Charles B. Ward and Guy D. Duncan, for the appellant.

John R. Wolff, John R. Smith and Horace A. Hawkins, for the appellee.

570 **WHITE, J.** John T. Duncan made application through the proper United States land office for patent to certain lode mining claims designated as Survey Lot No. 17,375, situate in Sugar Loaf Mining District, Boulder county. The Eagle Rock Gold Mining and Reduction Company filed an

adverse, and thereafter, within the time limited by law this suit, in support thereof, claiming of Duncan's lodes substantially all of the Black Prince, Black Prince No. 1 and Black Prince No. 2, located in 1904, as portions of its Ellmettie and Grace lodes, located in 1898; Oro and Anna G., located in 1899; Everett, Washington and Monarch, located in 1900, and demanding damages, reasonable attorney's fees, and expenditures in support of the adverse. By the complaint the legal right to occupy and possess said premises, and to the possession thereof was claimed, "by virtue of full compliance with the local laws and rules of miners of said mining district, the laws of the United States and of the state of Colorado, by pre-emption and purchase, and by actual possession as lode mining claims located on the public domain of the United States."

⁵⁷¹ Duncan, defendant below, denied specifically the allegations of the complaint, and alleged title in himself to the territory in question. The replication traversed the allegations of the answer. Upon the issues so joined, trial was had, resulting in a verdict for plaintiff, the appellee here, for possession of the territory in dispute, two hundred and twenty-five dollars expenses and counsel fees, in support of the adverse, and seven hundred dollars damages. Motion for new trial interposed and overruled, judgment in accordance with verdict entered, and writ of restitution ordered. From the judgment Duncan prosecutes this appeal, and assigns numerous errors, only a few of which we deem it necessary to consider.

Appellee, to prove its corporate existence and its citizenship, introduced in evidence a certified copy of its articles of incorporation showing that it was duly organized and existing, as a corporation, under and by virtue of the laws of the state of Colorado. No other proof of the citizenship of its stockholders was made, and it is contended that citizenship in that respect was not established. It appears from *Jackson v. White Cloud Gold Min. etc. Co.*, 36 Colo. 122, 85 Pac. 639, that the proof, upon the matter in question, was sufficient.

Appellee acquired some of its claims by purchase, and the others by location. Of the former were the Ellmettie and the Grace. The Ellmettie location certificate was filed by F. J. Rogers and William Capp, and an amended certificate thereof by William and M. L. Capp. The Grace location certificate was filed by William Capp. There was no evidence that Rogers, or either of the Capps, at the time of making the respective locations; or the conveyance of the claims to appellee, were citizens, or had declared their intention of becoming citizens, of the United States. Appellant contends that the ⁵⁷² appellee could not sustain its adverse as to these two

claims, because it failed to prove the citizenship of the original locators, and in support of his contention cites several authorities.

In *Lee v. Justice Min. Co.*, 2 Colo. App. 112, 29 Pac. 1020, after announcing the statutory rule that none but citizens of the United States, and those who have declared their intention to become such, can acquire any right to public mineral lands, it is held that an alien cannot acquire such an interest in a mining claim upon the public domain, by location, as can be sold, and upon which a subsequent title can be predicated. That case was carried to this court, however, and in 21 Colo. 260 was overruled, it there being held that the court of appeals was in error in assuming that the record in the case presented a question as to the right of an alien to acquire by location a transferable interest in a mining claim, as that question could not, under the facts there presented, be raised.

In *Thomas v. Chisholm*, 13 Colo. 105, 21 Pac. 1019, the title to a mining claim, based upon a prior location made by one Joseph Hudson and the Kansas City Mining and Smelting Company, a corporation, and by them assigned or conveyed to Chisholm, the defendant, was under consideration in an adverse suit, and it was expressly held necessary to allege and prove the citizenship of the original locator or locators, as well as the citizenship of the successful party to the action.

Appellee contends, notwithstanding these decisions, that the citizenship of the original locator is material only where he continues to be the claimant to the time of the institution and determination of an adverse suit. It must be conceded that many authorities so hold. Such is the doctrine announced in *Morrison's Mining Rights*, twelfth edition, page 286; *Lindley* ⁵⁷³ on Mines, section 233, and other authorities. We are constrained, however, to adhere to the doctrine, heretofore announced by this court, until there is a specific holding to the contrary by the United States supreme court. Appellee insists that such pronouncement has already been made by that tribunal, and that the doctrine of *Thomas v. Chisholm*, 13 Colo. 105, 21 Pac. 1019, has been overturned in *McKinley Creek M. Co. v. Alaska M. Co.*, 183 U. S. 563, 22 Sup. Ct. Rep. 84, 46 L. ed. 331, and *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. Rep. 651, 38 L. ed. 532.

We are of the opinion that neither of the cases go to the extent claimed by appellee. *Manuel v. Wulff* holds that a deed of a mining claim, by a qualified locator, to an alien, operates as a transfer of the claim to the grantee, subject to question in regard to his citizenship by the government only, and if such alien becomes a citizen, or declares his intention to become such at any time before judgment in a contest concerning such mining claim, the alien's disability

to take title is thereby removed. In that case, on page 511, it is said: "We are of opinion on this record that, as Alfred Manuel (the original locator) was a citizen, if his location were valid, his claim passed to his grantee not by operation of law, but by virtue of his conveyance, and that the incapacity of the latter to take and hold by reason of alienage was, under the circumstances, open to question by the government only. Inasmuch as this proceeding was based upon the adverse claim of Wulff to the application of Moses Manuel for a patent, the objection of alienage was properly made, but this was as in right and on behalf of the government, and naturalization removed the infirmity before judgment was rendered. . . . And as Moses Manuel was the grantee of a qualified locator, and became naturalized before the order, we conclude that there was error in the direction of a nonsuit."

⁵⁷⁴ McKinley Creek Min. Co. v. Alaska Min. Co., 183 U. S. 563, 22 Sup. Ct. Rep. 84, 46 L. ed. 331, does not appear to be an adverse, but rather a controversy in which the federal government was neither directly nor indirectly interested. After reciting that, in *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. Rep. 651, 38 L. ed. 532, the court had sustained the validity of a conveyance of a mining location to an alien, reversing a decision of the supreme court of Montana to the contrary, states that the "decision was based upon the difference between a title by purchase and title by descent, and the doctrine expressed that an alien can take title by purchase and can only be divested of it by office found"; and then quotes from the case of *Gouverneur v. Robertson*, 11 Wheat. 332, 6 L. ed. 488, as follows: "That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary. It no doubt owes its present authority, if not its origin, to a regard to the peace of society and a desire to protect the individual from arbitrary aggression. Hence it is usually said that it has regard to the solemnity of the livery of seisin, which ought not to be divested without some corresponding solemnity. But there is one reason assigned by a very judicious compiler, which, from its good sense and applicability to the nature of our government, makes it proper to introduce it here. I copy it from Bacon, not having had leisure to examine the authority which he cites for it: 'Every person,' says he, 'is supposed a natural born subject that is a resident in the kingdom and that owes a local allegiance to the king, till the contrary be found by office.' This reason, it will be perceived, applies with double force to the resident who has acquired

of the sovereign himself, whether by purchase or by favor, a grant of freehold."

⁵⁷⁵ It is then said: "The meaning of *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. Rep. 651, 38 L. ed. 532, is, that the location by an alien and all the rights following from such location, are voidable, not void, and are free from attack by anyone except the government."

It appears by these decisions that the court went no further than to hold that, whoever is occupying the public domain under an apparent valid claim, has a right to so continue until ousted by the government itself. That is, the citizenship of the holder and the original locator of the mining claim is subject to question only by the sovereign. In support of the proposition that a location made by an alien can be conveyed to a citizen, and when vested in the latter is as complete as if originally acquired by him by location, and that the government itself cannot assail his title, Mr. Lindley, in his work on Mines, section 233, argues that, if the government can, by direct conveyance to an alien, vest in him a title to the absolute fee, it follows that an alien can acquire a limited estate by location, subject to an inquiry as to his qualifications, when he seeks acquirement of the ultimate fee.

Unquestionably, the sovereign is a competent grantor in all cases in which an individual may grant, but in the case of mining claims it will not, and does not, knowingly grant to an alien. Inasmuch, however, as every person is supposed a natural born subject that is resident in the kingdom, the sovereign in effect says to all, a certificate of location of a mining lode, complete in itself, gives an apparent right which must be recognized until the sovereign inquires into its validity. When the inquiry is made, the apparent right becomes, what it really is, no right at all.

The mineral lands of the United States are open to exploration and purchase only by citizens of the ⁵⁷⁶ United States, or by those who have declared their intention to become such. As citizenship goes to the very inception and initiative of the title or right to hold, as against the government, a noncitizen can never make a valid location, though one so made is apparently valid.

Proceedings to obtain title to mining property are in the nature of "inquest of office." "In such cases the sovereign is a party in fact to the proceeding, which is a direct one, for the procurement of title, and the objection of alienage, no matter by whom suggested, is based solely upon the right of the government to interpose the fact of alienage as a bar to procuring or holding an interest in realty. If, however, the grant of title, or the equivalent, is made to an alien, it

cannot be attacked by any third party": *Billings v. Aspen M. & S. Co.*, 52 Fed. 250, 3 C. C. A. 69.

The Ellmettie certificate of location called for 384 feet on said lode running southwest from the center of the discovery shaft, and 1116 feet running northeast therefrom, and particularly described the lode as: Beginning at the northeast cornerstone of the Fair Count lode. The Fair Count lode was a patented claim. An additional or amended location certificate of the Ellmettie, filed in June, 1899, called for 360 feet running north 76 degrees 36 minutes west from center of discovery shaft, and 1140 feet running south 76 degrees 35 minutes east from center of discovery shaft, and fixed the southwest corner thereof as Corner No. 1, which was also therein stated to be Corner No. 3, Survey No. 6980A, Fair Count lode; thence north 5 degrees 15 minutes east 151.54 feet to Corner No. 2, whence Corner No. 3 of said survey No. 6980 bears south 5 degrees 15 minutes west 1.5 feet. Corner No. 3 of the Ellmettie was identical with Corner No. 2 of the Grace ⁵⁷⁷ lode, and Corner No. 4 was identical with Corner No. 1 of the Grace lode. The claim, as described and fixed by its monuments and ties, was practically a rectangle lying due east of the Fair Count. The location certificate of the Grace lode called for 100 feet running north 78 degrees .05 minutes west from center of discovery shaft, and 1400 feet running south 78 degrees .05 minutes east from center of discovery shaft, and the west end corner stakes thereof were made identical with the east end corner stakes of the Ellmettie lode. The Grace was also a right-angle parallelogram.

It is apparent from these descriptions, and the testimony likewise shows, that the Ellmettie was intended as an extension of the Fair Count, and the Grace was intended as an extension of the Ellmettie. The location certificate of the Grace, and the amended location certificate of the Ellmettie, and likewise the other location certificates of plaintiff's lodes, were all prepared by a deputy United States surveyor upon surveys made by him for that purpose. The descriptions in the certificates of the Grace and the Ellmettie lodes, and likewise the amendment of the latter, placed both those claims far south of any of the territory in controversy.

It was incumbent upon the plaintiff to clearly establish the segregation from the public domain, and the appropriation by it, of the particular territory claimed in its adverse. In order to do this, it was essential, among other requirements, that it produce in evidence certificates of location, or amendments thereof, in conformity with law, covering or including the particular territory in dispute. In this essential requirement it failed, and the court erred in not so advising the jury at the request of the defendant.

578 Whether the plaintiff is in any better position as to its other claims, the record does not disclose. Instead of locating and surveying its claims, in preparation for this suit, by the monuments given in the location, or amended location certificates, and the calls therein specified, the plaintiff wholly disregarded them, but produced upon a map, or plat, the alleged location and relative position of the several claims without any real or substantial facts for a basis.

After application for patent, the plaintiff took a deputy United States surveyor, and pointed out to him its alleged discovery workings, and location stakes of its several claims constituting the adverse. The surveyor thereupon assumed that these fixed the location of such claims, and reproduced them upon a plat in their relative position to each other, and to defendant's claims, as so pointed out. Some excerpts from the testimony of the surveyor will illustrate the worthlessness of this plat:

"Q. If, Mr. Armstrong, you took the east corners of the Fair Count, as the west corners of the Ellmettie lode, and projected the side lines of the Ellmettie lode in accordance with the location certificate, then the Ellmettie lode would not touch any ground for which defendant has made his application for patent, would it? A. What relation does the corner you refer to bear to this shaft?

"The Court: Can you answer that question?

"A. No, sir. No one can answer it.

"Q. Why did you not go to the Fair Count lode, survey No. 6980A, for your place of beginning? A. When I made this adverse survey?

"Q. Yes, sir. A. I never heard of it being done. I didn't go because it is not the custom. No one does it. We tie to the discovery shaft.

"Q. You paid no attention to this certificate 579 (location certificate), did you? A. I never do. . . . I paid no attention to certificates."

And, further: "Q. How far is that discovery adit from the end line, from the west end line, of the Grace lode? A. One hundred and four feet.

"Q. One hundred and four feet? Is that the correct distance between that adit and the actual end line of that claim? A. As I found them on the ground.

"Q. Now, I don't know just what you mean by your answer. Do you mean to say that that is the actual measurement as you took it upon the ground? A. If you will let me explain, when I go upon the ground I pay no attention to the location certificates at all. I simply take the man out and say: 'Show me your stakes.' I run a traverse around to make a closed traverse. . . .

"Q. When you started out to locate the claim, why did you take a discovery adit when the location certificate calls for a discovery shaft? A. Because the man who owns the claim went with me and showed me the point he had taken as the point of discovery."

The territory comprising the claims in dispute had been prospected for many years prior to the locations of plaintiff. Claims identical in name with some of plaintiff's had been located and abandoned. The country was covered with old, abandoned shafts, adits and discovery cuts. Under these circumstances it is clearly apparent that this map or plat upon which plaintiff's case was predicated, has nothing to support it, and should not have been received in evidence over defendant's objection. There is not the slightest evidence, in the entire record, to identify the claims described in plaintiff's several certificates of location, and amendments thereof, with its claims as designated upon the plat. In making the plat, plaintiff disregarded the rule that, in surveys, the deputy mineral surveyor is controlled by the record ⁵⁸⁰ of the certificate of location, and the markings on the ground, the latter controlling where there is a variation between the descriptive calls of the record and the monuments: 1 Lindley on Mines, sec. 396.

As said in *Thallman v. Thomas*, 102 Fed. 935: "The rule that monuments shall control courses and distances is recognized only in cases where the monuments are clearly ascertained. If there be doubt as to the monuments, as well as to the course and distance, there can be no reason for saying that monuments shall prevail, rather than the course given in the patent; and that is this case."

In the Ellmettie location certificate the west end corner stakes are practically the east end corner stakes of the Fair Count, yet the surveyor failed to take that into consideration, and failed to locate or show the Fair Count claim. The certificate of the Ellmettie calls for a discovery shaft, yet the surveyor took an adit and constructed the claim around it, notwithstanding a discovery shaft was upon the ground at the identical spot designated in the certificate of location. The location certificate of the Grace also calls for a discovery shaft, but again an adit was taken for the initiative point of the survey. The discovery shaft, adit, or cut, as the case might be, as called for in the certificate, constituted one of the principal monuments for the purpose of finding the claim. When the location certificate of a claim in the vicinity of territory which a prospector desires to locate calls for a particular monument, to wit, a shaft, an adit, a cut, or "a post four inches square, set two feet in the ground," the prospector has a right to look for, and to de-

mand, the particular monument specified, and his rights cannot be jeopardized by proof of some other monument not designated.

⁵⁸¹ In *Resurrection G. M. Co. v. Fortune G. M. Co.*, 129 Fed. 668, 64 C. C. A. 180, it is said: "Parol evidence, however, is incompetent to substitute a different monument for one clearly called by a deed or patent, or by the survey upon which it is founded, because that course of proceeding would violate the settled rule that written contracts may not be contradicted or modified by oral evidence."

In that case, the patent did not call for a monument at Corner No. 3. The field-notes were introduced in evidence, and, at said corner, called for a post four inches square, four feet long, two feet in ground, marked 3—2309, cut into the post. Evidence was then introduced that a round stake, four inches in diameter, with two blazes, the later on the side of the earlier, with the figures 3—2309 written in pencil, but not cut into the post, was really intended. The trial court instructed the jury that this stake satisfied the description of the corner post. In reversing that holding, it is said: "Its effect is to strike out of the patent and field-notes the description of the square post marked by the figures '3—2309' cut into it, and to write into them the description of the round, blazed stake, inscribed with the figures '3—2309' by means of lead pencil, and in this way to violate the settled rule that written conveyances may not be modified or contradicted by parol."

This court, in *Pollard v. Shively*, 5 Colo. 309, said:

"In this case the call is for a post at the southwest corner, and it is insisted that parol evidence is admissible to show that, while a post is called for, a stump was in fact established as a corner.

"Courts have gone far in the admission of parol evidence in the matter of uncertain and disputed boundaries, but I am unable to see how this demand of the defendant can be sustained on principle. The ⁵⁸² certificate, like a deed, must be construed *ex visceribus suis*. When the intent is clearly expressed, no evidence of extraneous facts or circumstances can be received to alter it: 3 Washburn on Real Property, 400, 404; *Bagley v. Morrill*, 46 Vt. 94.

"The general rule stated more fully is, that parol evidence cannot be admitted to control or contradict the language of a deed, but latent ambiguities can be explained by such evidence. Facts existing at the time of the conveyance, and prior thereto, may be proved by parol evidence, with a view of establishing a particular line as being the one contemplated by the parties when, by the terms of the deed, such line is left uncertain: 3 Washburn on Real Property,

401; *Drew v. Swift*, 46 N. Y. 204; *Claremont v. Carlton*, 2 N. H. 369, 9 Am. Dec. 88; *Peaslee v. Gee*, 19 N. H. 273.

"There is neither latent ambiguity nor uncertainty in the terms of the certificate, to bring it within the meaning of the rule.

"The call of the certificate is for a post. A stump does not answer the call. If parol evidence is admissible to show that a stump, and not a post, is the actual corner, it would be equally competent to show a pile of stones, or any other monument uncalled for. This would not be construing the calls of a survey, but making them; it would not be an application of the rule that monuments control courses and distances, but an infringement of the rule that in the absence of latent ambiguity a deed cannot be varied or contradicted by parol evidence. It would not be controlling courses and distances by monuments, but controlling both by parol evidence: *Claremont v. Carlton*, 2 N. H. 369, 9 Am. Dec. 88.

"The rule is, that where monuments are relied upon to control courses and distances, they must be found as called for: *Buckner's Lessee v. Lawrence*, 1 Doug. 19; *McCoy's Lessee v. Galloway*, 3 Ohio, 282, 17 Am. Dec. 591; ⁵⁸³ *Seaman v. Hogeboom*, 21 Barb. 398; *Finley v. Williams*, 9 Cranch, 164, 3 L. ed. 691.

"In the case of *McCoy's Lessee v. Galloway*, 3 Ohio, 282, 17 Am. Dec. 591, it was held that, where the patent called for a tree of one kind, it was not competent to show a tree of another kind. . . . Where there is a variation to any considerable extent between the courses and distances of the location certificate and monuments established on the ground, the record, with its misdescription, in point of fact, gives no notice of the ground actually appropriated. If the monuments are swept away, no search, no exercise of prudence, diligence or intelligence, would advise the subsequent locator of the prior appropriation. In such case the rule demanded by the defendant would work the greatest injustice and hardship, and would be an interpretation of the law in the interest of erroneous records and indolent claimants."

Appellee argues that, as section 3154, *Mills' Annotated Statutes*, makes an open cut, crosscut, tunnel or adit, each the equivalent of a shaft, that, therefore, though the certificate of location calls for a shaft, and the proof shows an open cut, or an adit, there is no variance between the proof and the certificate. This contention is unquestionably sound when applied to the discovery work required; but when used in a certificate, for the purpose of ascertaining the situs of the claim, it has not that force and effect. The legislature, in making a cut, a tunnel, or an adit equivalent to a discovery shaft, did not change the definition or meaning of those respective words. Notwithstanding the statute, an

open cut or an adit is not a shaft, and in locating the claim that for which the certificate calls must alone be used. Moreover, the evidence is undisputed that, as located, the Grace was a straight claim with six posts, one at each corner, and one at the center of each side line; ⁵⁸⁴ yet upon the plat the claim is shown as extending from Corner No. 2. being also Corner No. 3 of the Ellmettie, north 67 degrees 36 minutes east 115.70 feet; thence south 82 degrees 41 minutes east 1369.97 feet to Corner No. 3. The surveyor having testified that he constructed this plat, not from the monuments and calls given in the certificates, but from the stakes upon the ground as pointed out, admitted that there were no stakes at either of the angle corners as shown on the plat; yet, in order to make the adit pointed out the discovery point, it was necessary to construct the claim with this angle. A plat or diagram so constructed, based upon assumptions only, in utter disregard of, and contrary to, the facts, should have no place in a court of justice.

Plaintiff conceded that the annual labor required by statute was not performed upon, nor within, its adverting claims, but contended that it had performed such labor through the Eagle Rock No. 1, Post Boy, and Georgie Marie tunnels on adjacent claims, comprising, with the claims in controversy, a group.

Plaintiff produced evidence as to the amount and value of work done in its tunnels in each year from 1901 to and including 1904, the year in which defendant's claims were located. Upon cross-examination, defendant attempted to show that, during those years plaintiff claimed a great number of lodes by possessory title, in addition to the claims forming the basis of the adverse, and that the work done in the tunnels, during each of those years, was intended by the plaintiff as the annual labor upon the entire group, and did not aggregate in value one hundred dollars for each claim; that plaintiff had notices posted upon each of the claims constituting the entire group to the effect that the work on such claims respectively was then being done through said tunnels. ⁵⁸⁵ By instructions given, and by the rulings upon the admissibility of this evidence, the court denied defendant's right to make such inquiry, and held substantially that plaintiff need prove the annual labor only for the group of claims described in its complaint, instead of upon its entire group.

As the annual assessment work had not been done within the surface boundaries of the adverse claims, it was incumbent upon plaintiff to show that such work as had been done elsewhere was, in fact, intended at the time as the annual assessment work upon these particular claims, and was of such a character and sufficient in amount to satisfy the requirements of the law for the entire group.

In *Chambers v. Harrington*, 111 U. S. 350, 4 Sup. Ct. Rep. 428, 28 L. ed. 452, it is said: "The expenditure of money or labor must equal in value that which would be required on all the claims if they were separate or independent." And in *Mt. Diablo etc. Min. Co. v. Callison*, 5 Saw. 439, Fed. Cas. No. 9886, the rule stated is: "A general system of work for the exploration of the whole ground embraced in these three sets of contiguous claims seems to have been carried on by plaintiff. And we think that all work done was a part of that general system, and, as such, applicable to all the claims which had by purchase been concentrated in a single party, the plaintiff. . . . The natural and reasonable presumption is, that all the work is done as part of the system, and as such applicable to all the claims."

The question of the intention of the plaintiff as to the annual work done by it was, therefore, a material issue in the case. To make work done on a tunnel an improvement upon another mining claim under the law requiring annual labor, the work must have been done for the express purpose of benefiting such claim, and for its development: *Bryan v. McCaig*, 10 Colo. 309, 15 Pac. 413. If plaintiff did an insufficient ⁵⁸⁶ amount of work to hold its entire group, yet posted notices that the work on each claim was being done through specific tunnels, it could not thereafter, when certain of such territory became valuable through discovery and development by others, apply the work to such particular territory only, in order to hold it. Defendant was entitled to a fair and full cross-examination of plaintiff's witnesses in order to bring before the jury the intent of the plaintiff at the time of doing the work: *Resurrection G. M. Co. v. Fortune G. M. Co.*, 129 Fed. 668, 64 C. C. A. 180.

Where several contiguous mining claims constitute a group, and expenditures are made upon an improvement which is intended to aid in the development of all so held, the improvement constitutes a distinct entity, not subject to physical subdivision, or apportionment, in its application to the claims intended to be benefited by it. The work performed attaches to the claims collectively, and not severally. This is the rule clearly and forcibly announced by the Secretary of the Interior, in *Re James Carretto and Other Lodes*, 35 L. D. 361, 364. It is there said: "To undertake to set apart or apportion a physical segment or section, or an arbitrary fractional part of a common improvement, and to credit the value thereof to a particular claim, is in violation of the theory of a common benefit, accruing from a common improvement. The scheme here invoked for adjusting the monetary worth of the benefit derived from a common improvement is, on its face, unreasonable, and leads to a result

but little short of absurd. The department is of opinion that it is unwarranted and unauthorized by, and contrary to, the law. . . . In this or in any similar patent proceeding, where a part of the group is applied for and reliance is had upon a common improvement, the land department should be fully advised as to the total number ⁵⁸⁷ of claims embraced in the group, as to their ownership and as to their relative situations, properly delineated upon an authenticated plat or diagram."

Appellee, however, contends that, under the pleadings in this case, the question of whether the plaintiff had forfeited its lode claims for failure to do the annual assessment work, was not an issue; that forfeiture is an affirmative defense which must be specially pleaded, and if not, is waived.

Under a general denial, or its equivalent, each party to an adverse suit claims the title upon which the right of possession is based, and the court determines which of the two holds it. Each are actors, and both may fail. As said in *Bryan v. McCaig*, 10 Colo. 309, 15 Pac. 413: "The act of Congress of March 3, 1881, authorizing the jury to find that title to the ground in controversy has not been established by either party, makes it absolutely necessary that a party claiming the right to the possession of any portion of the public domain, in an adverse suit, by virtue of a mining location, must establish such right by evidence of a compliance with the state and federal statutes relating to the location and holding of mining claims: *Becker v. Pugh*, 9 Colo. 589, 13 Pac. 906. The pleadings required proof to be made of a compliance with the requirements of the statute; the policy of the law, without regard to the pleadings, requires such proof to be made."

Being an adverse suit, it devolved upon each of the parties to bring forward proof of every material fact necessary to sustain the validity of their respective claims, and it was necessary for the appellee to prove the annual work, at least, for the year immediately preceding the location, or attempted location, of appellant's claims. This was evidently the view which the court and counsel entertained of the law at the trial. The plaintiff treated this as one of the ⁵⁸⁸ issues to be tried, and submitted evidence upon that theory. The defendant sought by cross-examination to show that the work done was insufficient by reason of the great number of claims in plaintiff's group, and it was error to deny him that right.

We will not prolong this opinion by discussion of other errors assigned, as it is clearly evident the judgment must be reversed, and it is so ordered.

Chief Justice Steele and Mr. Justice Bailey concur.

Citizenship, or a Declaration of Intention to Become a Citizen, must be proved in a suit in aid of a patent protest and adverse claim under section 2326 of the Revised Statutes of the United States: *Strickley v. Hill*, 22 Utah, 257, 83 Am. St. Rep. 786.

Work may be Done on One Mining Claim for the Benefit of a Group of Claims: Note to *McKay v. McDougall*, 87 Am. St. Rep. 411; *Hawgood v. Emery*, 22 S. D. 573, 133 Am. St. Rep. 941. The work done, however, must be done in good faith for the benefit of all the claims, and have a tendency to benefit or develop the claims other than the one upon which it is done: *Big Three Mining etc. Co. v. Hamilton*, 157 Cal. 130, 137 Am. St. Rep. 118. Whether it does so or not is usually a question of fact for the court or jury, as the case may be, to say upon the evidence whether the requirements of the law have been met: *Copper Mountain Min. etc. Co. v. Butte etc. Co.*, 39 Mont. 487, 133 Am. St. Rep. 595.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

EVANS v. MOORE.
[247 Ill. 60, 93 N. E. 118.]

RESULTING TRUST—Parol Promise of Grantee.—A mere parol promise of a grantee or devisee to hold the title in trust, unattended with any fraud in procuring the conveyance or devise to be made, does not raise a resulting trust. (p. 306.)

TRUST.—If an Uncle Agrees, in Writing, to Devise property to his nephew if the latter will leave his parents, brothers, sisters, and other relatives, renounce allegiance to the land of his birth, come to this country to live, and become a citizen of the United States, the agreement is based upon a legal, valid consideration, and, when performed by the nephew, the agreement becomes binding upon the uncle and his devisees, who are then trustees of the legal title for the nephew. (pp. 308, 309.)

TRUST—Agreement to Devise—Enforcement.—An agreement, based upon a valuable consideration, to make a particular disposition of property by will, will be enforced in equity against those to whom the legal title has descended, and the remedy will not be allowed to be defeated by a devise or conveyance during the lifetime, inconsistent with the agreement, unless rights of purchasers deserving of protection have intervened; and, where specific performance would be decreed between the original parties to the contract, it will be decreed as to all who claim under them, unless intervening equities would make the decree an injustice to the parties. (p. 308.)

TRUST—Enforcement Against Transferee.—Wherever property, real or personal, which is already impressed with or subject to a trust, express or by operation of law, is transferred by the trustees, not in the course carrying into effect the terms of an express trust, or devolves from a trustee to a third person who is a mere volunteer, or is a purchaser with notice of the trust, such heir, devisee, successor, or other voluntary trustee, or such purchaser, acquires the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary. (p. 310.)

TRUST—Agreement to Devise—Enforcement.—Where an uncle has agreed, in writing and for valid consideration, to devise property to his nephew, the latter may, in equity, enforce the agreement against a subsequent voluntary grantee or devisee of his uncle, where no rights of bona fide purchasers have intervened. (p. 310.)

EQUITY—Statute of Limitations.—Where the jurisdiction of equity is exclusive, the court is not bound by the limitations applicable

to actions at law, but may restrict or enlarge them according to the peculiar circumstances of the particular case. (p. 311.)

TRUST—Agreement to Devise—Enforcement—Laches.—Where an uncle agreed to devise property to his nephew, but, on account of the latter's dissipation, placed the property in trust for him until his habits should improve; and the property was devised to a third person upon his verbal promise to hold in trust for the nephew; and the trustee held the property for about two years and a half after the uncle's death, when he died, devising the property to his own children, the nephew is not barred either by the statute of limitations or laches, from asserting his rights against such devisees, especially where the trustee had led the nephew to believe that he would do as he said he would, and that there was no necessity for any resort to the courts; and where nothing inequitable stands in the way of enforcing the rights of the nephew. (pp. 303, 313.)

Henry S. Dixon, George C. Dixon and John B. Crabtree, for the appellants.

Trusdell, Smith & Leech, for the appellee.

⁶¹ **FARMER, J.** This is a bill in equity by appellee, Samuel T. Evans, as complainant, against appellants, who are executors, heirs and devisees of John H. Moore, deceased, to require them to account for, convey and assign to complainant certain real estate in the city of Dixon, Illinois, and certain personal property which in his lifetime belonged to David L. Evans, uncle of complainant, and was by said David L. Evans devised by last will and testament to John H. Moore, deceased, who left a last will and testament devising the same property to his children.

David L. Evans was originally from Wales but had resided in the city of Dixon, Illinois, many years before his death. He had been married, but his wife had been dead a long time and they had no children. His only living relatives were a brother, two sisters and nephews and nieces, all of whom resided in Wales and were citizens of Great Britain. The bill alleges that in the latter part of 1891 and the early part of 1892 David L. Evans was in ill-health and believed he had but a short time to live; that he wrote to complainant, asking him to come to Dixon as soon as possible and become a citizen of this country, and, in consideration of his doing so, stated he would leave to complainant all his property. At the time these letters were written the complainant was twenty-five years old, a single man, residing with his parents. The bill alleges that in consideration of the request and promise of David L. Evans the complainant came to Dixon, Illinois, renounced allegiance to Great Britain and became a citizen of this country. The bill alleges that in November, 1894, David L. Evans was ⁶² taken seriously ill, and believing it was his last illness he consulted with one Moses C. Weyburn, and being of opinion, on account of complainant's age and unsteady habits, it was not wise to vest him with immediate

custody and control of the property, he requested Weyburn to accept title to it and hold it in trust for complainant; that Weyburn declined to accept the trust and secured the consent of John H. Moore to accept the same, and said Moore promised said David L. Evans to accept the trust and hold the property for the benefit of complainant, and agreed that he would turn it over to complainant after his habits became steadier or after he had reached years of greater maturity; that David L. Evans was at that time very ill and confined to his bed and unable to give the matter of the preparation of the will personal attention; that he reposed great confidence in Moore; that Moore was then giving him his personal attention in his illness; that he exercised great influence over said David L. Evans and promised to consult an attorney about having the will prepared; that either through a fraudulent purpose or misunderstanding as to the proper way to carry into effect the expressed intentions of said David L. Evans, said Moore procured the will to be drawn in such manner as to give him the property absolutely and not in trust; that when the will had been so drawn said Moore took it to said David L. Evans, who executed it, but was at the time so weakened by disease and his mental faculties were so dulled that he did not comprehend the manner in which the will was drawn. The bill further alleges that after the will was executed, and before the death of said David L. Evans, said Moore told complainant the property had been given to him (Moore), but that he would turn it over to complainant in a short time; that said David L. Evans died December 6, 1894, three days after making his will, and Moore took possession of the estate and property of the said David L. Evans and took out letters testamentary; that said Moore dealt ^{as} out to complainant small sums of money from the proceeds of said estate, and allowed him to occupy rooms in the building and to let rooms to other parties and receive the rent therefor; that on numerous occasions the said Moore professed to be holding the property for complainant, and kept the money of said estate separate from his own private means and kept a separate bank account, as executor; that he never assumed to complainant or to others to hold the property adversely to complainant, but acknowledged complainant's rights in the premises, and that complainant never learned anything to the contrary until the death of said Moore, in June, 1907, when it appeared by his will that he had disposed of his property among his children. The bill prays that defendants be ordered and decreed to convey to complainant, by good and sufficient deed, the real estate owned by David L. Evans in his lifetime, and that they be required to account to complainant for the personal property and the rents and profits received by John H. Moore from said real estate.

The answer of defendants denied that any trust relation existed between John H. Moore and the complainant, and denied all the material facts alleged out of which it was claimed in the bill the trust arose, and averred that by the will of David L. Evans, John H. Moore became the absolute owner of all the estate and property of said Evans, and claimed and asserted such ownership from the time of the admission of the will to probate until his death. The answer also set up and claimed the benefit of the statute of limitations and the statute of frauds, and interposed the defense of laches as a bar to any relief.

The cause was referred to the master in chancery to take the proof and report his conclusions. The master reported that the complainant was not entitled to the relief prayed, on the ground that there was an agreement between David L. Evans and Moore by virtue of which Moore held the property for complainant as trustee of a constructive ⁶⁴ trust. He found that the agreement of David L. Evans to leave his property to complainant was a valid and binding contract between them; that complainant performed his part of it, and that Moore had sufficient knowledge of the agreement to charge him with notice thereof, and that those claiming under him in equity took the property as naked trustees for the benefit of complainant; that the statute of frauds, under the circumstances, was not a defense, but that complainant was chargeable with notice of his legal and equitable rights to enforce the trust as early as December, 1894, but failing to take any steps to do so until the commencement of this suit, July 8, 1907, he is barred by laches and the statute of limitations; that but for laches and the statute of limitations complainant would be entitled to a decree for the conveyance of the real estate to him and for an accounting for the property and the rents and profits. He reported the defendants were entitled to a decree dismissing complainant's bill. Both parties filed objections, which were overruled by the master and by order of the court stood as exceptions on the hearing. The exceptions filed by defendants were overruled. The exceptions filed by complainant were sustained and a decree entered granting the relief prayed for. From that decree the defendants have prosecuted this appeal.

The bill in this case proceeds upon two theories recognized by both parties in their briefs: 1. That John H. Moore was the trustee of a constructive trust arising out of the facts and circumstances under which he obtained title to the property in controversy; 2. That David L. Evans ⁶⁵ made a valid and binding contract with complainant to leave him his property, and that complainant is entitled to the enforcement of

the performance of that contract against the devisees of John H. Moore.

1. On the first ground mentioned we do not think the evidence would warrant the relief prayed by complainant. Conceding that the evidence shows Moore promised David L. Evans to hold the property in trust for the benefit of complainant, this alone would not create a trust which could be enforced where the statute of frauds was interposed as a defense. A mere parol promise of a grantee or devisee to hold the title to property in trust, unattended with any fraud in procuring the conveyance or devise to be made, does not raise a resulting trust. This question has been so often the subject of decision by this court that it will be unnecessary to do more than to refer to some of the cases. In *Lantry v. Lantry*, 51 Ill. 458, 2 Am. Rep. 310, will be found a discussion of the question and the citation of numerous authorities. In that case it was said (p. 464): "It will be observed that in all these cases there is something more than the mere receipt of the title to real estate with a parol promise to hold it subject to a trust. There is an interference with the owner of the property, by means of which he is induced to forego the execution by himself of his designs for the benefit of a third person, and to leave the execution to the party deluding him by a false promise and through such false promise obtaining title to the property. . . . If A voluntarily conveys land to B, the latter having taken no measure to procure the conveyance, but accepting it and verbally promising to hold the property in trust for C, the case falls within the statute and chancery will not enforce the parol promise. But if A was intending to convey the land directly to C, and B interposed and advised A not to convey directly to C, but to convey to him, promising if A would do so he (B) would hold the land in trust for C, chancery will lend its aid to enforce the trust, upon the ground that B obtained the title by fraud and imposition upon A." The rule announced in the *Lantry* case was not new. It was the law as laid down in text-books and followed generally by all courts. A few of the many cases decided since the *Lantry* case, where that case was cited with approval, are *Walter v. Klock*, 55 Ill. 362, *Fischbeck v. Gross*, 112 Ill. 208; *Biggins v. Biggins*, 133 Ill. 211, 24 N. E. 516; *Champlin v. Champlin*, 136 Ill. 309, 29 Am. St. Rep. 323, 26 N. E. 526; *Pope v. Dapray*, 176 Ill. 478, 52 N. E. 58; *Williams v. Williams*, 180 Ill. 361, 54 N. E. 259; *Markham v. Katzenstein*, 209 Ill. 607, 70 N. E. 1071.

The evidence in this record shows that David L. Evans, at the time he made his will, did not desire or intend then to place the title in complainant. Complainant was to some extent dissipated, and his uncle thought it would not be wise to give him the immediate control of the property. For that

reason he desired to place the title in someone else for the time being. Moore did not solicit or request that the devise be made to him to hold for the benefit of complainant, and did nothing to induce it to be so made, beyond, possibly, promising David L. Evans to hold the title for the benefit of complainant until he was more mature in years and less given to dissipation. It was the intention and desire of Evans to devise the property to Moses C. Weyburn before he ever said anything to Moore about it. Weyburn testified he declined to accept the devise and recommended Evans to make it to Moore, and it was at his suggestion that the devise was so made. We do not think the contention of the complainant that Moore fraudulently prevented David L. Evans from expressing in the will the trust upon which the property was devised is sustained by the evidence. There is no proof that Evans ever said or did anything to indicate that he intended or thought it advisable to express in the will the trust upon which he devised the property. It is true, the will states that all the property should "go to and be the absolute property of the said John H. Moore." The will was written by a lawyer ⁶⁷ of high standing in the profession, in the presence of Moore and Weyburn, and after, as testified to by Weyburn, he was told by both of them the purpose for which the devise was made to Moore. Evans was very ill and feeble in body at the time he executed the will, but according to the testimony of Weyburn, which is uncontradicted, his mind was clear enough when he gave directions for the preparation of the will to fully understand the purpose of making it and the disposition he desired to make of his property, and no suggestion was made by him that the trust be written in the will. Apparently all parties having knowledge of the transaction relied on the verbal promise of Moore and did not think it necessary to write in the will the conditions of the devise. If the decree depended alone upon the enforcement of a constructive trust we are of opinion it could not be sustained.

2. The proof shows that David L. Evans came to this country from Wales many years ago and had lived at Dixon, Illinois, a long time. He was a childless widower for many years and lived in rooms in the two-story building on a lot owned by him in the city of Dixon, which constitutes the bulk of his estate. At the time of his death he owned personal property to the value of eleven hundred dollars. All his relatives lived in Wales and were citizens of Great Britain. In the latter part of 1891 he first wrote requesting his nephew, who was then twenty-four or twenty-five years old, to come to Dixon, renounce his allegiance to Great Britain and become a citizen of the United States, promising if his nephew would do so he would leave him all his property at his death. Two

or three of the letters written by David L. Evans had been lost, but members of the family of complainant, whose depositions were taken in Wales, testified they read and heard read the lost letters; that in them David L. Evans urged complainant to come to Dixon to live, and said if he would do so he would leave complainant all of his property at the time of his death, as he ⁶⁸ had no relatives in this country to whom he could leave it. Three letters written by David L. Evans to his nephew in February, 1892, were introduced in evidence. In one of them the writer states he incloses a ticket from Liverpool to Dixon and thirty dollars in money. In all of them the writer expresses a great desire that complainant come to Dixon and become a citizen of this country as soon as he can, under the law, after arriving. In one or more of them he states he has made his will, and expresses some apprehension about whether he will live until his nephew arrives. He says his will is in the vault of the City National Bank; that John H. Moore and a Mr. Carpenter are executors of it, and advises complainant, if the writer should not survive until he arrives, to confer with Moore and Carpenter, in the hands of one or both of whom would be left all his affairs. He expresses anxiety that complainant shall take out his first papers for naturalization immediately upon his arrival at Dixon, and advises him to take possession of the building at once if he (David L. Evans) should not be alive when complainant arrives. These letters show conclusively that David L. Evans promised complainant, in writing, if he would come to Dixon and become a citizen of the United States the writer would leave him all of his estate and property. The agreement and promise were in writing. Complainant complied with this request and performed the conditions imposed upon him by David L. Evans.

An agreement, based upon a valuable consideration, to make a particular disposition of property by will will be enforced in equity against those to whom the legal title has descended, and the remedy will not be allowed to be defeated by a devise or conveyance during the lifetime, inconsistent with the agreement, unless rights of purchasers deserving of protection have intervened; and where specific performance would be decreed between the original parties to the contract, it will be decreed as to all who claim under them, unless intervening equities would make the decree ⁶⁹ an injustice to the parties: *Whiton v. Whiton*, 179 Ill. 32, 53 N. E. 722; *Hudnall v. Ham*, 183 Ill. 486, 75 Am. St. Rep. 724, 56 N. E. 172, 48 L. R. A. 557; *Oswald v. Nehls*, 233 Ill. 438, 84 N. E. 619. The consideration for the agreement was that complainant should leave his parents, brothers, sisters and other relatives, renounce allegiance to the land of his birth, come to this country to live and become a citizen of the United

States. It was not a case of a promise to make a gift without consideration, but was an agreement made upon a legal, valid consideration, and when performed by complainant the agreement became binding upon David L. Evans and the law imposed upon him the obligation of performing it: *Shutt v. Missionary Society*, 41 N. J. Eq. 115, 3 Atl. 398; *Bush v. Whitaker*, 45 Misc. Rep. 74, 91 N. Y. Supp. 616; *Spencer v. Spencer*, 25 R. I. 239, 55 Atl. 637; 26 Am. & Eng. Ency. of Law, 2d ed., p. 26.

It is insisted by the defendants that no services were performed by complainant for David L. Evans and that the consideration for the agreement was inadequate. The agreement did not require the performance of any service by complainant for David L. Evans. There is no evidence in the record tending to show that David L. Evans contemplated or required the performance of any service for his benefit by complainant as one of the conditions of leaving complainant his property. David L. Evans appears to have been engaged in no business at the time the agreement was made and did not engage in any business before his death. He lived in rooms in his building, and, when well, kept his own house and for the most part prepared his own meals. He seems neither to have required nor desired the services of anyone else except in case of illness. Upon the arrival of complainant at Dixon he went to the rooms of his uncle and resided there for a time until he secured employment, after which he boarded at other places. When his uncle was sick he returned to the rooms kept by him and gave him such attention as he was able to do. There is some evidence tending to show that occasionally there was friction between the uncle and nephew, due, probably, to ⁷⁰ complainant's drinking. One witness testified he heard complainant on one occasion speak disrespectfully of his uncle, and say he could see him die and tell him he had to die, but there is no other testimony in the record tending to show any lack of respect for or duty toward his uncle by complainant. On the contrary, aside from drinking, there is no evidence, except that of the one witness referred to, that complainant was ever lacking in respect for his uncle, and there is no evidence that he ever failed in the performance of any duty or service requested or desired by his uncle, except in the matter of drinking. The evidence does not show that complainant was badly dissipated, but that he drank intoxicating liquors chiefly when out of employment, and occasionally became, to some extent, intoxicated. While this was displeasing to the uncle, it was not a condition imposed by him when he made the agreement to leave his property to complainant that he should abstain from the use of intoxicating liquors, and it clearly appears from the evidence that David L. Evans never intended to deprive

complainant of the property absolutely or refused to perform his agreement because of his nephew's habit of drinking, but merely wished to postpone the time when he would come into possession and control of it until his habits had been improved. Nothing complainant did or failed to do relieved David L. Evans of his obligation to perform his agreement. It is a fair inference, we think, from all the evidence, that John H. Moore knew of the agreement, but whether he did or not is unimportant. He paid no consideration for the title to the property, and, whether he had knowledge of the agreement or not, he took it subject to the rights of complainant. Upon the performance of the contract by complainant David L. Evans became trustee for his benefit and Moore took the property subject to the trust, and his devisees took it in like manner. "Wherever property, real or personal, which is already impressed with or subject to a trust of any kind, express or by operation of ⁷¹ law, is conveyed or transferred by the trustees, not in the course of executing and carrying into effect the terms of an express trust, or devolves from a trustee to a third person who is a mere volunteer or is a purchaser with actual or constructive notice of the trust, then the rule is universal that such heir, devisee, successor or other voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed and becomes himself a trustee for the original beneficiary. Equity impresses the trust upon the property in the hands of the transferee or purchaser, compels him to perform the trust if it be active and to hold the property subject to the trust, and renders him liable to all the remedies which may be proper for enforcing the rights of the beneficiary. It is not necessary that such transferee or purchaser should be guilty of positive fraud or should actually intend a violation of the trust obligation. It is sufficient that he acquires property upon which a trust is, in fact, impressed, and that he is not a bona fide purchaser for a valuable consideration and without notice. This universal rule forms the protection and safeguard of the rights of beneficiaries in all kinds of trust. It enables them to follow trust property—lands, chattels, funds of securities, and even of money—as long as it can be identified, into the hands of all subsequent holders who are not in the position of bona fide purchasers for value and without notice. It furnishes all those distinctively equitable remedies which are so much more efficient in securing the beneficiary's rights than the mere pecuniary recoveries of the law": Pomeroy's Equity Jurisprudence, sec. 1048. Therefore, unless the complainant is barred by laches or the statute of limitations from asserting his rights, we think he is entitled to the enforcement of the agreement of David L. Evans against the devisees of John H. Moore.

While courts of equity usually follow the law in applying the statute of limitations, and especially so in cases ⁷² where courts of law and equity have concurrent jurisdiction, yet where the jurisdiction of courts of equity is exclusive it is not bound by the limitations applicable to actions at law, but may restrict or enlarge them according to the peculiar circumstances of the particular case. "While the limitation fixed by the statute is ordinarily followed as a convenient measure for determining the length of time that ought to operate as a bar, it is not regarded as conclusive or binding. Relief may be refused although the time fixed by the statutory limitation has not expired or may be granted, although the time of such limitation has long elapsed. In some cases of purely equitable jurisdiction time may never be a bar": 19 Am. & Eng. Ency. of Law, p. 154. "The result of this rule of analogy is, that courts of equity, in cases in which their jurisdiction is exclusive, adopt the limitation provided by statute for analogous remedies at law as fixing the period beyond which any delay requires explanation and within which any suit may be brought, unless it affirmatively appears that peculiar facts exist which justify the application of some equitable exception to the ordinary rules. In short, it makes the statute controlling in the absence of proof of special circumstances showing that its strict application would work injustice and wrong. The persuasiveness of the statute acquires the force and effect of absolute law unless the inequity of such an application of the rule is made clearly apparent": 19 Am. & Eng. Ency. of Law, pp. 160, 161. This rule has been repeatedly announced by this court. "The statute of limitations is a purely legal, as contradistinguished from an equitable defense, and although courts of equity will ordinarily act in obedience and in analogy to the statute of limitations, yet they will also, in proper cases, interfere in actions at law to prevent the bar of the statute where it would be inequitable and unjust: 2 Story's Equity Jurisprudence, sec. 1521. And so it has been held that where the obligation is clear and its essential character has not been affected by the lapse of time, equity will enforce ⁷³ a claim of long standing as readily as one of recent origin, as between the immediate parties to the transaction": *Thorndike v. Thorndike*, 142 Ill. 450, 34 Am. St. Rep. 90, 32 N. E. 510, 21 L. R. A. 71. In *Reynolds v. Sumner*, 126 Ill. 58, 9 Am. St. Rep. 523, 18 N. E. 334, 1 L. R. A. 327, the court said: "Ordinarily, courts of equity adopt the time fixed by statute for barring claims at law, in analogous cases, as the period at the end of which they will conclude recovery in equity. This rule is by no means inflexible, and its application will always depend, upon consideration of the allegations and proof, whether the presumption from which the bar arises prevails. The

presumption arising from the mere lapse of time may be repelled by proof of other facts and circumstances inconsistent with it. When possession of trust property is taken by the trustee under the trust it is the possession of the cestui que trust, whether the trust be express or implied, and cannot be adverse until the trust is openly disavowed or denied and this fact is brought home to the knowledge of the cestui que trust." In *Board of Supervisors v. Winnebago Swamp Drainage Co.*, 52 Ill. 299, it was said: "The fact that the statute is positive in its terms will not, under all circumstances, operate as a bar in equity. There are cases in which a court of equity will not permit the bar of the statute to be interposed against conscience, and it will supply and administer a remedy within its jurisdiction and enforce the right for the prevention of a fraud." This language was cited with approval in *Kelly v. Donlin*, 70 Ill. 378, and *Farwell v. Great Western Tel. Co.*, 161 Ill. 522, 44 N. E. 891. Authorities might be multiplied, but we deem the rule so well established as not to require the further citation of cases.

The question then arises, Is the rule announced in those cases applicable to this case? We think this question must be answered in the affirmative. One witness, an old lady, who was present when the will was executed and signed it as a witness, testified she heard John H. Moore say to the complainant, immediately after the will was executed, that ⁷⁴ it was made; that everything was all right and he would turn the property over to complainant later. A large number of witnesses testified to declarations by Moore, made on different occasions, that he held the property for the benefit of the complainant. To some of them he stated he would turn it over to him when his habits became better, and to one, at least, that he would turn the property over to the complainant when he married. These declarations were made frequently up to within three or four years of Moore's death. While there is no proof of any such declarations or statements during the last three or four years of his life, there is no evidence that he at any time denied holding the property in trust for complainant. In addition to the trust relation sustained by him to the complainant, Moore manifested friendship for and a deep interest in the welfare of complainant. He was anxious that complainant should become a Christian and join the Baptist church of which Moore was a member. He solicited him to attend church and Sunday-school and wrote him about his spiritual welfare. Complainant did finally join the church, and the friendly relations between him and Moore appear never to have been disturbed. While Moore retained possession and control of the property, so far as the record shows he never claimed it as his absolute property, and, under the relations existing between him and

complainant and the purpose for which he claimed the control of the property, we do not think it can be said that Moore's possession was adverse to complainant. He allowed complainant to keep rooms in the building for a time without the payment of rent. He also allowed complainant to collect rent for rooms occupied by others for a while. At one time he gave complainant fifty dollars in money to enable him to buy a bicycle. His conduct and declarations were such as to lull complainant into a feeling of security and cause him to believe that Moore would do precisely as he said he would do, and that there was no necessity for any resort ⁷⁵ to the courts to secure his rights. Moore kept the account of the estate and property of David L. Evans in his name as executor and separate and apart from his private account. While he stated in his final report, in June, 1903, that as executor of the David L. Evans estate he had taken possession of the property as owner in fee and that no one else was interested in it, there is no proof that complainant had any actual knowledge of the report; and even if he had, under the fiduciary relations existing between him and Moore and the trust and confidence reposed in Moore by him, we do not think this act, alone, sufficient to charge complainant with notice that Moore claimed adversely to him. The proof justifies the conclusion that complainant refrained from asserting his rights by reason of the assurances and conduct of Moore, and it would be inequitable and unconscionable to permit Moore, or the devisees who represent him, to reap the benefit of his own wrong by sustaining the statute of limitations as a defense. The delay of complainant in asserting his rights worked no injury to Moore or his devisees, and they were not induced to do anything, or refrain from doing anything, that would make it inequitable to require them to account to complainant for the property which, in effect, he bought and paid for and his uncle intended him to have, and which Moore and his devisees, entire strangers to the blood of David L. Evans, never paid one cent for.

For the same reasons that equity will not permit the defense of the statute of limitations it will not permit laches to be interposed as a bar to the relief sought by the complainant.

The decree of the circuit court will be affirmed.

Resulting Trusts are discussed in the notes to Neill v. Keese, 51 Am. Dec. 751; Stonecipher v. Kear, 127 Am. St. Rep. 252.

An Agreement, upon Sufficient Consideration, to Devise or Bequeath Property is valid and enforceable: Waters v. Cline, 121 Ky. 611, 123 Am. St. Rep. 215; Teske v. Dittberner, 70 Neb. 544, 113 Am. St. Rep. 802; Laird v. Vila, 93 Minn. 45, 106 Am. St. Rep. 420; Stellmacher v. Bruder, 89 Minn. 507, 99 Am. St. Rep. 609; Carmichael v. Carmichael, 72 Mich. 76, 16 Am. St. Rep. 528. See, also, cases cited in the note to Johnson v. Hubbell, 66 Am. Dec. 784.

A Valid Agreement to Devise Property may be Specifically Enforced, and equity will impress a trust upon the property which will follow it into the hands of personal representatives of the promisor, or grantees without consideration: Teske v. Dittberner, 70 Neb. 544, 113 Am. St. Rep. 802; note to Johnson v. Hubbell, 66 Am. Dec. 787. As to the specific performance of an agreement to devise land in return for personal services, see, also, Laird v. Vila, 93 Minn. 45, 106 Am. St. Rep. 420; Carmichael v. Carmichael, 72 Mich. 76, 16 Am. St. Rep. 528.

If an Agreement to Make a Devise of Property to Another is Violated by a conveyance of the property to a third person, without consideration, or with notice, the conveyance may be immediately set aside at the suit of the promisee who is defrauded thereby: Teske v. Dittberner, 70 Neb. 544, 113 Am. St. Rep. 802; Carmichael v. Carmichael, 72 Mich. 76, 16 Am. St. Rep. 528. That a conveyance will not be allowed to defeat rights under such a contract, see, also, Quinn v. Quinn, 5 S. D. 328, 49 Am. St. Rep. 875. In such cases, equity will often charge those holding the property under the will with a trust for the benefit of the party to whom it was agreed to be given: Note to Johnson v. Hubbell, 66 Am. Dec. 787.

The Extent of the Adoption of Statutory Periods of Limitation in equity is stated in the note to Neppach v. Jones, 23 Am. St. Rep. 149; Deadman v. Yantis, 230 Ill. 243, 120 Am. St. Rep. 291; and in the note to Frame v. Kenny, 12 Am. Dec. 371, showing the rule in cases of exclusive equitable cognizance. The Missouri statute of limitations applies to equitable as well as legal causes of action: Savings Bank v. Butchers' etc. Bank, 107 Mo. 133, 28 Am. St. Rep. 405.

Excuse for Laches: See notes to Bell v. Hudson, 2 Am. St. Rep. 805, Neppach v. Jones, 23 Am. St. Rep. 149, and Williams v. Bennett, 75 Ark. 312, 112 Am. St. Rep. 57.

PROVIDENCE-WASHINGTON INSURANCE COMPANY v. WESTERN UNION TELEGRAPH COMPANY.

[247 Ill. 84, 93 N. E. 134.]

TELEGRAMS—Care and Skill in Transmitting.—Telegraph companies exercise a quasi-public employment, with duties analogous to those of common carriers, and are required to use a high degree of care and skill in the correct and prompt transmission of messages. (p. 317.)

TELEGRAMS—Failure to Deliver.—Where Insured Property is destroyed by fire, but the policy would have been canceled had it not been for the negligence of a telegraph company in missending a telegram, the proximate cause of the loss to the insurance company, by reason of the policy not having been canceled, is the negligence of the telegraph company and not the fire. (pp. 316, 317.)

TELEGRAM—Notice of Importance—Negligence.—When a message delivered to a telegraph company for transmission relates to an important business transaction, and discloses the nature of the business, the company has all the information necessary to show that prompt delivery is important, and to charge it with damages resulting directly from negligent failure to deliver. (p. 317.)

TELEGRAM—Failure to Deliver Message to Cancel Insurance. If property is destroyed by fire while a policy of insurance thereon is in force which would have been canceled but for the negligence of a

telegraph company in missending a telegram authorizing the cancellation of the policy, the loss of the insurance company is the direct result of the negligence of the telegraph company, and the telegraph company is liable for the amount of the loss sustained by the insurance company, and not merely for the difference between the reasonable value of carrying the risk for the additional time and the amount of the unearned premium. (p. 318.)

Action by the insurance company against the telegraph company to recover damages alleged to have resulted from the failure to deliver a message. The insurance company had written a policy of insurance on a paper-mill in Newark, Ohio, which policy, with the company's consent, was subsequently assigned to the Newark Paper Company, that company having acquired the paper-mill property. There was a clause in the policy which authorized its cancellation at any time by the insurer upon giving five days' notice of the cancellation. In about four months after the assignment, between 11 and 12 o'clock on the morning of April 29, 1902, F. W. Ransom, the state agent of the insurance company, delivered to the telegraph company's agent, at Van Wert, Ohio, for transmission to M. J. Reese, the insurance company's local agent in Newark, Ohio, the following message:

"Van Wert, Ohio, April, 30, 1902.

"M. J. Reese, Agt. Providence-Washington Ins. Co.

"Regret must cancel paper mill line. Daily was passed inadvertently.

F. W. RANSOM."

This telegram was never delivered to the insurance company's agent at Newark, Ohio. On May 2, 1902, Reese was instructed by mail to cancel the policy, but the paper company insisted upon the five days' notice provided for in the policy. Before the five days had expired the property was burned. The paper company then sued the insurance company and recovered a judgment. A compromise was effected, and the insurance company paid twelve hundred dollars in full satisfaction of the judgment. This action was brought in the municipal court of Chicago to recover the twelve hundred dollars and interest from the time of its payment. The insurance company obtained a judgment for thirteen hundred and sixty-five dollars. That judgment was, on appeal, affirmed by the appellate court for the first district, which granted a certificate of importance, and the case was taken to the supreme court for review.

West, Eckhart & Taylor, George H. Fearons and Francis Raymond Stark, for the appellant.

Bates, Harding, Edgerton & Bates, for the appellee.

§§ FARMER, J. Appellant contends (1) that its failure to deliver the message was not the proximate cause of the

damage sustained by appellee; that the fire was the proximate cause, and although the failure to transmit and deliver the message to appellee prevented the cancellation of the policy before the fire occurred, such failure is too remote to charge appellant with liability for the loss appellee sustained on account of the fire; (2) the breach of contract to deliver the message not being the proximate cause of the injury, the damages to be recovered are such, only, as according to the usual course of things result from the breach; that the fire could not have been foreseen by or in the reasonable contemplation of the parties to the contract as a probable result of the breach; (3) that the damages not arising in the usual and due course of things as a probable result of the failure to deliver the message but out of circumstances peculiar to the special case, they are not recoverable unless the special circumstances were known, or may necessarily be supposed to have been known, to appellant at the time it accepted the message.

In support of the contention that the failure to deliver the message could not in any sense be considered as the proximate cause of the injury, appellant relies upon *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695, *Denny v. New York Cent. R. Co.*, 13 Gray, 481, 74 Am. Dec. 645, *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106, and other cases from other jurisdictions. The *Morrison* case and the *Denny* case were referred to and commented upon in *Wald v. Pittsburgh etc. R. R. Co.*, 162 Ill. 545, 53 Am. St. Rep. 332, 44 N. E. 888, 35 L. R. A. 356. The rule announced in those cases is, that where, on account of the delay of the carrier in transporting goods delivered to it, they were destroyed or damaged by floods beyond the power of the carrier's control, the proximate cause of the injury is the flood and the carrier is not liable. ⁸⁹ The rule announced by those cases was relied upon in this court in the *Wald* case. In that case *Wald* bought a ticket over the defendant company's railroad from Cincinnati to New York City by the limited express and checked his baggage for transportation on the same train. The railroad company negligently failed to put the baggage on that train, but sent it on a later train, and it was destroyed by the Johnstown flood. The limited express upon which *Wald* rode and which should have carried his baggage reached its destination in safety. This court refused to follow the rule announced in the *Morrison* and *Denny* cases, and said: "A loss or injury is due to the act of God when it is occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight; and where property committed to a common carrier is brought by the negligence of the carrier under the operation of natural causes that work

its destruction, or is by the negligence of the carrier exposed to such cause of loss, the carrier is responsible."

The court quoted and approved the statement of the rule made by the supreme court of Missouri in *Wolf v. American Exp. Co.*, 43 Mo. 421, 97 Am. Dec. 406, in the following language: "The act of God which excuses the carrier must not only be the approximate cause of the loss, but the better opinion is that it must be the sole cause; and where the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active and co-operative cause, he is still responsible." Many authorities are cited holding this to be the rule. Appellant says the *Wald* case dealt with the rule as applicable to common carriers, and that a telegraph company is not a common carrier. So, also, were the courts dealing with common carriers in the *Morrison* case and the *Denny* case, cited by appellant. While the weight of authority is that telegraph companies are not common carriers and therefore insurers of the correct and prompt transmission and delivery of messages, it is held that they exercise a quasi-public employment, with duties ⁹⁰ analogous to those of common carriers, and are required to use a high degree of care and skill in the correct and prompt transmission of messages: *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38. The principle of the rule in the *Wald* case has been applied by this court in other cases not involving common carriers and loss resulting from the act of God: *City of Rock Falls v. Wells*, 169 Ill. 224, 48 N. E. 440; *Houren v. Chicago etc. R. Co.*, 236 Ill. 620, 127 Am. St. Rep. 309, 86 N. E. 611, 20 L. R. A., N. S., 1110; *City of Joliet v. Shufeldt*, 144 Ill. 403, 36 Am. St. Rep. 453, 32 N. E. 969, 18 L. R. A. 750.

In support of the second and third propositions of appellant's defenses it relies chiefly upon *Hadley v. Baxendale*, 9 Ex. 341, but we are of opinion the facts of this case bring it within the rule of *Postal Telegraph-Cable Co. v. Lathrop*, 131 Ill. 575, 19 Am. St. Rep. 55, 23 N. E. 583, 7 L. R. A. 474. The message sent by appellee to its agent related to an important business transaction. It disclosed the nature of the business to be the cancellation of insurance on paper-mill property. Appellant's agent could not have been ignorant of the fact that the prompt delivery of the message was an important matter. The mere fact that the telegraph was resorted to instead of the mails between points in the same state no farther apart than the cities from which and to which it was sent was sufficient to inform the agent of appellant that it was important to appellee's rights that the message be delivered with all reasonable speed, and that if this was not done it was liable to result in injury to appellee. Appellant had all the information necessary to charge it with damages resulting directly from a failure to deliver the message, and

under the rule announced in the cases in this state the appellee's loss is deemed to be the direct result of the negligence of appellant in failing to transmit and deliver to the sendee the message. That appellant was negligent is conceded, and its counsel in their brief assume that if the appellant had performed its duty the message would have been delivered early in the afternoon of the day it was sent; that the ²¹ insurance would have been terminated before the fire occurred, and that appellee would have sustained no loss by reason of the fire.

Considering the loss of appellee as the direct result of the negligence of appellant, which we think must be done under the decisions in this state, the liability would be the amount of the loss sustained by appellee, and not, as contended by appellant, the difference between the reasonable value of carrying the risk for the additional number of days and the amount of the unearned premium on the policy. In the Lathrop case the court said: "We think the reasonable rule, and one well sustained by authority, is, that where a message, as written, read in the light of well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, the company should be held liable for all the direct damages resulting from a negligent failure to transmit it, as written, within a reasonable time, unless such negligence is in some way excused." *Hadley v. Baxendale*, 9 Ex. 341, was relied upon by the telegraph company in that case as requiring the application of a different rule. In the opinion of the court in the Lathrop case a large number of cases are cited and commented upon, and while the decision is criticised and sought to be distinguished by appellant, in our opinion we could not adopt the rule insisted upon by it without overruling the Lathrop case, and we are not convinced that we would be justified in doing this.

In our opinion appellant was liable for appellee's loss, and the judgment of the appellate court is affirmed.

One may Recover Damages of a Telegraph Company for undue delay in transmitting and delivering a telegram, caused by the negligence of the company, although the message may, after the damage has been sustained, be delivered: *Western Union Tel. Co. v. Saunders*, 164 Ala. 234, 137 Am. St. Rep. 35. As to when the negligent failure of a telegraph company to deliver a message is the proximate cause of the death of a horse, see *Hendershot v. Western Union Tel. Co.*, 106 Iowa, 529, 68 Am. St. Rep. 313.

The Elements of Damages Recoverable from Telegraph Companies for a failure to transmit and deliver messages are discussed in the notes to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 778; *Kagy v. Western Union Tel. Co.*, 117 Am. St. Rep. 286, and in *Western Union Tel. Co. v. Merritt*, 55 Fla. 462, 127 Am. St. Rep. 169.

Knowledge of the Importance of a Telegram as affecting the question of damages is considered in the notes to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 785; *Kagy v. Western Union Tel. Co.*, 117 Am. St. Rep. 289; and in *Western Union Tel. Co. v. Merritt*, 55 Fla. 462, 127 Am. St. Rep. 169; *Baker v. Western Union Tel. Co.*, 84 S. C. 477, 137 Am. St. Rep. 848; *Western Union Tel. Co. v. Blackwell etc. Co.*, 24 Okl. 535, 138 Am. St. Rep. 893.

SEARS v. CITY OF CHICAGO.

[247 Ill. 204, 93 N. E. 158.]

STREETS—Held in Trust for the Public.—Whatever title a city has in its streets is held in trust for the public, whether it owns the fee or only an easement. The primary object of the trust is the interest of the public, which must always be paramount to all other interests. (p. 323.)

STREETS—Encroachment upon Rights of Public.—A city cannot grant away the rights of the public in its streets, nor can such rights be encroached upon by private individuals, with or without the consent of the municipality, to the detriment of the superior rights of the public. (p. 324.)

STREETS—Dedication—Recording Plat.—If title to the streets of a city is acquired by dedication of the owner in accordance with the statute relating to plats, the acknowledgment and recording of such plat have the effect, both in law and equity, of conveying a fee to the city of such portions of the premises platted as are noted on the plat as donated to the public. (p. 324.)

STREETS.—An Abutting Lot Owner on a Street which has been dedicated to the public in accordance with the statute has the right of ingress and egress, and an easement for light and air in addition to the right to use the street in common with all other persons, but he has no right to an exclusive appropriation of the street, either on the surface or above or below it, without the consent of the municipality. (p. 324.)

STREETS—Use not Inconsistent With Public Purpose.—A city may, under the power of exclusive control of its streets, allow any use of them which is not inconsistent with the public objects for which they are held, and may regulate such use and fix a reasonable compensation to be paid for the same. (p. 324.)

STREETS—Power of City to Control and Regulate.—Where a city owns the fee to its streets, its power with respect to the control and regulation of them is subject to no limitation except that the exercise thereof shall be reasonable and in a manner to safeguard the paramount right of the public to the free and unobstructed use of the street for the purpose for which it was dedicated. (p. 324.)

STREETS—Use by Abutting Owner Who Holds Fee.—An abutting lot owner who owns the fee to the center of the street has the right to make any reasonable use of the same which does not interfere with the full enjoyment of the easement that is held for the use of the public; and the city cannot compel him to pay for thus using his own property. (p. 325.)

STREETS—Use of Subsidewalk Space.—An Ordinance providing that no person shall use space underneath the surface of a street, or construct or maintain any structure thereunder, without a permit

from the city; that every applicant for a permit shall file a bond to save the city harmless from any claim for damages arising out of the use of such space or structure; and that a stated compensation shall be paid for such use, is valid when applied to the owners of lots located upon streets in which the city owns the fee, but cannot be enforced against the owners of lots abutting upon streets wherein the city has only an easement. (pp. 320, 325.)

STREETS—Title Acquired by Condemnation Proceedings.—The acquisition of a street by condemnation proceedings leaves the fee to the center of the street in the abutting owners, subject to the easement held by the city for the use of the public. (p. 325.)

DEDICATION.—The Plat of School Section Addition to Chicago, not having been executed according to the statute then in force, amounted merely to a common-law dedication, and the abutting owners took the fee to the center of the streets marked thereon. (p. 326.)

CONSTITUTIONAL LAW—Act to Cure Plat—Prior Conveyances.—The curative act of 1843, intended to remedy omissions and defects in the plat of School Section Addition to Chicago, did not vest the fee in the streets of the city. The title of the abutting lot owners who purchased lots in that addition before the passage of the act had become vested to the center of the streets, and that act could not disturb the vested rights acquired to the center of the streets by deed from the owner. (p. 326.)

STREETS—Private Use by Abutting Owner.—The title of an abutting owner to the center of the street, where the city does not own the fee, is not a contingent interest, or a mere expectancy, but is a present subsisting ownership of the fee, subject to the easement of the public, which he may subject to any private use he sees fit, in connection with his premises, which is consistent with the dominant rights of the public in the easement. (p. 326.)

CONSTITUTIONAL LAW—Retrospective Statute.—Any statute which, acting retrospectively, deprives one of vested property rights is unconstitutional. (p. 327.)

Wilson, Moore & McIlvaine, for the appellant.

Edward J. Brundage and William D. Barge, for the appellee.

210 VICKERS, C. J. Herbert M. Sears, as trustee under the will of Caroline B. Sears, claiming to be the owner of lots 1, 6 and 7, in block 138, of School Section addition to the city of **211** Chicago, filed a bill in equity in the circuit court of Cook county against the city of Chicago to enjoin said city from enforcing an ordinance passed February 5, 1906, prescribing the terms and conditions under which abutting property owners might use the subsidewalk space adjacent to their lots for private purposes in connection with the buildings located on such lots.

This case is one of a number brought by different property owners in order to test the validity of the ordinance under the varying facts connected with the different pieces of property involved. So far as the same is necessary to a proper understanding of the questions involved in the present case the ordinance challenged by the bill is as follows:

"Sec. 1. No person shall use any space underneath the surface of any street or other public ground in this city, or construct or maintain any structure thereunder, without first obtaining a permit so to do from the commissioner of public works of the city."

"Sec. 3. Every applicant for such a permit shall file with his application his bond in the penal sum of ten thousand dollars, with surety or sureties to be approved by said commissioner of public works; and such bond shall be conditioned that the person to whom such bond shall be issued, his heirs, successors or assigns, will save and keep the city free and harmless from any and all loss or damage, or claim of damage, arising from or out of the use of the space or structure therein mentioned, and for the maintenance of the street, alley or other public way, or the sidewalk over such space, as the case may be, . . . and for the prompt and full payment of the compensation hereunder required during his ownership of said property, so long as said permit shall be outstanding.

"Sec. 4. When the space so used does not extend more than fifteen feet below the surface of the street, alley, way or ground over the same, the person, firm or corporation making, using or maintaining any such structure or using ²¹² space underneath the surface of any street, alley, public way or public ground, shall render to the city as the annual compensation for such use, whenever the adjoining property is subject to general taxation, a sum equal to four per cent of the amount determined by multiplying the number of square feet of surface over the space so used by a sum equal to one-tenth of the land value of the average square foot in the lot abutting on such space, as fixed by the last assessment thereof for general taxation by the state or county authorities: Provided, however, that in every case the annual compensation shall be at least ten dollars."

"Sec. 6. If any person now using any space underneath any street, public alley, sidewalk or public way shall fail to take out a permit for such use, as herein provided, within ninety days after this ordinance is in effect, then the commissioner of public works shall proceed to remove every such structure and close the space therein."

"Sec. 11. Nothing in this ordinance contained shall be held or construed to apply to any person now using any such space underneath the surface of any street or other public ground according to the terms of any ordinance heretofore passed which requires the payment of compensation for such use if such person is making such payments, nor so long as such payments are made according to the terms of such ordinance."

The property involved in this case is located on the southeast corner of Dearborn and Van Buren streets and is

bounded on the east by Plymouth court. Van Buren street runs east and west. Dearborn street runs north and south, and intersects Van Buren at the northwest corner of lot 1 involved in this case. Upon these lots is located an office building known as the Old Colony building, which is seventeen stories high, and is one hundred and forty-eight and one-half feet on Dearborn street and sixty-eight feet on Van Buren. The building has six elevators and is occupied by about one hundred and fifty tenants. The space under the sidewalk on Van Buren street is used for ²¹³ the elevator machinery, while that under Dearborn street and Plymouth court is used for fuel and ashes, and as a means of bringing fuel into the building and conveying ashes and other refuse out of the same.

The contentions of the parties may be briefly stated, as follows: The complainant below contends that he is the owner of the fee to the center of the streets and to the center of Plymouth court, subject to the easement in the public, and that as such owner he has the right to use the subsidewalk space for private purposes in connection with his building, and that the ordinance imposing upon him a tax for the use of such space is illegal and void. On behalf of the city it is contended that it owns the fee in the streets adjacent to complainant's property and in Plymouth court, and in the second place it is contended by the city that, whether it has a fee or only an easement in the said streets, it has the power, under the statute, to pass the ordinance in question.

The circuit court sustained the bill and granted an injunction against the enforcement of the ordinance in so far as it affected the Dearborn street side of the complainant's property, but held as to Van Buren street and Plymouth court the city owned the fee and that the ordinance was a valid exercise of its power of control over highways. The complainant below has appealed from the decree dismissing his bill as to Van Buren street and Plymouth court, and the city has assigned cross-errors calling in question that portion of the decree below which granted the relief prayed for as to Dearborn street. Since the rights of the city in each of these streets and in Plymouth court were acquired at different times and in different ways, it will be necessary to briefly state the manner in which the city's rights were acquired in each place.

Appellant's premises were originally a part of section 16, township 39 north, range 14 east of the third principal meridian, and were granted by the United States to the ²¹⁴ state of Illinois for the use of the inhabitants of the township in which the same were situated, for the use of schools. The proposed grant was accepted by the state of Illinois by ordinance duly passed August 26, 1818. Said section 16 was platted by a school commissioner appointed pursuant to an

act of the legislature of Illinois adopted January 22, 1829, which plat was recorded in the recorder's office of Cook county sometime between 1833 and 1836. That portion of the city of Chicago which was originally section 16 is known as School Section addition to Chicago. The school commissioner's plat of section 16 divided said section into one hundred and forty-two blocks, leaving open spaces, presumably for streets, but there is nothing on the plat to indicate what the spaces are intended for except figures indicating the width, which in some instances is forty feet and in others sixty-six feet. Block 138 in the School Section addition is three hundred and ninety-six feet north and south by three hundred and eight-seven feet and nine inches east and west. North of block 138 is an open space sixty-six feet wide, running east and west the entire length of said addition. East of said block there is also an open space indicated by the plat, but there is nothing to show its width or the purpose for which it was left. Truman G. Wright having acquired title to block 138, made a subdivision thereof, dividing the same into twenty-four lots, in 1836, a plat of which was filed for record in Cook county February 16, 1836. Lots 1, 6 and 7, in block 138, as shown by Wright's subdivision, are the premises belonging to the appellant. By Wright's subdivision of block 138 a street seventy feet wide is designated on the plat east of the property in question and one sixty-six feet wide north of said premises. The seventy foot space on the east is referred to in this record as Plymouth court, and the sixty-six foot street on the north is known as Van Buren street, and occupies the same place that was left open north of block 138 by the school commissioner's plat. Dearborn street, opposite the premises of appellant on the west, was opened by the city by condemnation proceedings in July, ²¹⁵ 1887, the eastern half of which was so located on appellant's lots.

So far as the right of the city in Plymouth court is concerned, it rests entirely upon the plat made by Truman G. Wright, but as to Van Buren street the city's right may rest upon either the plat made by the school commissioner or that made subsequently by Wright. If the plat of the school commissioner for any reason failed to vest the fee in Van Buren street in the city, the fee passed by the conveyance of block 138 to Wright to the center of the street, and he, having such fee, had the power to dedicate it, so far as his title extended, to the public by a properly executed plat when he subdivided block 138.

Whatever title the city has in its streets and other public grounds is held in trust for the public, and this is true whether it owns the fee or only an easement. The interest of the public, which is the primary object of the trust, must always

be paramount to all other interests. The city cannot grant away the rights of the public, nor can they be encroached upon by private individuals, with or without the consent of the municipality, to the detriment of the superior rights of the public: *Elliott on Roads and Streets*, sec. 17; *State v. Murphy*, 134 Mo. 548, 56 Am. St. Rep. 515, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369; *Matthiessen & Hegeler Zinc Co. v. City of La Salle*, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81. Where the title to its streets is acquired by dedication of the owner in accordance with the statute relating to plats, the acknowledgment and recording of such plat have the effect, both in law and in equity, of conveying a fee simple title to the city of such portions of the premises platted as are noted on the plat as donated to the public: *Chicago etc. R. R. Co. v. City of Joliet*, 79 Ill. 25. Where the city owns the fee in a street, the abutting lot owner has the right of ingress and egress and an easement for light and air in addition to the right to use the street in common with all other persons: *Jones on Easements*, sec. 489. The owner of an abutting lot ²¹⁶ upon a street which has been dedicated to the public in accordance with the statute has neither the possibility of reverter, nor any title, right or interest, in law or equity, under which he can justify an exclusive appropriation of any portion of the said street, either on the surface or above or below it, without the consent of the municipality: *Union Coal Co. v. City of La Salle*, 136 Ill. 119, 26 N. E. 506, 12 L. R. A. 326.

Whatever may be the rule in other jurisdictions, the law is settled in this state that a city may, under the power of exclusive control of its streets, allow any use of them which is not inconsistent with the public objects for which they are held: *Nelson v. Godfrey*, 12 Ill. 20; *Gridley v. City of Bloomington*, 68 Ill. 47; *Chicago etc. Ry. Co. v. People*, 91 Ill. 251; *City of Quincy v. Bull*, 106 Ill. 337; *Chicago Municipal Gas Light Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616; *Gregsten v. City of Chicago*, 145 Ill. 451, 36 Am. St. Rep. 496, 34 N. E. 426; *West Chicago Masonic Assn. v. Cohn*, 192 Ill. 210, 85 Am. St. Rep. 327, 61 N. E. 439, 55 L. R. A. 235; *Dillon on Municipal Corporations*, 541-551. And it is equally well settled that the city may regulate such use and fix a reasonable compensation to be paid for the same: *McCarthy v. City of Chicago*, 53 Ill. 38; *City of Chicago v. Norton Milling Co.*, 196 Ill. 580, 63 N. E. 1043; *Lobdell v. City of Chicago*, 227 Ill. 218, 81 N. E. 354. The power of the municipality in this regard in cases where it owns the fee in its streets is subject to no limitation except that its exercise shall be reasonable and in a manner to safeguard the paramount right of the public to the free and unobstructed use of the street for the purpose for which it was dedicated. In cases, however, where

the municipality only has an easement in its streets and the fee remains in the abutting lot owners, the relative rights of the municipality and the abutting lot owners are to be determined under entirely different rules of law. When private property is taken for public use, the general rule is that it can only be taken to the extent that the public use to which it is to be applied requires. A law could not be sanctioned which would permit a corporation ²¹⁷ to condemn private property for the sole purpose of applying such property to a purely private use. The law provides a method by which the owner of real estate which is platted into town lots may, if he so desires, convey a determinable fee to the municipality by the execution of a properly acknowledged and recorded plat. When this course is adopted, the owner, having the power to make any disposition of his property he sees fit, can invest the municipality with the fee. If such statutory plat is made and recorded, all persons who subsequently purchase lots according to such plat will be presumed to have notice that they acquire no rights in the public streets except those already referred to. On the other hand, one buying a lot abutting upon a street in which the city has only an easement must be presumed to purchase with knowledge of the fact that a conveyance of the abutting lot carries the title to the center of the street, subject only to the easement of the public therein. The abutting lot owner, thus being the owner of the fee to the center of the street upon which his lot is located, has the right to make any reasonable use of the same which does not interfere with the full enjoyment of the easement which is held for the use of the public: 3 Kent's Commentaries, 12th ed., 433; Perley v. Chandler, 6 Mass. 454, 4 Am. Dec. 159; Tucker v. Tower, 9 Pick. 109, 19 Am. Dec. 350. It is as unreasonable as it is illogical to say that the abutting lot owner who owns the fee in a street, subject only to the easement of the public, must pay the city for the privilege of using his own property in a manner that in no way interferes with or disturbs the full enjoyment of the easement.

It follows, we think, from the foregoing principles of law, that the validity of the ordinance involved cannot be questioned when applied to the owners of lots located upon streets in which the city owns the fee, and it is equally clear that the ordinance cannot be enforced against the owners of lots abutting upon streets wherein the city has only an easement. In accordance with these views the holding ²¹⁸ of the court below in regard to Dearborn street was correct. As we have already seen, that street was acquired by condemnation, which, under the law, left the fee to the center of the street in the abutting owners: Illinois Cent. R. R. Co. v. City of Chicago, 138 Ill. 453, 28 N. E. 740; Reed v. Ohio etc. Ry. Co., 126 Ill. 48, 17 N. E. 807; Cooley's Constitutional Limitations, 550.

The rights of the city in Van Buren street and Plymouth court were acquired under plats neither of which was executed in accordance with the statute. So far as the plat made by the school commissioner is concerned, counsel for the city admit that it does not comply with the law of 1833 providing for the recording of plats, which was in force at the time the plat was recorded. This plat was before this court in the case of Sanitary District v. Pittsburgh etc. Ry. Co., 216 Ill. 575, 75 N. E. 248, and it was there held that the plat of School Section addition, not having been executed according to the statute then in force, amounted merely to a common-law dedication, and that the abutting lot owners took the fee to the center of the streets marked thereon. The city contends that the curative act of 1843 removes all legal objections to this plat and gives it the same effect it would have had if the law of 1833 had been complied with in the first instance.

The curative act relied on, so far as it concerns this plat, is as follows: "That the recorder of the county of Cook is hereby directed to certify upon the maps or plat of the school section recorded in his office in book A page 315, that the same is the plat of the School Section addition, an addition to the town of Chicago, and to make such other certificates upon said maps as the common council of Chicago shall direct to remedy any omission or defect in the same, and the said plat or map, when so certified, is hereby declared and made good, valid and legal for all purposes whatever, any omission or defect in the same to the contrary notwithstanding, and the same shall hereafter be ²¹⁹ deemed good, valid and legal and all omissions and defects in the same cured by this law and the common council of such city are hereby authorized to cause said school section to be resurveyed and the same run out so as to correspond with said plat."

This act is relied on by the city, and it is strenuously contended that it had the effect of vesting the fee in the streets in the city. To this we cannot assent. The title of the abutting lot owners who purchased lots in the School Section addition prior to the passage of the act of 1843 had become vested to the center of the streets, and to give the act of 1843 the effect contended for would be to deprive such abutting owners of their property without due process of law and would be a taking of private property for public use without compensation. The title of the abutting owner to the center of the street where the city does not own the fee is not a contingent interest or a mere expectancy, but is a present subsisting ownership of the fee, subject to the easement of the public, which he may subject to any private use he sees fit, in connection with his premises, which is consistent with the dominant rights of the public in the easement. Any

statute which, acting retroactively, would deprive one of property rights thus vested would be unconstitutional and void: McGhee on Due Process of Law, p. 153 et seq. and cases cited in notes. Appellant's lots had been sold and patents issued thereto fully five years before the act of 1843 was passed, hence that act could not disturb the vested rights acquired to the center of the streets by deed from the owner.

What has already been said disposes of all legal questions arising on this record. The plat made by Truman G. Wright in 1836, on which Plymouth court and Van Buren street appear as public grounds, was not executed in conformity to the statute of 1833. This is admitted by counsel for the city. Appellant being the owner in fee of all of the subsidewalk space which he is using in connection ²²⁰ with his building, and there being no pretense that he is in any way interfering with the rights of the public, his bill for an injunction against the enforcement of said ordinance against him should have been sustained. The court below therefore erred in dismissing the appellant's bill as to Van Buren street and Plymouth court. The decree in this regard is reversed and the cause remanded, with directions to enter a decree in accordance with the prayer of the bill.

A City Holds Its Streets in Trust for the Public, and cannot put them to any use inconsistent with street purposes: Note to Carson v. City of Genesee, 108 Am. St. Rep. 139; it has no power to grant a street or any portion thereof to an individual or a corporation for private purposes or convenience: Note to Commonwealth v. Morrison, 125 Am. St. Rep. 345.

The General Rights of the Public and of Abutting Owners in a Street are discussed in the note to Commonwealth v. Morrison, 125 Am. St. Rep. 344; and in Donahue v. Keystone Gas Co., 181 N. Y. 313, 106 Am. St. Rep. 549; White v. Northwestern etc. R. R. Co., 113 N. C. 610, 37 Am. St. Rep. 639. Every owner of a lot abutting on a public street has an easement for the free admission of light and air, and for ingress to and egress from the property: Gans & Sons Mfg. Co. v. Railroad Co., 113 Mo. 308, 35 Am. St. Rep. 706; Sherlock v. Kansas City Belt Ry. Co., 142 Mo. 172, 64 Am. St. Rep. 551; O'Brien v. Central Iron etc. Co., 158 Ind. 218, 92 Am. St. Rep. 305.

The Owner of a City Lot is Presumed to Own the Fee to the Center of the Street: Dell Rapids etc. Co. v. Dell Rapids, 11 S. D. 116, 74 Am. St. Rep. 783; and the city is presumed to have an easement only: White v. Northwestern etc. R. R. Co., 113 N. C. 610, 37 Am. St. Rep. 639.

The Fee of a Street, Acquired by a Common-law Dedication is in the original proprietor or his grantees, burdened with the public easement, and upon a vacation thereof reverts to them; but a statutory dedication operates as a conveyance and vests the legal title to the soil of the street in the city: Note to Heinrich v. City of St. Louis, 46 Am. St. Rep. 495.

To Effect a Complete Dedication of Streets and alleys by the making, acknowledging and recording of a town plat, the acceptance of the municipal corporation is necessary; and until acceptance, the fee does not vest in the corporation, but remains in the original proprietor: Note to Osage City v. Larkin, 10 Am. St. Rep. 189. As to dedication

by maps, plats, etc., see, also, *People v. Holladay*, 93 Cal. 241, 27 Am. St. Rep. 186. A conveyance of lots before the acceptance of a plat carries the title to the center of the street: *Thompson v. Maloney*, 199 Ill. 276, 93 Am. St. Rep. 133.

The Dedication of Land to Use as a Public Street is the subject of a note to *Benton v. St. Louis*, 129 Am. St. Rep. 576.

As to the Construction of Vaults Under Streets or Alleys, see *Gregsten v. City of Chicago*, 145 Ill. 451, 36 Am. St. Rep. 496; and as to the construction of a subway for public travel below the surface of a public street, see *Sears v. Crocker*, 184 Mass. 586, 100 Am. St. Rep. 577.

The Power of a City to Charge for the Use of Subsidewalk Space has been considered in other late Illinois cases, brought by different property owners, each raising for decision the right of the city of Chicago to adopt and enforce an ordinance requiring property owners to pay compensation for the use of the space underneath the sidewalks adjoining their premises, and the same conclusion reached in each as in the principal case. Thus, if the city owns the fee of a street, it has power to charge an abutting owner a reasonable compensation for the use of subsidewalk space adjoining his lot: *Ryerson v. City of Chicago*, 247 Ill. 185, 93 N. E. 162.

The same sections of the same ordinance involved in the principal case were considered in *Tacoma Safety Deposit Co. v. City of Chicago*, 247 Ill. 192, 93 N. E. 153, holding that a city has power, where the fee of a street is in the city, to contract for the use of space beneath the public streets of the city; that it may require persons who use subways beneath sidewalks adjoining their property to pay for the use of such space; and that it can provide for such use, and regulate the manner thereof, and the compensation to be made therefor, by ordinance, in those streets in which it holds the fee, subject at all times to the right to reclaim the portion of the street then in use when the necessities of the public may require, but that, where the fee of the street is in an abutting lot owner, the city is without power to pass an ordinance requiring persons who use subways beneath sidewalks adjoining their property to pay compensation for the use of such space. If the fee of the street is in the city, an approval of building plans of the owner of an abutting lot, by the building department of the city, though such plans provide for the construction of subways beneath the sidewalks adjoining the premises of such owner, does not estop the city from afterward requiring the owner to remove subsidewalk structures, or to pay to the city compensation for the use of the space beneath the sidewalk in the street, which belongs to the city. Such approval amounts merely to a license to construct a subway, and may be revoked by the city, upon the owner's refusing to pay for the space occupied: *Tacoma Safety Dep. Co. v. Chicago*, 247 Ill. 192, 93 N. E. 153.

The same sections of the ordinance involved in the principal case were also considered in *Williams v. City of Chicago*, 247 Ill. 240, 93 N. E. 165, holding that the city of Chicago owns the fee of streets in the Fort Dearborn addition; and that the ordinance requiring abutting lot owners to pay compensation for the use of subsidewalk space in front of their property is valid as to streets in which the city owns the fee, but that it cannot be enforced against the owners of lots abutting upon streets in which the city has only an easement.

CITY OF CHICAGO v. PITTSBURGH, FT. WAYNE AND
CHICAGO RAILWAY COMPANY.

[247 Ill. 319, 93 N. E. 307.]

MUNICIPAL CORPORATIONS—Building of Railway Viaducts.
In granting to a railway company the right to construct its railway in a city, the municipal authorities may lawfully require the company to construct and maintain proper crossings at streets, alleys, and highways; or, if the safety and security of the public require, to erect and maintain viaducts with proper approaches thereto. (p. 331.)

MUNICIPAL CORPORATIONS—Approach to Railway Viaduct.
Ordinarily, an approach to a viaduct in a city is considered a part of the viaduct; but what is a viaduct proper and what is an approach, where one begins and the other ends, and what is a street or highway as distinguished from the approach, are more questions of fact than of law, and sometimes not easy to decide. They must be determined by what is reasonable in the particular case. (pp. 331, 332.)

MUNICIPAL CORPORATIONS—Approach to Railway Viaduct.
A railroad company must keep and maintain its crossings so that they will continue to meet the needs and requirements of an increasing population in respect to the safety of persons and property; but this does not necessarily require it to keep and maintain that which is, for every practical purpose, a street or highway, even though incidentally it is used as a part of the ascent or approach to reach a viaduct. (p. 332.)

MUNICIPAL CORPORATIONS—Approach to Railway Viaduct.
A railway company cannot be compelled by a city to repave the surface of a street, where the grade thereof, for an entire block, has been raised, from building line to building line, to the necessary height to conform to the ascent to a railroad viaduct, and where the surface has been paved, manholes provided, curbing set, and sidewalks built. Such ascent having, except for the slope or grade, all the appearances of a city street, must be regarded as a street and not merely as an approach to the viaduct. (p. 334.)

Loesch, Scofield & Loesch, for the appellant.

Edward J. Brundage, corporation counsel, and Chas. M. Haft, for the appellee.

320 CARTER, J. This is an appeal from a judgment for six thousand three hundred and seventy-seven dollars and two cents entered against appellant in the municipal court of Chicago May 20, 1910. The judge by whom the case was heard certified that the rights of the respective parties depended upon the validity of a municipal ordinance, and the public interests required that the appeal should be taken directly to this court.

The city of Chicago, October 21, 1907, passed an ordinance directing appellant to repave Eighteenth street between the center line of Canal street and the east line of Mechanic street, either with granite block or standard pavement, put in new curbing, manholes, and such accessories as are incident to the repavement of streets, and to lay new sidewalks. The ordinance further provided that if appellant failed to enter

upon the performance of the work within seven days the commissioner of public works should perform the work therein specified and charge the same to appellant, to be recovered by a suit in a proper form of action. Appellant refused to do the work required by the ordinance, which was thereafter performed by the city, and this suit is brought to recover from appellant a portion of the cost.

Eighteenth street runs east and west. The appellant's tracks extend north and south. When said railroad entered the city of Chicago it crossed Eighteenth street at grade and so continued for years thereafter. The Chicago and Alton Railway Company parallels the tracks of the appellant ³²¹ company on the east side at this point. March 22, 1876, the city council of said city made an appropriation toward the erection of a viaduct over the tracks of appellant and the Chicago and Alton Railway at Eighteenth street. On April 15, 1878, the city council passed an ordinance directing the commissioner of public works to erect a viaduct over said tracks, with stone abutments and iron framework, requesting the appellant to contribute fourteen thousand dollars toward said construction, and that said viaduct be constructed under the general superintendence of the department of public works and the chief engineer of appellant. The ordinance provided that the city should maintain the approaches and the floor of said viaduct at its own expense and do all ordinary repairs. The viaduct was constructed in accordance with the terms of such ordinance. After this work was completed the grade of Eighteenth street from the center line of Canal street to the west line of Mechanic street was established. Canal street extends north and south across Eighteenth street, and Mechanic street, also extending north and south, is a short block east of Canal. The grade of Eighteenth street between the center line of Canal street and the west line of Mechanic street was obtained by depositing earth in the street from building line to building line, to the necessary height. The surface of this fill was paved, manholes were provided, curbing set and sidewalks built, and the street, except for the slope or grade of six or seven feet between Canal and Mechanic streets, is to all appearances a city street. East of Mechanic street the approach to the viaduct is constructed of planking and a substructure of woodwork or iron. On the south side of Eighteenth street, between Canal and Mechanic streets, stands a large business building, occupying the entire distance between said streets and abutting on the sidewalk on Eighteenth street. At the northwest corner of Mechanic and Eighteenth streets stands a business house built to the street line and abutting on the sidewalk ³²² on said streets. Both of these buildings conform to the grade of the street as now established. Appellant does not own any property

on Eighteenth street between Canal and Mechanic streets, and has no interest therein, either directly or indirectly, all such property being owned by private interests for business purposes. No question is raised on this record as to paving the street or keeping up the approach east of Mechanic street.

It is insisted by the city that all of Eighteenth street from Canal street to the viaduct proper over the railways, including pavement, manholes, catch-basins, curbing and sidewalks, is a part of the approach to said viaduct and therefore a part of the viaduct, and for that reason the city can compel appellant to keep and maintain all of said approach in such condition of repair as the convenience of the public or the safety of lives and property may require; that notwithstanding the ordinance under which the viaduct was constructed provided that the city should maintain and repair these approaches, the city authorities by said ordinance could not waive the authority of the city, under its police power, to require appellant to maintain and repair said viaduct, including its approaches. The conclusion that we have reached in this matter renders it unnecessary for us to consider that question. There can be no doubt that under the provisions of the ordinance granting the appellant the right to construct its railway in the city of Chicago, as well as under the statutes of the state concerning the control of railways, the public authorities can compel appellant to construct and maintain proper crossings at streets, alleys and highways, or, if the safety and security of the public require, to erect and maintain viaducts with proper approaches thereto.

Under the common law, and generally under the statutes in this country, a bridge includes the abutments and such approaches as will make it accessible and convenient for public travel. It has been held in some cases that ³²³ whether a particular bridge includes approaches depends on the circumstances in which the word "bridge" is used: *State v. Illinois Cent. R. R. Co.*, 246 Ill. 188, 92 N. E. 814. What is true as to a bridge and its approaches is equally true of a viaduct and its approaches. Ordinarily an "approach," as that term is used, is considered a part of the viaduct. What would be regarded as approaches would depend largely upon the demands of the traveling public and "upon what would be reasonable under the circumstances and local situation in each case. It is manifest that they do not and should not, in all cases, include all that part of the right of way that is covered by the street or highway and is not immediately at the crossing": *City of Bloomington v. Illinois Cent. R. R. Co.*, 154 Ill. 539, 39 N. E. 478. What is a viaduct proper and what is an approach, where one begins and the other ends, and what is a street or highway as distinguished from the approach, are more questions of fact than of law and are some-

times not easy to decide: *Tolland v. Willington*, 26 Conn. 578. The material of which the approach was constructed might or might not have weight in deciding whether said approach was a part of the viaduct or of the street. If the driveway or approach to a viaduct was only of sufficient width for the use of teams in going over the viaduct, occupying a comparatively small part of the street or highway, and not of a character to be used for any other street purposes, the question whether it was constructed of permanent and lasting material or of material that would have to be replaced within a few years could have little weight in deciding the matter here under consideration. Such a structure, whether permanent or temporary, would ordinarily be held to be an approach and a part of the viaduct. If a viaduct were to be constructed in a depression some two or three blocks distant from the higher ground, and the public authorities and owners of adjacent property thought it wise to construct the connection with such viaduct for the entire ³²⁴ distance from the viaduct to the ridge, so as to make such connection all on the same level, whether such structure from the viaduct to the ridge would be considered a part of the approach or a part of the street would depend upon the character of the structure and the situation with reference to surrounding property. No one would contend that if the whole distance, for the full street width, from the viaduct to the ridge was filled in and made a solid street and the buildings on either side constructed along such street on that grade, the connection in question would be considered an "approach" to the viaduct, as that term is usually understood. On the other hand, if such structure were built up in the air and below it was a street bordered by buildings built at the street grade, such a structure might be held to be an approach to the viaduct. If the rise to a viaduct from the ordinary surface of the ground is not more than six or eight feet, it is not generally thought necessary to commence the ascent or approach more than a block away from the viaduct proper. If, however, the public authorities and the property owners along a street for three or four blocks all agree to distribute this grade of six or eight feet over said three or four blocks and have the pavement, curbs, sidewalks and buildings for that distance conform thereto, it could hardly be argued that the whole of such three or four blocks was a part of the approach, which the railway company constructing the viaduct would be compelled to maintain and keep in repair. As was said by this court in *City of Bloomington v. Illinois Cent. R. R. Co.*, 154 Ill. 539, 39 N. E. 478: "What is to be considered as the extent of the approaches to the railroad crossing must be determined by what is reasonable in the particular case." The railroad must keep and maintain its crossings so that

they will continue to meet the needs and requirements of an increasing population in respect to the safety of persons and property (*Northern Pacific Ry. Co. v. Duluth*, 208 U. S. 583); but this ³²⁵ does not necessarily require the railroad to keep and maintain that which is for every practical purpose a street or highway, even though incidentally it is used as a part of the ascent or approach to reach the viaduct. The railroad company in *State v. St. Paul etc. Ry. Co.*, 98 Minn. 380, 120 Am. St. Rep. 581, 108 N. W. 261, 28 L. R. A., N. S., 298, 8 Ann. Cas. 1047, was compelled, under the police power of the state, to erect and maintain a viaduct and long approaches over its railroad. But the same court held in *State v. Northern Pac. Ry. Co.*, 99 Minn. 280, 109 N. W. 238, 110 N. W. 975, that there were reasonable limitations upon the liability of the railway company to maintain and repair the so-called viaduct approaches; that where a part of these approaches was filled in permanently the full width of the street, resulting in a mere raising of the street grade, such permanently filled portions of the improvement constituted no part of the viaduct or "approaches," and that the curbing, paving and sidewalk upon those portions could not be charged to the railroad company.

This court decided in *People v. Illinois Cent. R. R. Co.*, 235 Ill. 374, 85 N. E. 606, 18 L. R. A., N. S., 915, where the railroad company had elevated its tracks and constructed a subway at a certain point for a street, that under the provisions of its charter (similar to the provisions of appellant's charter) and the general police power resting in the state, under the principles of law here invoked, the city could not require the railroad to maintain the pavement of the subway or its approaches. The situation of Eighteenth street between Canal and Mechanic streets is very similar to that of the approaches to the subway in the case last referred to. The reasoning of this court in that case as to the authority of the city, under its police power, to compel the railroad company to pave the subway and approaches applies with equal force to the authority of the city in this case to compel appellant, under the police power, to pave Eighteenth street between Canal and Mechanic streets.

³²⁶ It is insisted by counsel for the city that *McFarlane v. City of Chicago*, 185 Ill. 242, 57 N. E. 12, and *City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39, are controlling in favor of the city on the questions here involved. We cannot so hold. The basis of those decisions was, that there was a contract between the railroad company and the city that in consideration of certain privileges granted to said company it should construct, maintain and keep in repair approaches to certain viaducts, and that because of such contract the property owners abutting on the said approaches

could not be compelled to pay for the paving of said approaches; that to compel the property owners to pay for the work which the railroad company had agreed to construct would be unjust. This is also the reasoning in *City of Chicago v. Newberry Library*, 224 Ill. 330, 79 N. E. 666, and the ordinance in each of these three cases, requiring the property owners to pave the portions of the street there in question, was held unreasonable and void. These decisions do not support the contention of the city.

Whether Eighteenth street between Canal and Mechanic streets should be repaved and kept in repair by special assessment or by general taxation is not before us for decision. The argument of counsel for the city that it would be unjust to the abutting property owners to compel them to repave this street because they have been damaged by the elevation of the street above its former grade is without force. If the property owners have been damaged by such elevation, according to the long-settled law of this state they have a remedy for such damages: *Chapman v. City of Staunton*, 246 Ill. 394, 92 N. E. 905.

On the facts in this record the city of Chicago was without authority to pass or enforce the ordinance in question requiring appellant to repave and keep in repair West Eighteenth street from Canal to Mechanic street. The judgment of the municipal court must therefore be reversed.

As to the Power to Compel a Railroad Company to Construct and Repair Viaducts and Approaches, see *Chicago etc. R. R. Co. v. State*, 47 Neb. 549, 53 Am. St. Rep. 557, and cases cited in the cross-reference note thereto. The power to compel a railway company to remove viaducts and to elevate railway tracks is discussed in *Chicago v. Pittsburgh etc. Ry. Co.*, 244 Ill. 220, 135 Am. St. Rep. 316.

In the Case of Murphy v. Chicago etc. Ry. Co., 247 Ill. 614, 93 N. E. 381, an ordinance of the city of Joliet, requiring the elevation of the tracks of six railroad companies was attacked by property owners, fronting on the street, as void, but the court held that the city council had authority, under its police power, to pass such an ordinance, and that the power of the council was limited in its exercise only by the requirement that the ordinance be reasonable. "In regulating and controlling the use of the streets and alleys within its limits and the maintenance and operation of railroads upon and over them," said the court, "the city is in the exercise of a governmental function. An ordinance granting authority for such purpose and fixing the rights and liabilities of the railroad companies is a legislative act, even though it may by the act of the companies become also a contract."

It was asserted in the bill that the passage of the ordinance was an abuse of power, for the reason that there was no necessity for the vacation of Joliet street, a part of which was vacated by the ordinance. "This," said the court, "is only the statement of the pleader's conclusion. The facts stated show that inconvenience will result to the appellants (the property owners), and their tenants; that probably their business will be much diminished and their property will greatly depreciate in value. These circumstances alone do not even tend to show that the ordinance is unreasonable. Such consequences

not infrequently result to some property from the elevation of railroad tracks, the building of viaducts, and the making of other improvements, but the improvements are not to be suspended on that account at the instance of the owner of the property affected. If damages result, of such a character that he is entitled to compensation, he may recover such damages, but he cannot call upon a court of equity to stop the improvement. It is not essential to the validity of the ordinance that the plan of elevating the tracks, making subways, and securing, protecting, and preserving the public safety is the best that could have been devised. It is sufficient if it is not unreasonable though some other plan might be thought to be a better one."

GOODRICH v. BUSSE.

[247 Ill. 366, 93 N. E. 292.]

MUNICIPAL ORDINANCE—Source of Power to Enact.—An ordinance may derive its validity from several different grants of power. Its validity does not necessarily depend upon any single clause or section of the statute concerning the power of the municipality to legislate upon the subject covered by the ordinance. (p. 337.)

PEDDLERS.—Ordinance Forbidding Outcry or Noise.—An ordinance prohibiting any person from advertising or calling attention to his wares by noise made by public outcry, or by means of devices for making a noise, may be sustained under a grant of power authorizing the city to regulate traffic and sales upon its streets, and to regulate, suppress, and prohibit hawkers and peddlers. (p. 337.)

PEDDLERS.—Ordinance Concerning—Discrimination.—An ordinance prohibiting any person from advertising or calling attention to his wares by noise made by public outcry, or by means of devices for making a noise, excepting in amusement grounds, parks, halls, and other places duly licensed by the city, is not, because of such exception, void for unjust discrimination against the business of hawking and peddling on the streets, as the differences in the conditions between the places mentioned furnishes a reasonable basis upon which to rest a classification. (p. 337.)

PEDDLERS.—Ordinance Concerning—Due Process.—An ordinance prohibiting any person from advertising or calling attention to his wares by noise made by public outcry, or by means of devices for making a noise, does not deprive hawkers and peddlers on the streets of property without due process of law. It is at most but a mere regulation of a business which, if not controlled, might become a public nuisance. (pp. 338, 339.)

Darrow, Masters & Wilson, for the appellant.

Edward J. Brundage, corporation counsel, Clarence N. Boord and John J. Beilman, for the appellees.

³⁶⁷ **HAND, J.** This was a bill in chancery filed by the appellant in the circuit court of Cook county, on behalf of himself and all other persons in the city of Chicago similarly

situated, for an injunction to restrain the mayor and police department of the city of Chicago from enforcing in said city, against him and all other persons engaged in peddling fruits and vegetables in the city of Chicago, the provisions of section 1450 of the municipal code of said city, as amended on November 29, 1909, in force January 1, 1910, which reads as follows:

"That excepting in amusement grounds, parks, halls and other places duly licensed in accordance with the ordinances of the city, no person shall make, or cause, permit or allow to be made, any noise of any kind by crying, calling or ^{see} shouting, or by means of any whistle, rattle, bell, gong, clapper, hammer, drum, horn or similar mechanical device, for the purpose of advertising any goods, wares or merchandise or of attracting the attention or inviting the patronage of any person to any business whatsoever."

The bill averred that appellant was engaged in peddling fruits and vegetables in the city of Chicago; that he owned and used in said business a horse and wagon; that he purchased fruits and vegetables upon Market street, in said city, from wholesale dealers, and that with his horse and wagon, loaded with fruits and vegetables, he drove through the streets and alleys of said city for the purpose of making sales of such fruits and vegetables; that in order to attract customers to his presence and the fruits and vegetables which he had for sale, it was necessary that he make a noise by calling or shouting; that eighteen hundred persons in the city of Chicago were engaged in peddling fruits and vegetables, and that in said city there were six thousand peddlers; that numerous prosecutions and convictions had been had under said ordinance, and that appellant had been arrested and was being prosecuted by the city authorities in the municipal court of the city of Chicago for a violation of said section of said municipal code. A demurrer was interposed by the city to the bill and sustained and the bill was dismissed for want of equity, and the judge before whom the case was tried having certified that the constitutionality of said section 1450 of the municipal code was involved, and that in his opinion the public interest required that the constitutionality of said section of the municipal code be passed upon by the supreme court, an appeal has been prosecuted to this court.

It is contended that said section of the municipal code is void, first, for unreasonableness; and secondly, by reason of the fact that it is in conflict with the constitutions of the state of Illinois and of the United States.

³⁰⁹ Section 1, of article 5, chapter 24, Hurd's Statutes of 1909, in part provides that the city council is empowered and authorized by ordinance: "Twentieth—To regulate traffic and sales upon the streets, sidewalks and public places. . . .

Forty-first—To license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals and other exhibitions, shows and amusements, and to revoke such license at pleasure.

It has been held by this court (*Gundling v. City of Chicago*, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230, and *Spiegler v. City of Chicago*, 216 Ill. 114, 74 N. E. 718) that an ordinance may derive its validity from several different grants of power, and that its validity does not necessarily depend upon any single clause or section of the statute concerning the power of the municipality to legislate upon the subject covered by the ordinance. We think, therefore, that the section of the municipal code now under consideration may be sustained under the grant of power to the municipalities of this state which authorizes them to pass ordinances for the regulation of traffic and sales upon the streets and alleys of such municipalities and to regulate, suppress and prohibit hawkers and peddlers within such municipalities.

The appellant contends that the ordinance is unconstitutional for the reason that it unjustly discriminates against the business of the appellant in this: That it permits a person whose business is confined to amusement grounds, parks, halls and other places duly licensed by the city, to advertise his wares by public outcry, while the appellant is prohibited from so advertising his fruits and vegetables upon the public streets and alleys of the city. We think this contention is without force, for the reason that the appellant is not prohibited from selling or advertising for sale his fruits and vegetables in the places excepted from the operation of the section of the code by public outcry if he desires to frequent those places for the purpose of making sales, and it would seem clear that the conditions which ³⁷⁰ surround amusement grounds, parks, halls, and other places duly licensed by the city so far differ from the conditions which are found in and upon public streets and alleys of the city of Chicago that such differences would furnish a reasonable basis upon which to rest a classification which would support said section of the municipal code. It is obvious that persons frequent the places excepted from said section of the municipal code for reasons wholly different from those which influence the citizen when he builds his house or place of business upon the public streets or uses the public alleys of the city. At the one place the visiting public anticipates and expects there will be noise and confusion, while upon the streets and alleys of the city, outside of the noise and confusion incident to travel, it may well be expected order and quiet will be maintained. Especially is this true in a great city like Chicago, where a large per cent of its working people perform

services at night and sleep during the day, and who, during their hours of rest in the daytime, should be protected by the city from being disturbed by the shrill outcries of fruit and vegetable peddlers as they pursue their calling throughout the city.

In *City of Chicago v. Brownell*, 146 Ill. 64, 34 N. E. 595, it was urged an ordinance was discriminatory which permitted book-making within the inclosure of incorporated fairs or race-track associations and prohibited book-making elsewhere. The court said: "If it were admitted that the ordinance, by implication, sanctions book-making, etc., within 'the actual inclosures of fair or race-track associations that are incorporated under the laws of the state,' etc., it does not appear that defendant in error, or anyone else, is discriminated against. If anyone can lawfully engage in that business in those places at such times, for anything appearing in this ordinance defendant in error and all other persons so disposed can do the same. On the principle that a city council may discriminate between different localities within the city limits in granting license to sell intoxicating ³⁷¹ liquors, 'making no distinction between persons, but between places, only,' as was held in *City of East St. Louis v. Wehrung*, 46 Ill. 392, this ordinance would be valid in any view which can be taken of it."

We do not think the ordinance is void by reason of the fact that the business of appellant is discriminated against, or will be discriminated against, by its enforcement.

Neither have we been able to discover that this ordinance is in conflict with the Federal constitution, in that it deprives the appellant of his property without due process of law. The appellant is not deprived of the right (as is contended by his counsel) to engage in the business of peddling fruits and vegetables upon the streets and alleys of the city of Chicago. The utmost the ordinance does is to regulate the business of the appellant, and all persons who are similarly situated, while pursuing their calling upon the streets and alleys of the city. This the city clearly has the right to do by the express provisions of the statute (*Lauder v. City of Chicago*, 111 Ill. 291, 53 Am. Rep. 625), and the ordinance being within the power conferred upon the city, we think it is valid.

While it may be conceded that the appellant has the right to sell fruits and vegetables upon the public streets and alleys of the city, clearly he has no vested property right resting in him to make a noise upon the streets of the city by advertising his fruits and vegetables by public outcry in such places, any more than he would have the right to advertise such articles by any other means upon the streets and alleys of the city the result of which would be to disturb the peace and quiet of the neighborhood in which he pursues his calling.

It is apparent the advertising of the articles usually handled by peddlers upon the streets and alleys of the city by public outcry, especially if six thousand persons were engaged at one time in so advertising the articles which they were offering for sale, would soon, if ³⁷² not immediately, become, if not controlled, a public nuisance and one which would urgently demand abatement.

The recent case of *New Orleans v. Fargot*, 116 La. 369, 40 South. 735, is directly in point. The charter of the city of New Orleans empowered and authorized the city council to pass ordinances "to preserve the peace and good order of the city" and "to suppress all nuisances": Acts 1902, p. 434. The city passed an ordinance which provided that peddlers and hawkers should not outcry for sale of fruits, game, fish and other products usually sold in the market, in the streets and thoroughfares of the city. In sustaining the ordinance the court said: "In the exercise of police power the city council has some discretion. The ordinance was not wanton nor arbitrary. A person engaged in peddling and hawking fruits has no right to bawl away in a manner that is annoying to others. The mere fact of selling was not the cause of the prosecution, but the manner of the peddler or hawker in offering to sell, which was, as we are led to infer by the charge and by the surrounding circumstances, loud and boisterous and within the terms of the ordinance, which sought to regulate the occupation and keep it in such bounds as that it would not be felt to be a nuisance. We are not concerned with the right or authority of the city council to prohibit the peddling and hawking of wares, but we do think that that body has the right and authority to put a stop to loud and boisterous outcries of over-zealous and anxious sellers of goods and wares on the public street."

From a careful examination of the questions involved in this case we are of the opinion section 1450 of the municipal code of Chicago is a valid ordinance and that the circuit court did not err in dismissing appellant's bill. The decree of the circuit court will therefore be affirmed.

A Statute Relating to the Manner of Sale by Hawkers or Peddlers, and not the right to sell, is a valid exercise of police power, and is not a violation of the right secured by the constitution of acquiring, possessing and protecting property: *Commonwealth v. Gardner*, 133 Pa. 284, 19 Am. St. Rep. 645. See, also, the note to *Hager v. Walker*, 129 Am. St. Rep. 276.

CITY OF CHICAGO v. MORELL.

[247 Ill. 383, 93 N. E. 295.]

MUNICIPAL CORPORATIONS.—An Action to Recover a Penalty for the violation of a municipal ordinance is a civil action. Although commenced by affidavit and warrant, it is not a criminal proceeding. (p. 340.)

MUNICIPAL CORPORATION.—The Penalty Imposed for the Violation of a municipal ordinance is not a debt within the meaning of the constitution. (p. 341.)

LICENSE.—The Wheel Tax Ordinance of Chicago is not unconstitutional for the reason that it is a revenue ordinance and imposes a penalty for its violation which may be enforced by arrest and imprisonment. (p. 341.)

LICENSE TO RUN AUTOMOBILE—Enforcement by Fine.—The city of Chicago has a right to enforce, by fine and imprisonment, the wheel tax ordinance of that city, which requires the taking out of a license as a prerequisite to the running of an automobile upon the streets of that city. Such prosecution is not a proceeding to collect the wheel tax upon automobiles, but to collect the penalty imposed by the ordinance for using an automobile without having complied with the ordinance. (p. 341.)

Kruse & Peden and R. C. Merrick, for the plaintiff in error.

Edward J. Brundage, Clarence N. Boord and Edwin H. Cassels, for the defendant in error.

³⁸⁵ **HAND, J.** The plaintiff in error, Andrew W. Morell, was convicted of a violation of the wheel tax ordinance of the city of Chicago in the municipal court of Chicago, and was fined twenty-five dollars and costs and ordered committed to the house of correction until the fine and costs were paid, and he has sued out this writ of error to reverse said judgment.

The only question raised upon this record is the constitutionality of the wheel tax ordinance of the city of Chicago. The position of the plaintiff in error, as defined in his brief, is, that said ordinance is unconstitutional for the reason that it is a revenue ordinance and imposes a penalty for its violation which may be enforced by arrest and imprisonment, which, it is argued, amounts to the enforcement and collection of a tax—which, it is said, is a debt—by arrest and imprisonment.

In *Harder's Fireproof Storage etc. Co. v. City of Chicago*, 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536, and in *Ayres v. City of Chicago*, 239 ³⁸⁶ Ill. 237, 87 N. E. 1073, the constitutionality of the wheel tax ordinance of the city of Chicago was sustained. The question here raised, however, was not there considered.

The law is well settled in this state that an action to recover a penalty for the violation of a municipal ordinance is a civil action, and, although commenced by affidavit and warrant,

it is not a criminal proceeding, and the penalty imposed for the violation of such an ordinance is not, within the meaning of the constitution, a debt: *Webster v. People*, 14 Ill. 365; *Town of Partridge v. Snyder*, 78 Ill. 519; *City of Chicago v. Kenney*, 35 Ill. App. 57; *Rich v. People*, 66 Ill. 513; *Kennedy v. People*, 122 Ill. 649, 13 N. E. 213. The proceeding in which plaintiff in error was arrested, fined and ordered imprisoned was not a proceeding to collect the wheel tax upon his automobile, as it seems to be his view, but it was a proceeding commenced against him to collect the penalty imposed by the ordinance for using his automobile upon the streets of the city of Chicago without having complied with the wheel tax ordinance, and had he paid the fine imposed upon him and the costs adjudged against him he would not have had the right to run his automobile upon the streets of the city of Chicago without first taking out a license under the wheel tax ordinance. We think, therefore, it is clear that the city had the right to enforce said ordinance against the plaintiff in error by fine and imprisonment.

The plaintiff in error relies upon *State v. Green*, 27 Neb. 64, 42 N. W. 913, and three other cases decided by the supreme court of Nebraska, to sustain his contention. The cases from that state referred to are out of line with the adjudications in this and other states (*St. Louis v. Sternberg*, 69 Mo. 289; *St. Louis v. Green*, 70 Mo. 562; *Johnson v. Macon*, 114 Ga. 426, 40 S. E. 322; *Salt Lake City v. Christensen Co.*, 34 Utah, 38, 95 Pac. 523, 17 L. R. A., N. S., 898; *Cousins v. State*, 50 Ala. 113, 20 Am. Rep. 290; *Matter of Guerrero*, 69 Cal. 88, 10 Pac. 261; *Stewart v. Potts*, 49 Miss. 749; ³⁸⁷ *People v. Mulholland*, 82 N. Y. 324, 37 Am. Rep. 568; *State v. Cohen*, 84 N. C. 771; *Ex parte Schmidt*, 2 Tex. App. 196; *Commonwealth v. Byrne*, 20 Gratt. 165); and they have been overruled by the supreme court of Nebraska in the late case of *Rosenbloom v. State*, 64 Neb. 342, 89 N. W. 1053, 57 L. R. A. 922.

The judgment of the municipal court will be affirmed.

The Registration and License of Automobiles is discussed in the note to *O'Brien v. People*, 108 Am. St. Rep. 218. Statutes and ordinances requiring the registration of automobiles and the taking out of a license by the owner or operator have been generally upheld as constitutional: Note to *Hager v. Walker*, 129 Am. St. Rep. 286.

RUSSELL v. ROBBINS.

[247 Ill. 510, 93 N. E. 324.]

DEEDS—Consideration, Parol to Deny or Explain.—A consideration duly acknowledged in a deed cannot be contradicted by parol for the purpose of destroying the legal effect of the deed as a conveyance; but it is legitimate and proper to show the actual consideration for the purpose of determining whether there was fraud for which the deed should be set aside in equity. (p. 345.)

FRAUD—Promise to Do Something in the Future.—Ordinarily a promise to do something in the future does not constitute a fraud, and a violation or disregard of such a promise does not amount to a fraud. (p. 345.)

DEED FOR FUTURE SUPPORT.—A Deed Made in Consideration of the grantor's future support belongs to a peculiar class, and is distinguishable from an ordinary deed of bargain and sale by the fact that the grantor gives up his property for the consideration of future support, which a court of equity cannot compel the grantee to furnish and a court of law cannot make good with damages. (p. 345.)

DEED FOR FUTURE SUPPORT.—Equity will Set Aside a deed made in consideration of the future support of the grantor, if satisfied that the contract was entered into with a fraudulent intent, or has been abandoned; but the failure to perform on the part of the grantee must be substantial and in relation to material matters; and, if the grantor prevents the grantee from carrying out the contract, there can be no presumption of fraud which will justify the setting aside of the deed. (p. 345.)

DEED FOR FUTURE SUPPORT—Construction.—If a deed is made upon the consideration that the grantee shall take the grantor to the former's home and support him during his natural life, the grantee is not bound to furnish support at any other place, nor to compensate other persons for taking care of the grantor during the time which he chooses to remain away from the grantee's home without any designated cause. (p. 346.)

DEED FOR FUTURE SUPPORT.—In Determining Whether Proper Support has been furnished by the grantee in a deed made in consideration of the future support of the grantor, the condition in life of the parties at the time the contract was made must be taken into consideration. (p. 346.)

McCaskill & Son, for the appellants.

Birmingham & Swiney and John Stuart Roberts, for the appellee.

⁵¹¹ **CARTWRIGHT, J.** On December 31, 1909, the appellee Catherine Williams Russell, filed her amended bill of complaint in the superior court of Cook county, asking the court to set aside a deed executed by her on January 18, 1901, of four acres of land in said county, and two subsequent deeds of the same land, to Mary A. Thompson, who is now Mary A. Robbins, one of the appellants. A tenant of Mrs. Robbins was made defendant with her, but he had no substantial interest, and in this opinion Mrs. Robbins will be called the defendant. The ground for asking a

cancellation of the deeds was that they were made in consideration of future support of the complainant, which was not furnished. The bill was answered, and the fact that the original deed was made in consideration that the defendant would support the complainant during her natural life was admitted, but the charge that the condition was not complied with was denied. The first deed conveyed the property, and the two subsequent deeds conveyed nothing but were of a confirmatory nature. The chancellor heard the evidence of the parties ⁵¹² and entered a decree finding that the defendant had failed, refused and neglected to furnish the complainant with reasonable care and support with the exception of about two and a half years after the making of the first deed, and had failed and refused to compensate other parties with whom the complainant had lived the remainder of the time, for such care and support, and setting aside the deeds in accordance with the prayer of the bill.

On the first Sunday in January, 1901, the defendant went with a friend to an old house on the four acres of land in question, where the complainant lived. The complainant was about seventy-three years old and feeble, and her husband had recently died. It was a very cold day, and they found the complainant lying on a broken-down bed, with no fire in the house and covered with a lot of rags. The house was a cheap, old concern, that cost perhaps three or four hundred dollars when built, and was without a foundation, with no glass in the windows and the kitchen doors broken down. The complainant was there alone in a house that was not habitable for a human being, and the defendant, who had worked for her four summers when the defendant was a child, and took some interest in her, proposed to take her home and take care of her. The defendant took something to the house for the complainant to eat and left it there, and the complainant said that if she would take her home she would give her her property, if there was any left. The defendant came back a few days afterward and took the complainant home with her, and on January 18, 1901, the complainant executed a deed of the four acres of land to the defendant. The deed recited the consideration of one hundred dollars and future support during the natural life of the complainant. The land was of comparatively little value, being covered with stumps, the greater part of it dry and the remainder a wet slough. The defendant was a working woman of the poorer class, who did washing for others. There was no complaint by ⁵¹³ the complainant of her treatment, but in June, 1902, she went on a visit to the home of the defendant's sister, where she remained about three months, during which time

the defendant called on her several times and asked her if she wanted to come home, but was told that she was well enough off where she was. The defendant and her sister had some difficulty, and the complainant filed a bill to set aside her deed but afterward dismissed the suit, and on September 2, 1902, executed a warranty deed reciting a consideration of eight hundred dollars and without any condition as to support. The defendant had put in windows, shingled the house, put water conductors on it, had a well put in, painted the house and put in new floors, and rented it for five dollars a month. The eight hundred dollars was figured up from these improvements and costs paid by the defendant and for some settlement in the probate court, and no other consideration was paid. The complainant then lived with the defendant for some time, but on some date, not made certain by the evidence, she went to the defendant's mother in law on an agreement that the mother in law would keep her for two weeks, until she could get a hired man. The complainant found the place pleasant for her and remained there about two years, during which time defendant took clothes and shoes to her and told her she could always come back when she wanted to. The defendant was married to George R. Robbins in October, 1903. He was a well-digger and later janitor of a public school. At the end of the two years the complainant, saying she was going to take a walk, left the mother in law and upon search was found at the home of the defendant's sister, where she remained two years. The defendant visited her at various times during the absence of the sister, with whom she was not on good terms, and tried to get her to come back. While the complainant was away from the defendant's home complainant had caused an attorney to place on record a notice that the second deed had been obtained by undue influence and was void for ⁵¹⁴ want of consideration. After two years with the sister the complainant went back to live with the defendant, and the two went to the office of an attorney, where the complainant executed a quitclaim deed on May 14, 1907, to remove the cloud created by the notice, and eight hundred dollars was named as the consideration in that deed. Complainant then continued to live with the defendant until August 1, 1908, when she walked out of the gate and disappeared. The defendant made search for her and left a notice at the police station, and she was found at the house of another woman who had once been a neighbor of the defendant and who was at enmity with her. A police captain went there to get her to return, but she declined to do so, saying that she had been all right at the defendant's house but did not like to stay there, and was

going to stay with the other woman. While at this other woman's house the complainant filed this bill, and while there she suffered a stroke of paralysis. About the middle of May, 1910, she came back to the defendant's and was living there at the time of the hearing. The complainant was called to the stand and said that she was eighty-two or eighty-three years old; that she was living with the defendant and had made a deed of the property to her; that she liked it at the defendant's very well, and she repudiated her solicitor in the case. The chancellor being of the opinion that she was incapable of testifying, had her removed from the witness stand and appointed a guardian ad litem for her.

The deeds recited money considerations, from which it is argued that they could not be set aside because the complainant could not dispute the payment of such considerations. It is true that a consideration duly acknowledged in a deed cannot be contradicted by parol for the purpose of destroying the legal effect of the deed as a conveyance: *Kimball v. Walker*, 30 Ill. 482; *Illinois Central Ins. Co. v. Wolf*, 37 Ill. 354, 87 Am. Dec. 251; *Redmond v. Cass*, 226 Ill. 120, 80 N. E. 708. The legal effect of the deeds is not questioned in this case, but ⁵¹⁵ it is admitted that they were sufficient to transfer the legal title, and it was legitimate and proper to show the actual consideration for the purpose of determining whether there was fraud for which the deeds should be set aside in equity. Even on the face of the first deed which conveyed the property, the future support was the material part of the consideration. It is also true, as claimed, that ordinarily a promise to do something in the future does not constitute a fraud, and a violation or disregard of such a promise does not amount to a fraud; but deeds such as those in question in this case belong to a peculiar class, distinguished in the decisions of this court from ordinary deeds of bargain and sale in the fact that the grantor gives up his property for the consideration of future support, which a court of equity cannot compel the grantee to furnish and a court of law cannot make good with damages: *Frazier v. Miller*, 16 Ill. 48. If the evidence is such as to justify a conclusion that a contract of that kind was entered into with a fraudulent intent or has been abandoned, a court of equity will set aside the conveyance. The failure to perform on the part of the grantee must be substantial and in relation to material matters (*Pittenger v. Pittenger*, 208 Ill. 582, 70 N. E. 699), and if the grantor prevents the grantee from carrying out the contract there can be no presumption of fraud which would justify setting aside a deed: *Calkins v. Calkins*,

220 Ill. 111, 77 N. E. 102, 1 L. R. A., N. S., 393; Williams v. Langwill, 241 Ill. 441, 89 N. E. 642, 25 L. R. A. 932. The complainant in this case chose to remain away from the home of the defendant, and the defendant was not bound to furnish support at any other place. The chancellor found that the defendant had failed and refused to compensate other parties who took care of the complainant, but she was under no obligation to do so. The other persons who kept the complainant because they chose to do so—and two of them, perhaps, because of enmity toward the defendant—never had, or pretended to have, any claim against her. The defendant was not expected to pay in ⁵¹⁶ money for the support of the complainant or the services of other people which she could herself render.

In determining whether proper support was furnished, the condition in life of the parties at the time the contract was made must be taken into consideration. They were all poor people, and the complainant was not only unable to care for herself, but had no property that would have furnished her any support. Defendant was of the working class, and it was not anticipated by either that the support furnished would be different from or better than that pertaining to their station in life. The chancellor found that proper support was not furnished, and as he saw the witnesses and heard them testify he had better opportunities to judge of their credibility than we have, but after giving due consideration to that fact we are unable to agree with the conclusion reached. There was no evidence tending in any degree to show a failure on the part of the defendant to keep her contract from January 18, 1901, when the first deed was made, up to the summer of 1907, and the only testimony as to any facts occurring at that time came from two women who acknowledged their hostility and ill-feeling toward the defendant and manifested a desire to injure her, if possible. One of them, who did washing and house-cleaning, and at the time of the hearing was sweeping, cleaning and dusting for the bureau of charities, and who for seven months, beginning in the fall of 1907, occupied a building on the rear of defendant's lot, testified to want of support and bad treatment, and she was corroborated by her sister to some extent, but there was a very clear preponderance of evidence coming from disinterested parties that the complainant was well cared for according to the station in life of the parties and was well and comfortably clothed. The complainant was fickle and changeable, and would disappear from any place where she might be, without notice and apparently without cause. Both she and her husband had been addicted to the use of intoxicating ⁵¹⁷ liquors, and she habitually smoked a pipe. The evidence shows that she had a comfortable room

whenever she chose to stay with the defendant and was supplied with pipes and tobacco but not with liquor, and that she spent her time largely in smoking her pipe and did no work except such as she voluntarily did. Under the evidence in the record the decree cannot be supported upon any correct view of the law.

The decree is reversed and the cause remanded, with directions to dismiss the bill for want of equity.

Conveyances in Consideration of the Support of the Grantor by the Grantee is the subject of a note to *Davis v. Davis*, 130 Am. St. Rep. 1039. In *Meyer v. Meyer*, 247 Ill. 535, 93 N. E. 341, the court refused to set aside a conveyance, in the form of a contract, voluntarily made by a father to his son in consideration of the latter's agreement to care for and support the grantor and wife during their natural lives, where the evidence showed that the grantee had substantially and fairly complied with his contract. "Even were this not so," said the court, "and he had failed in some small particulars to treat his parents as he should have treated them under his contract, the court would not be warranted in setting the deed aside and wholly depriving appellant of all the fruits of his labor on that account. 'A slight or partial neglect on the part of one of the contracting parties to observe some of the terms or conditions of the contract will not justify the other party in abandoning or rescinding the same. A deed or contract made in consideration of the support of the grantors will only be set aside in equity where there has been an entire failure or refusal to perform the agreement, or at least such a substantial failure to perform the contract in respect to material matters as would render the performance of the rest a thing different from what was contracted': Quoting from *Pittenger v. Pittenger*, 208 Ill. 582, 70 N. E. 699.

THOMAS v. THOMAS.

[247 Ill. 543, 93 N. E. 344.]

WILLS—Rule Concerning a Devise to a Class.—The rule that where a devise is to a class, none will be permitted to take except such as are in esse at the time of distribution, is applicable in cases where the postponement of the period of distribution is for reasons personal to the devisees, or in cases where the language clearly indicates an intention that the remainder is to vest only in such members of the class as survive the period of distribution; but if there is nothing to show that the postponement is for any other reason than to let in a life estate, the rule is not applicable. (p. 349.)

WILLS—Vesting of Remainder.—If the Enjoyment of the estate, or the period of distribution, is postponed for the convenience of the funds of the estate, and not for reasons personal to the devisees, the remainder is vested. (p. 349.)

WILLS—Vesting of Remainder Devised to Class.—A remainder devised to a class will, unless a contrary intention clearly appears, vest in those members of the class in esse at the testator's death, notwithstanding the possibility of after-born children coming into the class as the estate vested will open up to let such children in, if

the postponement of the period of distribution appears to be for no other purpose than to let in a life estate. (p. 349.)

WILLS—Devise to a Class—Vested Remainder.—Where land was devised to the testator's daughter for life, at her decease to be divided among her children in fee, share and share alike; and the daughter had three children living when the testator died, but one of the children died intestate before the death of her mother, leaving her father, mother, and two brothers as her heirs, the remainder vested in the devisee's children immediately on the testator's death, and the deceased child's interest passed to her heirs. (p. 350.)

H. M. Kelly, for the appellants.

Butters & Armstrong, for the appellee.

544 VICKERS, C. J. This was a bill for partition, brought in the circuit court of La Salle county by appellee, John Thomas, against his two minor sons, who are appellants here, for the partition of about eighty-four acres of land. Appellee claimed that he owned a one-twelfth undivided interest in the real estate involved. Appellants by their answer denied that appellee had any interest in said land and claimed the entire estate. The court below, being of the opinion that John Thomas was the owner in fee of one-twelfth undivided interest, sustained the bill, rendered a decree for partition and appointed commissioners, who reported that the premises were indivisible, whereupon a decree for sale was entered. The only question presented for our consideration is whether the court properly found the interests of the parties.

Christian Eggert, the grandfather of appellants, died testate October 23, 1897. The lands in controversy were disposed of by the third clause of his will, which is as follows:

"I give and devise to my daughter, Lizzie Thomas, the north half ($\frac{1}{2}$) of the south-west quarter ($\frac{1}{4}$) of section fifteen (15), in township thirty-two (32), north, in range three (3), east of the third (3d) principal meridian, in the county of La Salle and State of Illinois, and the north four (4) acres of the south half ($\frac{1}{2}$) of the south-west quarter ($\frac{1}{4}$) of said section fifteen (15), to have, hold, use and enjoy the same for and during her natural life, and at her decease the same shall be divided among her children in fee, share and share alike. But this devise is made subject ⁵⁴⁵ to the payment of \$100 per year to my said wife, Catherine M. Eggert, for and during the life of my said wife, and subject also to the payment of all taxes legally assessed against and upon said lands, and the keeping of said lands in good condition during the lifetime of my said wife and during the lifetime of my said daughter."

Lizzie Thomas, the life tenant under the foregoing clause of the will, had three children living at the death of the

testator—Carrie Thomas and the two appellants herein, John Thomas, Jr., and Arthur Thomas. Carrie died intestate before the death of her mother but long after the death of the testator. Carrie Thomas left surviving her the appellee (her father), her mother, Lizzie Thomas, and her two brothers, who are minors.

Appellants contend that under the third clause of their grandfather's will the remainder given to the children of Lizzie Thomas was contingent and did not vest until the death of their mother, and that since they were the only survivors of the class to whom the remainder was given at the time it vested, they took the entire estate upon the death of their mother; while appellee contends that the estate in remainder vested in the children of Lizzie Thomas immediately upon the death of the testator, and that when Carrie died leaving no children but leaving her parents and two brothers as her only heirs, appellee, as her surviving father, inherited one-fourth of one-third, or one-twelfth, under the second clause of section 1 of our statute of descent. Appellants contend that where a devise is to a class, none will be permitted to take except such as are in esse at the time of distribution, and more especially where the only words in the will importing the gift are those employed to denote the time of division.

The rule contended for by appellants is applicable in cases where the postponement of the period of distribution is for reasons personal to the devisees, or in cases where the language clearly indicates an intention that the remainder ⁵⁴⁶ is to vest only in such members of the class as survive the period of distribution. There is clearly no word of survivorship in the clause in question, nor is there anything in this clause or in the context of the will which will warrant us in concluding that the postponement was for any other reason than to let in a life estate for the testator's daughter, Lizzie. Where the enjoyment of the estate or the period of distribution is postponed for the convenience of the funds of the estate and not for reasons personal to the devisees, the remainder is vested: *Scotfield v. Olcott*, 120 Ill. 362, 11 N. E. 351; *Carter v. Carter*, 234 Ill. 507, 85 N. E. 292; *Knight v. Pottgieser*, 176 Ill. 368, 52 N. E. 934. The possibility of after-born children coming into the class does not interfere with the operation of this rule. In such case the estate vested will open up to let in subsequently born children. In this case there were no children born to Lizzie Thomas subsequent to the death of the testator. In *Scotfield v. Olcott*, 120 Ill. 362, 11 N. E. 351, this court said: "But even though there be no other gift than in the direction to pay or distribute in futuro, yet if such payment or distribution appear to be postponed

for the convenience of the fund or property, as where the future gift is postponed to let in some other interest—for instance, if there is a prior gift for life or a bequest to trustees to pay debts, and a direction to pay upon the decease of the legatee for life or after payment of the debts—the gift in remainder vests at once and will not be deferred until the period in question. But where the payment is deferred for reasons personal to the legatee the gift will not vest till the appointed time.”

The case at bar cannot be distinguished, in principle, from the late case of *Carter v. Carter*, 234 Ill. 507, 85 N. E. 292. On the authority of that case, as well as of the cases above cited, the court below ruled correctly in holding that the remainder vested in the children of Lizzie Thomas immediately upon the death of the testator. Appellee became the owner of one-twelfth interest in these premises upon the death of his ⁵⁴⁷ daughter, Carrie. No other question is presented which is of importance enough to require our consideration.

The decree of the circuit court of La Salle county will be affirmed.

A Remainder Devised Should be Held Vested where the postponement of the enjoyment is for the convenience and benefit of the estate rather than for reasons personal to the devisee: *Mettler v. Warner*, 243 Ill. 600, 134 Am. St. Rep. 388. A vested remainder in children is created by a devise for life, with remainder to the children of the life tenant. A remainder is not made contingent by the fact that the interest of the remainderman may be divested by his death before the death of the life tenant: *Mercantile Bank v. Ballard's Assignee*, 83 Ky. 481, 4 Am. St. Rep. 160.

Gifts to Children as a Class are discussed in the note to *Thomas v. Thomas*, 73 Am. St. Rep. 413; and see *Estate of Murphy*, 157 Cal. 63, 137 Am. St. Rep. 110, 114, illustrating the difficulty courts sometimes have in determining whether a devise in such cases is to individuals named or to a class.

Concerning a Devise to a Class Where the period of distribution is deferred to some time after the testator's death, see *Thomas v. Thomas*, 149 Mo. 426, 73 Am. St. Rep. 405.

PEOPLE v. BURKHALTER.

[247 Ill. 600, 93 N. E. 379.]

INHERITANCE TAX—Transfer—Enjoyment Postponed.—If the actual intention of the parties to a deed is that possession or enjoyment of the land shall be postponed until after the grantor's death, the transfer is subject to an inheritance tax, though the intention is not evidenced in writing. (p. 352.)

INHERITANCE TAX—Transfer in Contemplation of Death.—An absolute gift, though followed by possession and enjoyment of the property in the donor's lifetime, is subject to an inheritance tax if made in contemplation of death, without regard to any intent to evade the payment of the tax. (p. 352.)

INHERITANCE TAX—An Owner may Give Away or otherwise dispose of his property, or any part of it, in any manner he sees fit, and if such disposition takes effect, in possession and enjoyment, during his lifetime, it will not be subject to an inheritance tax unless made in contemplation of his death. (p. 352.)

INHERITANCE TAX—The Contemplation of Death must be the impelling motive, without which the conveyance would not be made, in order to subject a transfer of property to the inheritance tax. (p. 353.)

INHERITANCE TAX—A Transfer of Property to one not related to the transferor, either by blood or marriage, as the consideration for a contract whereby the transferee is to attend and care for the deaf and dumb daughter of the transferor as long as she lives, is not subject to an inheritance tax, as having been made in contemplation of death, where the performance of the contract, on both sides, has been completed during the transferor's lifetime, although he may have expected his daughter to outlive him, and where it was not his impending death which was the impelling motive for making this disposition of his property, but his desire to provide for his daughter's future, whether he lived or died. (p. 354.)

W. H. Stead, attorney general, R. D. Robinson and Wilfred Arnold, for the appellant.

Williams, Lawrence, Welsh & Green and F. O. McFarland, for the appellee.

601 DUNN, J. Jonathan C. Garwood died intestate on February 17, 1907. In his lifetime he had been the owner of real and personal property of the value of about one hundred and twenty-five thousand dollars. A few years before his death he had conveyed, assigned and transferred all of it to the appellee, Anna E. Burkhalter, who was not related to him either by blood or marriage. An appraiser appointed under the inheritance tax law made a report to the county judge, who ascertained and fixed an inheritance tax against the appellee on account of the property so transferred to her (which was appraised at one hundred twenty-six thousand seven hundred and fifty dollars) of seven thousand nine hundred and eighty-four dollars, including interest. Upon an appeal by the appellee to the county court

an order was entered finding that the property was not subject to the provisions of the inheritance tax law, and the people appealed.

Section 1 of the inheritance tax law of 1895, which was in force at the time the several transfers were made and at the death of the grantor, imposes a tax upon all property which shall be transferred by deed, grant, sale or gift made in contemplation of the death of the grantor, or intended to take effect, in possession or enjoyment, after ⁶⁰² such death. If the actual intention of the parties to a deed is that possession or enjoyment of the land shall be postponed until after the grantor's death, the transfer will be subject to the inheritance tax even though such intention is not evidenced in writing: *People v. Moir*, 207 Ill. 180, 99 Am. St. Rep. 205, 69 N. E. 905. So will an absolute gift, though followed by possession and enjoyment of the property in the grantor's lifetime, if the gift was made by him in contemplation of his death (*Estate of Merrifield v. People*, 212 Ill. 400, 72 N. E. 446); and this without regard to any intent to evade the payment of the tax: *Rosenthal v. People*, 211 Ill. 306, 71 N. E. 1121. An owner may give away or otherwise dispose of his property, or any part of it, in any manner he sees fit, and if such disposition takes effect, in possession and enjoyment, during his lifetime, it will not be subject to an inheritance tax unless made in contemplation of his death. The questions presented by the record therefore are: Were the various deeds and transfers to the appellee made by the grantor in contemplation of his death, and were they intended to take effect in possession or enjoyment only after his death?

Jonathan C. Garwood's wife died in 1897. They had only one living child, a daughter, Manie, then about thirty-five years old, who from her birth had been unable to speak or hear. For a number of years Miss May Greenough had lived in the Garwood family as a companion of Miss Garwood, who by reason of her affliction needed a constant attendant. After Mrs. Garwood's death Miss Greenough remained with Miss Garwood until October, 1901, when she quit that service and was married, declining Mr. Garwood's offer of forty thousand dollars if she would continue there and not get married. Thereupon, through the mediation of her brother, Mr. Garwood prevailed upon the appellee to undertake the task of attending and caring for his daughter. After remaining a time she returned to her own home and Mr. Garwood again sought the help of the brother. The result was that the appellee again undertook the task, and ⁶⁰³ an agreement was entered into whereby, in consideration of the appellee's continuing to act as companion of and caring for Miss Garwood as long as the

latter lived, Mr. Garwood undertook to convey and transfer to the appellee all the property he possessed. The appellee faithfully performed her part of the contract and until Miss Garwood's death, in 1904, devoted herself to that work. On the other hand, Mr. Garwood performed the contract on his part by conveying and assigning to the appellee, from time to time, different portions of his property until he had transferred it all to her, the last transaction being a few weeks before his daughter's death. The appellee at once took possession of the property so transferred to her, leased and controlled the real estate, and had the actual custody of the stocks, bonds, notes and deeds. The appellee was confined closely to the house in the performance of her duties to Miss Garwood and business in connection with the property was sometimes transacted by Mr. Garwood. It was, however, only for the appellee and as her agent, for it is manifest from the evidence that after the respective transfers to her she had exclusive dominion over the property.

When the appellee went to Garwood's home he was seventy-four years old, but he was in good health, though not strong. Though he took medicine and required the attention of a physician during the last few years of his life, he had no serious illness and was not confined to his bed until about a month before he died. After his wife's death he had no family but the one helpless daughter, and his one object in life seems to have been the securing of her welfare throughout her life. He realized that he could live but a few years longer and expected his daughter would outlive him. He might well expect her to survive him many years, and the care of her future would necessarily be an object of great solicitude to him. In this sense his act in transferring his property may be said to have been made in contemplation of his death. But he did not transfer ⁶⁰⁴ his property to his daughter or in trust for her. Instead he sold it in consideration of a contract for her care, the performance of which began and was completed in his lifetime. The property itself was not devoted to the use of his daughter except, indirectly, as it would enable the appellee to carry out her personal contract. It was not his impending death which was the impelling motive for making this disposition of his property, but his desire to provide for his daughter's future, whether he lived or died. The contemplation of death must be the impelling motive without which the conveyance would not be made, in order to subject a transfer of property to the inheritance tax.

In the argument for the people the effect of the supposed fiduciary relation existing between the appellee and Jonathan C. Garwood is discussed, as well as the want of consideration for the conveyances of real estate in December, 1901. But these matters have nothing to do with the right of the people to an inheritance tax. The claim of the people is based upon the proposition that by the conveyances the appellee acquired title to the property. Unless she did acquire title there has been no transfer to which any tax can apply. The existence of any consideration for the deeds of December, 1901, is only important as bearing upon the credibility of the appellee as a witness. There is, however, no substantial conflict in the evidence. The statements of Mr. Garwood which are thought to be at variance with the appellee's version of the matter do not seem to us to be substantially in conflict with it. Whether the contract was wise or greatly beneficial to either party is not material and we have not discussed it, but it is plainly to be seen that if the services required of appellee had continued for thirty or forty years instead of three, it might well be doubted whether the property received would compensate her for the sacrifices made.

The judgment of the county court was right, and it will be affirmed.

The Leading Features of Inheritance Taxation is the subject of a note to *English v. Crenshaw*, 127 Am. St. Rep. 1035. This note also discusses transfers in contemplation of or to take effect upon death.

CASES
IN THE
SUPREME COURT.
OF
INDIANA.

STATE v. HUFF.
[172 Ind. 1, 87 N. E. 141.]

APPEAL—Failure to File Briefs.—The Reversal of a judgment may be ordered where the appellee fails to file a brief. (p. 357.)

PLEADING.—A Demurrer to an Answer containing two paragraphs in the following form: "Neither of said paragraphs of answer contains facts sufficient to constitute an answer to plaintiff's complaint and information," presents no question. (p. 357.)

PLEADING—Demurrer to Answer—Code Form.—The code provides but one form of demurrer to an answer, and it must be substantially followed. (p. 357.)

PLEADING—Form of Answer.—In determining the sufficiency of an answer the question is not whether the facts alleged are sufficient to constitute an answer to the complaint, but whether, taken as a whole, the pleading states facts sufficient to constitute a defense to the action. (p. 357.)

OFFICERS—Abandonment of Office.—In Order to Constitute an abandonment of office, it must be total, and under such circumstances as clearly to indicate an absolute relinquishment. Temporary absence is not sufficient. (p. 359.)

OFFICER—Resignation.—In Order to Constitute a resignation, it must be unconditional with intent that it shall operate as a resignation. There must be an intention to relinquish a portion of the term of office, accompanied by the act of relinquishment. (p. 359.)

OFFICER.—Resignations must be Made to the appointing power, or power authorized to call an election. (p. 359.)

OFFICER.—Withdrawal of a Resignation may be made if it is not accepted. (p. 360.)

OFFICER—Resignation—Conditional and to Wrong Power.—A paper addressed by a township assessor to the board of commissioners of the county, which has no power to accept a resignation or appoint a successor, asking the appointment of a certain person as his successor, and "If you cannot appoint him as my successor, I decline to resign, and will have him appointed as my first deputy," followed by a temporary absence at a time when there are no duties of the office to be performed, does not constitute a resignation or create a vacancy in the office. (p. 360.)

OFFICER—Resignation.—Where Conditions or Terms are attached to a resignation, it must be accepted, if at all, subject to
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them. If they are such as cannot be lawfully attached, the resignation is of no effect. (p. 360.)

OFFICERS—Validity of Agreement to Resign.—Contracts between persons whereby a public officer agrees to resign his office in another's favor, or to give another a chance of promotion or appointment, are void as against public policy, and cannot be enforced at the instance of either party. (p. 360.)

EVIDENCE—Act of Third Party.—Evidence that one in whose favor a public officer attempted to resign has offered to relinquish his rights to the office for a consideration, is not admissible against the officer in a proceeding where the validity of the resignation is in issue. (p. 361.)

Frank E. Gilkison, for the appellant.

² MYERS, J. The complaint alleges the election of relator to the office of assessor of Mitcheltree township in Martin county, Indiana, at the general election of 1904, his eligibility and qualification, and the discharge of his duties as such until February, 1907, when upon demand upon the auditor for the necessary and prescribed assessor's books, blanks and other papers they were refused him; that the auditor had attempted to appoint appellee as assessor, and had accepted and approved a pretended bond tendered by appellee, and administered a pretended oath of office to appellee and delivered to him all the plats, books, blanks, papers and other official supplies for the assessor of said township, and recognized ³ appellee as the assessor of said township; that on February 27, 1907, relator demanded from appellee the surrender to relator of all the plats, books, blanks, papers and other supplies for the assessor of said township, which appellee had in his possession, and that he deliver up the office to relator, all of which appellee refused, and has usurped and intruded into such office, and since said time has continued illegally and wrongfully to hold said office, to the great damage of relator, who is the assessor of said township and entitled to exercise the functions and perform the duties of said office. Prayer that relator be declared the true, acting and legal assessor, and that appellee be declared a usurper, and that he be ordered to turn over all books, plats and blanks appertaining to such office to relator, and for one hundred dollars damages.

Appellee answered in two paragraphs: One paragraph admitting the election of relator as assessor at the general election of 1904, and his qualification and discharge of the duties until December 15, 1906, "at which said time he voluntarily abandoned said office and left the state of Indiana, with the avowed purpose of remaining away permanently," and alleging the appointment, January 29, 1907, of appellee to fill the unexpired term of relator, appellee's eligibility, qualification and entry upon the duties of his office, and his continuance in discharge of those duties under such appointment. The second paragraph alleges the written resignation of relator

submitted to the board of commissioners on December 15, 1906, and its acceptance, the appointment of a successor by the board and such appointee's failure to qualify, the eligibility of appellee, his appointment by the auditor, his qualification, etc., and that he is acting by virtue of such appointment.

The demurrer of appellant to each of these answers was overruled, and exceptions reserved. There was a reply in general denial, a trial, finding and judgment for appellee.

Appellant assigns error upon the rulings upon demurrer to the answers, and in overruling the motion for a new trial.

⁴ We have not been favored with a brief from appellee, and would be justified in reversing the judgment, instead of being thereby forced to examine this record for ourselves, to determine whether there are any grounds of affirmance.

The form of the demurrer to the answer is that "neither of said paragraphs of answer contains facts sufficient to constitute an answer to plaintiff's complaint and information." This form presents no question. It is not a question whether the facts are sufficient to constitute an answer, but whether, taken as a whole, the pleading states facts sufficient to constitute a defense to the action. It might state facts sufficient to constitute a partial answer, or an answer to so much of the complaint, if so pleaded, but if addressed to the whole complaint it must challenge the whole, as pleaded, and if pleaded as a defense, the question is whether, so pleaded, it constitutes a defense to the action. The code provides for but one form of demurrer to an answer, and it must be substantially followed: 1 Woollen on Trial Procedure, secs. 1677, 1678.

The motion for a new trial challenges the sufficiency of the evidence to support the finding, and also the admissibility of certain evidence introduced. Relator, being about to make a trip to California in December, 1906, addressed the following communication to the board of commissioners of the county of Martin:

"December 15, 1906.

"To the Board of Commissioners of the County of Martin.

"This is to certify that I, assessor of Mitcheltree township, do hereby ask you to appoint Robert C. Armstrong as my successor, as assessor of said township. If you cannot appoint him as my successor, I decline to resign, and will have him appointed as my first deputy.

"WALTER MCGUYER,
"Mitcheltree Township Assessor."

This paper he delivered to Armstrong, who in turn delivered it to one of the members of the board, when not in session, or ⁵ to the auditor. There is some conflict in the evidence as to whether the paper was delivered by Armstrong

to the auditor, or by one of the members of the board. It bore the auditor's file-mark, and was presented to the board, and an order entered on December 31, 1906, as follows: "Comes now Walter McGuyer, assessor of Mitcheltree township, and presents his resignation of said office of assessor, effective at once. Ordered by the board that the same be and is hereby accepted, and further ordered that Robert C. Armstrong be, and he is hereby, appointed assessor of Mitcheltree township to fill the unexpired term of Walter McGuyer."

On January 29, 1907, the auditor of Martin county, after reciting that relator, the former assessor, had tendered his resignation to the county commissioners, and removed from the state, and the commissioners had appointed Armstrong, who was at the time ineligible, and that the office was vacant, appointed appellee to fill the unexpired term of relator, and appellee took the oath of office, qualified, and has since acted. The parol evidence shows no intention on the part of relator to remain in California, or to abandon his residence in Mitcheltree township, but shows an intention to return not later than March ensuing, unless the board should appoint Armstrong as his successor, or he should appoint Armstrong as his deputy, and then not later than March 15, 1907. There appears to have been some communication between relator and the commissioners prior to December 15, 1906, in regard to his going away, and in regard to his selection of a deputy, and there was an impression that the commissioners might have something to do with his appointing a deputy, in case they could not appoint a successor, or that he had to be present to appoint one himself, and it appears from the evidence that he supposed, until after the appointment of appellee, that Armstrong had been selected as his deputy, when he learned of it through a county paper. As early as January 20, 1907, relator had made preparations to return from California. On February 18, 1907, he wrote from California to the auditor of Martin county:

"I should have written you before, but have failed. I will leave to-morrow for Indiana to do my work as an assessor, as Mr. Armstrong failed to qualify, and my resignation which I sent was to the effect that if he did not serve, I was not to be considered as resigning. I will be at Shoals on March 1st."

He returned February 26th. The disclosed objects of his going away were on account of his health, and to visit the grave of a brother, who, as a soldier, had been killed in the Philippines, and his body brought back to San Francisco for burial. The latter was his primary purpose. There was no official duty for relator to perform between December 15, 1906, and March 1, 1907. A return ticket had been wired to him by his brother at Indian Springs, in his township, February 5, or 6, 1907. At that time he did not know of the

appointment of appellee, but learned of it before he left California. Prior to his leaving home he had sold a horse conditionally, so that he might, on his return repurchase it at the same price. Giving this evidence the intendment most favorable to appellee, we think it clear that relator's absence was only temporary; was with a fixed purpose of returning, not only to his residence, but to his official duties; was at a time when there were no duties which he could be called upon to perform, or could perform, and there is no evidence to sustain the theory of abandonment. In order to constitute an abandonment of office, it must be total, and under such circumstances as clearly to indicate an absolute relinquishment. Temporary absence is not sufficient: *State v. Scott*, 171 Ind. 349, 86 N. E. 409; *Relender v. State*, 149 Ind. 283, 49 N. E. 30; *Yonkey v. State*, 27 Ind. 236; *People v. Green*, 58 N. Y. 295; *Page v. Hardin*, 8 B. Mon. 648; *State v. Baird*, 47 Mo. 301; *Throop on Public Officers*, sec. 425, and cases cited.

⁷ The ex parte judgment of the auditor that a vacancy existed did not create a vacancy: *State v. Harrison*, 113 Ind. 434, 3 Am. St. Rep. 663, 16 N. E. 384. We come, then, to the question whether the paper relied on constituted a resignation. When it was offered, it was not objected to by relator on the ground that it had not been pleaded, and the question as to whether it was admissible on that ground is not presented. Nor was it objected to upon any ground of inadmissibility, but upon the ground that it was not a resignation, but a communication to the board of commissioners. It then resolves itself into the matter of the proper construction of the paper. In that determination several propositions of law are to be considered.

In order to constitute a resignation, it must be unconditional, with intent that it shall operate as a resignation: *State v. Clarke*, 3 Nev. 566; *State v. Fitts*, 49 Ala. 402.

"To constitute a complete and operative resignation, there must be an intention to relinquish a portion of the term of office, accompanied by the act of relinquishment. Webster and Richardson define the words 'resign' and 'resignation' substantially thus: To resign, is to give back, to give up, in a formal manner, an office; and resignation is the act of giving it up. Bouvier says, resignation is the act of an officer by which he declines his office, and renounces the further right to use it": *Biddle v. Willard*, 10 Ind. 62. Resignations must be made to the appointing power, or power authorized to call an election: *Burns' Rev. Stats.* 1908, sec. 9141; *Rev. Stats.* 1881, sec. 5557; *State v. Popejoy*, 165 Ind. 177, 74 N. E. 994, 6 Ann. Cas. 687; *Van Orsdall v. Hazard*, 3 Hill, 243; *Edwards v. United States*, 103 U. S. 471, 26 L. ed. 314.

A resignation may be withdrawn if not accepted, and it has been held not effective, although a successor has been appointed, if it was transmitted without the officer's consent: *Biddle v. Willard*, 10 Ind. 62; *State v. Boecker*, * 56 Mo. 17; *Rogers v. Slonaker*, 32 Kan. 191, 4 Pac. 138.

With these principles before us, we think there can be but one construction placed upon the writing in question: The appointing power as to township assessors is in the auditor, and not in the board of commissioners: *Burns' Rev. Stats.* 1908, sec. 10,251; *Acts* 1903, p. 49, sec. 16. The paper in question was not in the form of an unconditional resignation, and was not addressed to the appointing power. On its face it purports to be a private communication to the board of commissioners, which neither had the power of accepting a resignation nor appointing a successor; hence, any action it might take would be of no force or validity. At most, it is a communication to the members of the board as to their opinion of their authority to appoint a successor, and, if such authority is granted to them, requesting the appointment of Armstrong, and, in case they had power to act, was sufficient to authorize the inference of a formal resignation. It was thus expressly made conditional upon their having such power. It goes further, and expressly states that if they have no power to make the appointment, or are unwilling to appoint Armstrong, it shall not be treated as a resignation. The latter part of the communication is simply a declaration that relator will appoint Armstrong his deputy. It will thus be seen that if the board had the appointing power, the tender of resignation was conditional upon the appointment of Armstrong. But back of it all lies the proposition that the appointing power was not with the board, and anything it did could not affect the power reposed solely in the auditor. It may be thought that the act of the auditor in appointing was an acceptance of the resignation. The answer is that it was not addressed to him, was not so stated as to authorize him so to conclude, and relator might not have been willing to resign if the appointment of a successor was to be made by the auditor. The fact that it was not so addressed is an important factor. Besides, the * auditor could not accept it except upon the terms made by it. He must receive it, if at all, upon the terms stated. If it be said that relator could not attach conditions to his resignation, the result would be that there was no resignation, besides the conditions are not in themselves unlawful. Contracts between persons whereby a public officer agrees to resign his office in another's favor, or to give another a chance of promotion or appointment, are void as against public policy, and cannot be enforced at the instance of either party; and we apprehend that the making of such would be good ground for removal of an officer at

the instance of the state; but this could only be upon a showing of a corrupt bargain, such as the law inhibits. And while there was an attempt in this case to show an agreement between relator and Armstrong by which some consideration was to move to relator, for resigning, in order that Armstrong might be appointed, it wholly failed, and the evidence is wholly insufficient to establish a resignation. It results that the act of the board of commissioners was void, and the appointment of appellee likewise void.

The court below permitted appellee to show on cross-examination of Armstrong that after his alleged appointment, Armstrong had made proposals to others to resign his rights for a stipulated sum. This was unauthorized by, and unknown to, relator, and was clearly inadmissible against him upon any theory of the cause or of the law.

The judgment is reversed, with instructions to the court below to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

An Office may be Vacated by Abandonment, or resigned by parol: State v. Allen, 21 Ind. 516, 83 Am. Dec. 367; and see Cote v. City of Biddeford, 96 Me. 491, 90 Am. St. Rep. 417. The abandonment of office is the subject of a note to Attorney General v. Maybury, 113 Am. St. Rep. 516.

An Officer may Resign at Pleasure, but to constitute a complete and operative resignation there must be an intention to relinquish a portion of the term of the office, accompanied by the act of relinquishment; and some cases hold that the resignation of a public officer is not complete, so far as the public is concerned, until it is duly accepted by the proper authorities: Note to People v. Williams, 36 Am. St. Rep. 524, 525. The requisites of a valid resignation and the power to accept it are considered in State v. Augustine, 113 Mo. 21, 35 Am. St. Rep. 696. As to the withdrawal of a resignation of a public office, see State v. Fowler, 160 Ala. 186, 135 Am. St. Rep. 91.

A Public Office cannot be the Subject of a Contract: Water Commrs. v. Cramer, 61 N. J. L. 270, 68 Am. St. Rep. 705. Agreements for compensation to procure appointment to a public office, or to resign such office in another's favor for a consideration, are void, because against public policy: Basket v. Moss, 115 N. C. 448, 44 Am. St. Rep. 463. Contracts to secure appointment to office or places of trust are discussed in the note to Parsons v. Trask, 66 Am. Dec. 509.

RICHEY v. STATE.

[172 Ind. 134, 87 N. E. 1032.]

FORNICATION—What Constitutes at Common Law.—Fornication, as understood by the common law, was unlawful sexual intercourse between a man, either married or single, and an unmarried woman. It was not punishable as a common-law offense unless accompanied by such circumstances as per se constituted it a misdemeanor. (p. 363.)

FORNICATION—Common Law Adopted by Statute.—The criminal statutes of Indiana have adopted substantially the common-law doctrine upon the subject of fornication. (p. 363.)

FORNICATION.—To Constitute the Statutory Offense of fornication, it must be shown that the parties cohabited or lived together in the manner of husband and wife. The statute does not deal with private acts of incontinence and unchastity, but reaches those only who as paramour and mistress contemn and scandalize the institution of marriage. (p. 363.)

WORDS AND PHRASES.—The Word "Cohabit" implies a dwelling together for some period of time, and is to be understood as something different from occasional, transient interviews for unlawful and illicit intercourse. (p. 363.)

FORNICATION—Occasional Acts not an Offense.—Evidence that the defendant, a married man, living with his wife, indulged in occasional acts of illicit intercourse with a servant girl in his own house will not sustain a conviction of fornication. (p. 364.)

John O. Spahr and James A. Ross, for the appellant.

James Bingham, attorney general, Alexander G. Cavins, Edward M. White and William H. Thompson, for the state.

135 MONTGOMERY, J. Appellant was convicted upon a charge of fornication, his motion for a new trial was overruled, and a fine of three hundred dollars and costs assessed.

The only error properly assigned is the overruling of the motion for a new trial. The grounds of this motion were that the finding of the court is not sustained by sufficient evidence, and is contrary to law.

The statute upon which the prosecution was founded reads as follows: "Whoever cohabits with another in a state of adultery or fornication shall be fined not exceeding five hundred dollars, or imprisonment in the county jail not exceeding six months, or both": Burns' Rev. Stats. 1908, sec. 2353; Acts 1905, p. 584, sec. 457.

The evidence to sustain the conviction was brief and uncontradicted, and established the following facts: Appellant was thirty-eight years of age, married, and resided with his wife in the town of Carmel, Hamilton county, from April 15, 1907, until April 25, 1907. His codefendant was a single woman, nineteen years of age, who assisted his wife in the performance of housework for a few days during that period,

and was paid for her services, and within that time appellant had sexual intercourse with the girl twice in his residence.

Fornication, as understood by the common law, was unlawful sexual intercourse between a man, either married or single, and an unmarried woman: *State v. Chandler*, 96 Ind. 591; *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21; *State v. Lash*, 16 N. J. L. 380, 32 Am. Dec. 397; 19 Cyc. 1434. An act of fornication was not punishable as a common-law offense, unless accompanied ¹³⁶ by such circumstances as per se constituted a misdemeanor, as, for example, to make the act a public nuisance: *Crouse v. State*, 16 Ark. 566; *Anderson v. Commonwealth*, 5 Rand. 627, 16 Am. Dec. 776; *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308.

The common law regarded clandestine acts of adultery and fornication as a gross violation of personal rights for which redress might be had in a civil action by the injured party, but left the punishment of the sin to the upbraidings of a guilty conscience and to be dealt with by religious judicatories. The criminal statutes of this state have adopted substantially the common-law doctrine upon this subject. The earlier statutes denounced as a crime the living "in open and notorious adultery or fornication": *Rev. Stats. 1838*, p. 217, sec. 59; *Rev. Stats. 1843*, p. 977, sec. 80; 2 *Rev. Stats. 1852*, p. 433, sec. 21. In the case of *Wright v. State*, 5 Blackf. 358, 35 Am. Dec. 126, this court said: "The testimony did not prove a 'living together,' as is required by the statute, but simply, if it proved anything, an occasional illicit intercourse between the defendant and the woman named in the indictment. The offense consists in an open and notorious cohabitation, and unless it be of that character, it is not indictable": *Lumpkins v. Justice*, 1 Ind. *557; *State v. Gartrell*, 14 Ind. 280; *Gaylor v. McHenry*, 15 Ind. 383.

The statute upon which the present case was based omits the words "open and notorious," but still requires that the parties shall cohabit in a state of fornication to constitute a public offense. To cohabit, in the sense in which that word is used in this statute, is for a man and woman to live together in the manner of husband and wife: *Jackson v. State*, 116 Ind. 464, 19 N. E. 330; *State v. Chandler*, 96 Ind. 591; *State v. Johnson*, 69 Ind. 85; *State v. Cassida*, 67 Kan. 171, 72 Pac. 522; *Turney v. State*, 60 Ark. 259, 29 S. W. 893.

In the case of *Jackson v. State*, 116 Ind. 464, 19 N. E. 330, Judge Mitchell, ¹³⁷ speaking for the court with reference to the meaning of the word cohabit, said: "It implies a dwelling together for some period of time, and is to be understood as something different from occasional, transient interviews, for unlawful and illicit intercourse. To sustain an indictment under this section, the evidence must establish cohabitation, including one or more acts of sexual intercourse, between parties not

lawfully occupying the relation of husband and wife to each other."

This statute does not deal with private acts of incontinence and unchastity, but its design, like that of similar laws in other states, was to prohibit and punish the illicit relations of persons of opposite sex, who, without lawful marriage, cohabit or live together in the manner of husband and wife. It does not attempt to control the private, immoral indulgence of the individual or affix a penalty to the furtive violation of the Seventh Commandment, but only to conserve the public morals, by the prevention of indecent and evil examples tending to debase and demoralize society. It may be regretted that the legislature has not deemed it expedient to go so far as to denounce and punish the master, who, under his own roof, clandestinely violates the chastity of his female servant. The statute reaches those only who as paramour and mistress condemn and scandalize the institution of marriage by unlawfully assuming its visible forms and habitually exercising toward each other the rights and privileges which belong to the conjugal relation: *State v. Marvin*, 12 Iowa, 499; *Carotti v. State*, 42 Miss. 334, 97 Am. Dec. 465; *Kinard v. State*, 57 Miss. 132; *Searls v. People*, 13 Ill. 597; *Commonwealth v. Calef*, 10 Mass. 153; *Sullivan v. State*, 32 Ark. 187; *McNeely v. State*, 84 Ark. 484, 106 S. W. 674; *Pruner v. Commonwealth*, 82 Va. 115; *People v. Salmon*, 148 Cal. 303, 113 Am. St. Rep. 268, 83 Pac. 42, 2 L. R. A., N. S., 813; *Whitehead v. State*, 48 Fla. 64, 37 South. 302; *State v. Chandler*, ¹³⁸ 132 Mo. 155, 53 Am. St. Rep. 483, 33 S. W. 797; *State v. Carroll*, 30 S. C. 85, 14 Am. St. Rep. 883, 8 S. E. 433; *State v. Miller*, 42 W. Va. 215, 24 S. E. 882; *State v. Williams*, 94 Minn. 319, 102 N. W. 722.

The evidence in this case shows that appellant is married and was living with his wife, and indulged in acts of illicit intercourse with the servant girl, which, so far as appears, would never have been known except for the confession of the victim of his lustful passion. This offense, morally reprehensible as it is, does not come within the definition of the statute, nor show that the parties cohabited in a state of fornication. The finding of the court is therefore not sustained by sufficient evidence, and is contrary to law.

The judgment is reversed, with directions to sustain appellant's motion for a new trial.

THE CRIME OF FORNICATION.

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I. Scope of Note.

Illicit carnal connection is called by different names, according to the circumstances which attend it. Unaccompanied with any facts which tend to aggravate it, it is simple fornication. When it causes the birth of an illegitimate child, it is fornication and bastardy. When the man who commits it is married, it is adultery. When the parties by whom it is done are related to one another within certain degrees of consanguinity or affinity, it becomes incest. Where it is procured under a promise of marriage it is called seduction. But the body of all these offenses is the illicit connection. In each the essential fact which constitutes the crime is fornication: *Dinkey v. Commonwealth*, 17 Pa. 126, 55 Am. Dec. 542. In this note, however, we intend to confine ourselves strictly to the consideration of the crime of "fornication," thus excluding the general crime of "unlawful cohabitation" by whatever name it may be known, either under the common or statutory law.

II. Definitions.

"In criminal law," says Bouvier, "fornication is the unlawful carnal knowledge by an unmarried person of another, whether the latter be married or unmarried": Bouvier's Law Dictionary, "Fornication." The authorities, however, do not quite agree, either with Bouvier or among themselves, as to what constitutes fornication, as will appear from the following statements from various decisions.

Fornication is sexual intercourse between a man, married or single, and an unmarried woman: *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21; *State v. Johnson*, 69 Ind. 85; *State v. Chandler*, 96 Ind. 591; *State v.*

Lash, 16 N. J. L. 380, 32 Am. Dec. 397; *State v. Sharp*, 75 N. J. L. 201, 66 Atl. 926, affirmed without opinion in 70 Atl. 1102. Fornication is illicit sexual intercourse between parties neither of whom is married: *Banks v. State*, 96 Ala. 78, 11 South. 404; *State v. Dana*, 59 Vt. 614, 10 Atl. 747. Fornication is the living together and having carnal intercourse with each other, or habitual intercourse with each other, without living together, of a man and woman, both being unmarried: *Cosgrove v. State*, 37 Tex. Cr. 249, 66 Am. St. Rep. 802, 39 S. W. 367. Illicit intercourse between an unmarried man and a married woman is fornication in the man: *Commonwealth v. Lafferty*, 6 Gratt. (Va.) 672. Fornication is the voluntary sexual intercourse of one person with another: *People v. Barnes*, 2 Idaho, 161, 9 Pac. 532. Fornication is criminal connection had between a male and female, unmarried: *Easley v. Commonwealth (Pa.)*, 11 Atl. 220. Fornication is the carnal and illicit intercourse of an unmarried person with the opposite sex: *Territory v. Whitcomb*, 1 Mont. 359, 25 Am. Rep. 740.

III. Nature and Elements of the Offense.

a. **By the Common Law** fornication is the act of illicit sexual intercourse between either a married or an unmarried man and an unmarried woman: *State v. Lash*, 16 N. J. L. 380, 32 Am. Dec. 397; *State v. Searle*, 56 Vt. 516. It is not punishable as a common-law offense unless accompanied by circumstances which render it a public nuisance: *Crouse v. State*, 16 Ark. 566; *Hopper v. State*, 54 Ga. 389; *Carrotli v. State*, 42 Miss. 334, 97 Am. Dec. 465; *State v. Lash*, 16 N. J. L. 380, 32 Am. Dec. 390; *Anderson v. Commonwealth*, 5 Rand. (Va.) 627, 16 Am. Dec. 776. See the principal case, ante, p. 362.

b. **By the Canon or Ecclesiastical Law**, fornication is the act of illicit sexual intercourse on the part of an unmarried person with a person of the opposite sex, whether married or unmarried, and, if married, whether a man or a woman: *Bouvier's Law Dictionary* "Fornication"; *Territory v. Whitcomb*, 1 Mont. 359, 25 Am. Rep. 740.

c. **By Statute.**—But in many, if not most, of the states, statutes have been enacted providing for the punishment of the offense of "fornication," although in few of the statutes is the offense defined. Wherever the statute does define the crime of fornication, or the courts have defined it in the absence of a statutory definition, recourse has been had either to the canon or the common law for its meaning.

d. **Statutory Construction.**—Under section 381 of the Penal Code of Georgia there are three distinct kinds of indictable sexual intercourse, viz., adultery, fornication, and adultery and fornication, the offense in each instance being a joint one. If both the parties to its commission are married, each is guilty of adultery; if both are single, each is guilty of fornication; if one is married and the other is single, each is guilty of adultery and fornication: *Kendrick v. State*, 100 Ga. 360, 28 S. E. 120.

In *State v. Seiler*, 106 Wis. 346, 82 N. W. 167, the question arose as to the meaning of the word "man" in the Revised Statutes, paragraph 4580, as amended by the laws of 1899, chapter 99, providing that "any man who commits fornication with a sane female, of previous chaste character under the age of eighteen years, etc." The court says: "The defendant's contention as regards the second ques-

tion arises in regard to the use of the word 'man' in the statute. The argument is that the word 'man' means a male adult as distinguished from a woman or a boy. Undoubtedly, this is the usual definition given by the lexicographers. The defendant carries the argument further, however, and claims that the word 'adult' means a man of full age. Hence, the conclusion is that the use of the word 'man,' in the statute must be limited to a male person over the age of twenty-one years, and the defendant, lacking a few months of that age, cannot be held liable for the offense charged. In determining the intention of the legislature in the use of this word, it is proper to ascertain the spirit of the act, and the mischief or vice aimed at. No one can doubt but that the object of the legislature was to prevent the illicit intercourse of the sexes, and the consequent evils. In law, the word 'man' frequently has a broader and more comprehensive meaning than usually given in the dictionaries. Much depends upon the context and the object sought to be attained. In some of its uses, it is construed to mean 'all human beings, or any human being, whether male or female': Anderson's Law Dictionary. Another law-writer says: 'Man is a human being; a person of the male sex; a male of the human species about the age of puberty': Bouvier. 'A human being of the male sex who has arrived at the age of puberty': Rapalje & Lawrence. In *Kenyon v. People*, 28 N. Y. 203, 84 Am. Dec. 177, construing the statute in regard to seduction, which says, 'any man who shall, under promise of marriage, seduce,' etc., Judge Balcom says: 'The prisoner's counsel insisted on the trial and in the supreme court, and has argued here, that the word "man," as used in the statute referred to, means a male person twenty-one years of age. This is too technical and limited a meaning to be applied to the word in the connection wherein it is used. It has a broader and more comprehensive signification. The apparent spirit of the act, and the mischief or vice aimed at by the legislature, clearly show that the word "man," as used in the statute, means a male person who has arrived at the age of puberty, or is capable of committing rape.' The language is directly applicable to the statute in question, and we adopt the conclusion stated, as the only one the legislature could have had in view when it was enacted. There is quite as good reason for curbing the impetuosity of youth as for laying the ban upon men of maturer years."

In *State v. Sauls*, 70 S. C. 393, 50 S. E. 17, the question arose as to the meaning of the words "each other" in the Criminal Code of 1902, paragraph 292, defining "fornication" as "the living together and carnal intercourse with each other, or habitual carnal intercourse with each other, without living together, of a man and woman, both being unmarried." The defendant's view was that the words "with each other," should be regarded as necessarily implying that the man and woman should be indicted together, and not separately, especially because the statute provides for the indictment of any man and woman, not any man or woman. It was held that the statute does not prevent the indictment of either party to the offense separately. The court says, in passing: "The practical objection to this construction is that it is extremely technical, and would result in allowing one guilty party to escape if the other should die before indictment."

e. **Open and Notorious Acts.**—Whether or not a man and woman must dwell together openly and notoriously in order to be guilty of

fornication depends upon the language of the statute. In *Searles v. People*, 13 Ill. 597, the indictment was for living in an open state of fornication, and the court says: "In order to constitute this crime the parties must dwell together openly and notoriously upon terms as if the conjugal relation existed between them. The object of the statute was to prohibit the public scandal and disgrace of the living together of persons of opposite sexes notoriously in the illicit intimacy which outrages public decency, having a demoralizing influence upon society. They may, indeed, live together in the same family, but if apparently chaste, regularly occupying separate apartments, a single instance of illicit intercourse would not constitute the crime of living together in an open state of fornication. . . . From the very nature of the case the offense must generally be proved by circumstances, and the statute provides that it 'shall be sufficiently proved by circumstances which raise the presumption of cohabitation and unlawful intimacy'; but this presumption must be something more than a mere suspicion. It must amount to a reasonable belief or conviction of the judgment, not only of unlawful intimacy, but also of cohabitation."

Occasional illicit intercourse is not sufficient ground for the charge of living in fornication: *Brevaldo v. State*, 21 Fla. 789; *State v. Gartrell*, 14 Ind. 280; *State v. Marvin*, 12 Iowa, 499. And in *State v. Cassida*, 67 Kan. 171, 72 Pac. 522, the court says: "There must be a cohabitation, an abiding together. There must be that familiar and easy relationship between the parties which characterizes the relation of husband and wife. If this relationship is shown, no matter what other may also at the same time exist, the parties are guilty. The question always is upon all the evidence, whether the relationship is such as to induce the belief that they were dwelling together as husband and wife, each receiving from the other such sexual privileges as usually arise out of that relationship."

"The mere stopping over one night," says the court in *Turney v. State*, 60 Ark. 259, 29 S. W. 893, "at a house upon a transitory journey, and assuming the marital relationship, for purposes of illicit sexual commerce, however scandalous and disgraceful from a moral standpoint, is not within the inhibition of our statute. Criminal statutes must be strictly construed. The term 'cohabitation' has a definite, legal signification, and, when used in criminal statutes, conveys the idea of living or dwelling together as husband and wife. Such conduct would be very convincing evidence if connected with other facts and circumstances going to show a degree of permanency or continuity in the ostensible relationship, but would not of itself 'authorize' the jury to convict of illegal cohabitation."

And in the case of *Richey v. State*, 172 Ind. 134, ante, p. 362, 87 N. E. 1032, 19 Ann. Cas. 654, the court, in reversing the judgment of conviction upon a charge of fornication, says: "The statute upon which the present case was based omits the words 'open and notorious,' but still requires that the parties shall cohabit in a state of fornication to constitute a public offense. To 'cohabit,' in the sense in which that word is used in this statute, is for a man and woman to live together in the manner of husband and wife. . . . This statute does not deal with private acts of incontinence and unchastity. . . . It does not attempt to control the private immoral indulgence of the individual or affix a penalty to the furtive violation of the seventh commandment, but only to conserve the public morals, by the preven-

tion of indecent and evil examples tending to debase and demoralize society.

"It may be regretted that the legislature has not deemed it expedient to go so far as to denounce and punish the master, who under his own roof clandestinely violates the chastity of his female servant; but this statute reaches those only who as paramour and mistress condemn and scandalize the institution of marriage by unlawfully assuming its visible forms and habitually exercising toward each other the rights and privileges which belong to the conjugal relation."

f. Guilty Intent.—Fornication and adultery is a joint act, and it must be shown that two persons, a male and a female, have habitually indulged in unlawful sexual intercourse; but it is not essential to the conviction of one of them to show that both had a guilty intent. The one having such intent may be convicted, although the other, through an ignorance of the facts, had no such intent: *State v. Cutshall*, 109 N. C. 764, 26 Am. St. Rep. 599, 14 S. E. 107.

IV. Indictment and Information.

a. In General.—It would be impossible to give any particular form of indictment covering the crime of fornication, in view of the conflicting definitions as to what constitutes this crime. We shall, therefore, give the cases in which indictments have been upheld or declared insufficient.

b. Surplusage.—In *Territory v. Corbett*, 3 Mont. 50, the defendant was indicted under a statute providing that "persons being within the degrees of consanguinity, within which marriages are declared incestuous and void, who shall intermarry with each other, or who shall commit fornication or adultery with each other." The indictment contained this language: "Did commit the crime of fornication with the said Sarah Parker, and then and there had carnal and sexual intercourse with the said Sarah Parker." Says the court: "The second ground of objection to the indictment is that the facts stated do not constitute a public offense. Under this head it is urged that the indictment charges that the defendant committed 'the crime of fornication,' when there is no such crime known to our laws. It is true that our criminal statutes do not specify any acts that shall constitute the crime of fornication, and there never was any such crime known to our laws. . . . If the language 'then and there had carnal and sexual intercourse,' is equivalent to the term 'fornication,' used in the statute, then the indictment is sufficient in its allegations upon this point without the words, 'crime of fornication.' . . . There cannot be any doubt but the words 'carnal and sexual intercourse,' have a meaning equivalent to the words . . . fornication. The clause in the indictment 'did commit the crime of fornication,' then, may be surely treated as surplusages," in order to uphold the indictment.

c. Living Together in Fornication.—An indictment for living "together in fornication," found against a man and woman, is sufficient, without stating the facts which enter into the composition of the offense: *Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182.

d. A Joint Indictment for fornication and adultery, which charges an unlawful bedding and cohabitation together, describes the offense sufficiently, and the charge is sustained by showing a habitual sur-

render of the person of one for the gratification of the other: *State v. Jolly*, 20 N. C. (3 Dev. & B.) 108, 32 Am. Dec. 656.

e. **Guilty Intent.**—Fornication and adultery is a joint act, and to convict, it must be shown that two persons, a male and a female, have habitually indulged in unlawful sexual intercourse; but it is not essential to the conviction of one of them to show that both had a guilty intent. The one having such intent may be convicted, although the other, through an ignorance of the facts, had no such intent. Moreover, in fornication and adultery, criminal intent need not be alleged nor proved. The crime is established when it is proved that a man and woman, not being married to each other, habitually engaged in sexual intercourse: *State v. Cutshall*, 109 N. C. 764, 26 Am. St. Rep. 599, 14 S. E. 107.

f. **Particular Statutory Requirements.**—An indictment, charging that a woman did bed to, and live with a man (naming him), is not good, under a statute prohibiting a man and woman living together as husband and wife without being married: *Crouse v. State*, 16 Ark. 566. And under the statute of Georgia, an indictment for fornication must allege that both parties to the illicit intercourse were, at the time, single or unmarried, and this fact must be proved by the state before a conviction can be had: *Bennett v. State*, 103 Ga. 66, 68 Am. St. Rep. 77, 29 S. E. 919.

In *Cosgrove v. State*, 37 Tex. Cr. Rep. 249, 66 Am. St. Rep. 802, 39 S. W. 367, it is held that under an indictment for adultery, with proper allegations, a conviction can be had, under proper evidence, for fornication. It is a question of allegation, and not whether one offense includes the other; but in such case all the elements of fornication must be charged to support the conviction. And failure to allege in the indictment that both parties to the offense were unmarried is a fatal defect.

In *Cannedy v. State*, 58 Tex. Cr. App. 184, 125 S. W. 31, it was held that under Penal Code of 1895, article 357, defining "fornication" as "the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman, both being unmarried," an information or indictment should follow the statutory definition in order to charge the commission of the offense, and an information merely charging habitual carnal intercourse was defective.

g. **Meaning of Cohabit.**—In *State v. Chandler*, 96 Ind. 591, the defendant was indicted under a statute providing that "whoever cohabits with another in a state of adultery or fornication shall be fined, etc." The indictment charged that "one William Chandler . . . being a married man, and having a lawful wife then living, and Grace Beeman, at the time being unmarried, and Grace Beeman and said Chandler, not being married to each other, did then and there during said time unlawfully live and cohabit together as man and wife." The trial court sustained defendant's motion to quash the indictment on the ground that it did not charge that the defendant and Grace Beeman lived together in a state of fornication and adultery. In reversing the action of the trial court, Chief Justice Elliott says:

"It has been many times decided that the general rule is that if the offense is charged either in the language of the statute, or in

language of like import and equivalent meaning, the indictment will be held good. In the present case the language used is not that of the statute, and the question is whether that employed is equivalent to that found in the statute. The term 'cohabit' has not such a broad and certain meaning as that annexed to it by the state. The word is not one of a certain meaning, for the lexicographers define it to mean to 'dwell with another in the same place'; 'to live together as husband and wife': Worcester's Dictionary; Webster's Dictionary. Bouvier says: 'The word does not include, in its signification, necessarily, the occupying the same bed: 1 Hag. Con. 144; 4 Paige Ch. 425; though the word is popularly, and sometimes in statutes, used in this latter sense: 20 Mo. 210; Bishop on Marriage and Divorce, 506n. . . . Used without reference to the relation of the parties to each other as husband and wife, or otherwise.' The word, considered apart from the words with which it is associated, cannot, then, be taken as equivalent to the language of the statute, for it cannot be inferred from the use of the word that the parties were guilty of adultery or fornication. The statute itself employs the word in the sense of living together, but does not annex to it the signification claimed. The word as used in the statute does not signify a state of adultery or fornication, for the words with which it is associated forbid such an interpretation. The rule is that every word of a statute shall be given force unless in so doing violence is done to the intention of the legislature.

"It is, however, contended that the words, 'as man and wife,' give to the word 'cohabit' a meaning equivalent to that conveyed by the words 'in a state of fornication.' We are inclined to think that this contention should prevail. The word 'cohabit' is, as we have seen, a word susceptible of meaning a dwelling together as husband and wife, and we think that the language with which it is associated in the indictment does give it this meaning. If the word 'cohabit' had a fixed and definite meaning, it might be that a different rule would prevail, but it is capable of two or more meanings, and one meaning of which it is susceptible is that which the words with which it is associated assign to it, namely, living together as husband and wife. Taking the whole indictment into consideration, we think it charges the offense of cohabiting in a state of fornication."

h. Description of Parties.—Where an indictment charged that Sam Means had sexual intercourse with Frances Slaton, that said Sam Means was an unmarried man, "and the Slaton an unmarried woman," the words "the Slaton" obviously refer to Frances Slaton above mentioned: Means v. State, 99 Ga. 205, 25 S. E. 682. And the fact that an indictment against two defendants for fornication and adultery erroneously describes one defendant, a woman, as a "spinster," and the evidence proves that she is a married woman, is no ground in arrest of judgment: State v. Guest, 100 N. C. 410, 6 S. E. 253.

l. Time of Offense.—Where an information charged that the defendant lived in open and notorious fornication, from September 20, 1858, until October 25, 1859, and the affidavit upon which the information was based charged that the offense was committed from October 20, 1858, until September 25, 1859, it was held that the information was good: State v. Record, 16 Ind. 111.

j. Allegation as to Marriage.—Whether or not an indictment for fornication must charge that the parties or either of them are un-

married, the authorities are not agreed, owing, no doubt, to the fact that they are not agreed as to the true meaning of fornication. In *State v. Sharp*, 75 N. J. L. 201, 66 Atl. 926, it is held that an indictment charging that the defendant did commit fornication with Sarah A. C. is good without stating that Sarah was an unmarried woman. Says the court: "The word 'fornication' is a word of long-settled meaning, and implies an act with an unmarried woman; so, where the statute simply makes fornication a misdemeanor, the use of the word 'fornication' as descriptive of the act would seem to be sufficient. Mr. Bishop says that in an indictment no greater certainty is necessary than will show a *prima facie* case, and the prosecutor, it is believed, is not required to prove that the party was not married, and therefore, in the absence of particular statutory words, the prosecutor could not be called upon to allege that the parties were not married. A marriage would seem in its nature to be a matter of defense, while it is a matter lying peculiarly within the knowledge of the defendant: Bishop on Statutory Crimes, par. 693. In this state it has been ruled that the state is not bound to prove that the woman with whom the commission of the act is charged was unmarried; that being the presumption: *Gaunt v. State*, 50 N. J. L. 490, 14 Atl. 600. The state being not required to prove the singleness of the woman, it follows, in the language of Mr. Bishop, that the state, in the absence of statutory language, is not called upon to allege it. This view is supported by the very satisfactory opinion delivered by the supreme court of Indiana in the case of *State v. Stephens*, 63 Ind. 542."

But in *Commonwealth v. Murphy*, 2 Allen (84 Mass.), 163, the court, in sustaining the exception of the defendant that the indictment contained no averment that the person of whom the defendant had carnal knowledge was not his wife, says: "In the present case the crime of fornication is not duly charged in the indictment. There is no allegation that the female, of whom it is alleged the defendant had carnal knowledge, was not, at the time when the supposed offense was committed, the wife of the defendant. This should have been averred in some form of words, by which the fact that they were not married to each other should have been distinctly set out. . . . Such an averment has uniformly been introduced into indictments for this offense, in this commonwealth: Davis' Criminal Justice, 'Fornication.' The same reasons, on which it has been adjudged that an indictment for adultery is bad which does not allege that the persons who committed the offense were not married to each other, apply to the offense of fornication." And to the same effect is the case of *Bennett v. State*, 103 Ga. 66, 68 Am. St. Rep. 77, 29 S. E. 919, wherein it is held that there is no presumption, either of law or of fact, that a man or woman is single or unmarried.

In *Stebbins v. State*, 31 Tex. Cr. 294, 20 S. W. 552, the court says: "It is also urged that the different counts charging fornication are fatally defective in that they do not expressly aver that defendants were unmarried, and do not negative the fact that they were not married to each other. Both counts allege that, . . . neither of said persons being then and there lawfully married to another person then living. This allegation sufficiently avers the fact that the defendants are unmarried persons. It would be difficult to perceive how they could be married to each other without being at the same time 'married to another person then living'; and, if not married to another

person then living, they are evidently unmarried persons, and not married to each other. It would hardly be contended that defendants—one being a woman and the other a man—are one and the same person."

In *Townser v. State*, 58 Tex. Cr. App. 453, 137 Am. St. Rep. 976, 126 S. W. 572, it is held that an information for fornication which charges that the accused is an unmarried male and the person with whom the offense was committed is an unmarried female, sufficiently charges that the accused is a man and the other person is a woman.

V. Admissibility of Evidence.

a. **In General.**—It is difficult to lay down a general rule as to the character of the evidence necessary to prove the crime of fornication. Greenleaf says "the word 'evidence,' in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved": 1 Greenleaf on Evidence, c. 1, par. 1, quoted from Bouvier's Law Dictionary, "Evidence."

b. **Anterior Acts.**—On charges of illicit sexual intercourse within a limited period, evidence of acts anterior to such period may be adduced in explanation of acts of a similar character within that period, although such former acts, if treated as an offense, would be barred by the statute of limitations; evidence of this character would not, however, be admissible as independent testimony, but should be received when proposed in connection with or subsequently to the introduction of evidence tending to establish an improper intercourse between the parties during the period to which the charge is confined: *Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182.

In *Alsabrooks v. State*, 52 Ala. 24, the court says: "It is the settled law of this state that in a case 'involving a charge of illicit intercourse within a limited period, evidence of acts anterior to such period may be adduced in explanation of acts of a similar character, within that period, although such former acts, if treated as an offense, would be barred by the statute of limitations.' . . . Such evidence is only admissible, however, when proposed in connection with or subsequently to the introduction of evidence tending to establish an improper intercourse between the parties during the time covered by the indictment."

In *State v. Wheeler*, 104 N. C. 893, 10 S. E. 491, it was held that evidence tending to show acts of illicit intercourse prior to a former conviction was competent as corroborative evidence. But in *Duncan v. State* (Tex. Cr. App.), 45 S. W. 921, it was held that, in a trial for fornication, testimony that the accused had had habitual intercourse with the person with whom the offense was alleged to have been committed, during a period of eleven years, and that she had borne him six children, was inadmissible.

c. **Declarations and Confessions.**—Confessions of one defendant tending to prove subsequent illicit intercourse are admissible against the party making them on the trial of an indictment of two defendants jointly for living together in fornication, if their relevancy is shown from facts subsequently offered in evidence: *Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182. On the trial of a man charged with adultery and fornication with an unmarried woman, after proof that

the woman was married, her declaration, she being present in court, made three years previously, that she had heard her husband was dead, is not admissible to prove his death, it not appearing from whom her information is derived: *Williams v. State*, 86 Ga. 548, 12 S. E. 743.

In *Gaunt v. State*, 52 N. J. L. 178, 19 Atl. 135, the female, with whom the offense of fornication was alleged to have been committed, swore, on direct examination as a witness for the state, that she had sexual intercourse with the defendant less than six months before the birth of her child, and had never had sexual intercourse with any person prior thereto. On cross-examination the defendant, insisting that the child was mature at its birth, asked the witness a question concerning her whereabouts nine months before that event, with the view of proving facts which might tend to show that she became pregnant at that time. This question was overruled by the trial court. In reversing the judgment of conviction the court said: "The defendant had the legal right, on cross-examination, to prove facts tending to show that her denial was false. The question propounded was evidently designed to lead up to such proof, and by overruling it the court stopped the defendant at the threshold, and precluded him from an inquiry which might have gone far to establish his innocence."

d. Conduct of Parties.—In *Bass v. State*, 103 Ga. 227, 29 S. E. 966, it was held that when, on a trial for fornication, there was evidence for the state tending to show that the accused and the other alleged guilty party were, on a designated occasion, in a position strongly indicating that the act charged in the indictment was being committed, it was competent for the state to supplement this evidence by proving lascivious conduct between these parties on a previous occasion, such proof being relevant as throwing light upon their relations toward each other, and as tending to illustrate the real nature of their conduct upon the occasion in question. The state, in such case, having elected the occurrence which was the later in point of time as the one upon which it would rely for a conviction, the court very properly instructed the jury that they could not convict the accused upon the evidence relating to the prior occurrence, but that this testimony was for their consideration "simply to show the relation between the parties, and as a mere circumstance in the case in connection with other circumstances to be considered" by the jury; and that under the circumstances above recited, the evidence relating to the former occasion was certainly not rendered inadmissible merely because it had not been introduced before the grand jury.

In *State v. Raby*, 121 N. C. 682, 28 S. E. 490, it was held that, in the trial of an indictment for fornication and adultery, testimony that the defendants were seen working together in a field, although slight evidence of their guilt, was competent to show, in connection with other circumstantial evidence, that the defendants were living together in fornication and adultery.

e. Impeachment of Witness.—Where, on the trial of an indictment for fornication, the defendant proposes to prove what the prosecutrix has sworn before a justice of the peace in a trial for bastardy, such testimony can be admissible only for the purpose of impeaching the prosecutrix as a witness, and where no foundation therefor is laid by asking her if she has so testified, it is properly rejected: *Hollis v. State*, 77 Ga. 74.

f. Of Graver Offense.—In *State v. Summers*, 98 N. C. 702, 4 S. E. 120, on the trial of an indictment for fornication and adultery, the evidence showed that the defendants were not married to each other, and with no attempt at concealment they habitually associated, bedded and cohabited together; and that when the female defendant was not in a yielding or complying mood, he used violence and forced her to yield to his brutal lusts. It was urged on behalf of the male defendant that, as there was evidence to show that he had at times been guilty of rape, the offense of fornication and adultery were merged in the felony, and that the jury should not find the defendant guilty on the indictment which charged fornication and adultery. In affirming the judgment of conviction the court says. "It is difficult to conceive of a more wicked and unblushing violation of the law against fornication and adultery. . . . If at times, when the female defendant, from a sense of shame or any other reason, was not in a yielding or complying mood, he used violence and forced her, against her will, to yield to his brutal lusts, he may have been guilty of the more heinous crime of rape, he is none the less guilty of fornication and adultery in bedding and cohabiting with her in the manner testified to by the witnesses. The mistake that he commits is in supposing that he may not have been guilty of fornication and adultery in the habitual illicit intercourse to which she freely and voluntarily assented, and at other times of rape, if by violence he forced her to yield to his will. Of the former, the proof of his guilt seems conclusive; and he cannot evade the effect of this indictment by admitting, as he seems to do, that the evidence shows that he is guilty of the latter; he may be guilty of both offenses, but in this indictment he and his codefendant can only be convicted and punished for the former."

g. Circumstantial Facts.—On the trial of one indicted for fornication, evidence that the accused, an unmarried woman, was seen in bed in the same room with an unmarried man, who had just got out of bed, and was still in his nightclothes, is sufficient to warrant a finding that the sexual act was performed: *Seats v. State*, 122 Ga. 173, 50 S. E. 65. In a prosecution for fornication, it is not error to exclude evidence that the woman, with whom the offense was committed, had carnal intercourse with other men, as such evidence, if admitted, would show that she was of loose virtue, and tend to corroborate the state's case: *Rodes v. State*, 38 Tex. Cr. 328, 42 S. W. 990. On the trial of a female for the offense of adultery and fornication, evidence that she lived in the same house with the unmarried man with whom she is charged with having committed the act is admissible, although it may tend to prove that they lived together in a state of adultery and fornication, which under the code is a different offense: *Radford v. State*, 7 Ga. App. 600, 67 S. E. 707.

In *Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182, it was held that evidence of the refusal of the male defendant to pay for the services of a physician rendered during the confinement of his codefendant, and of his statement that the child was not his, not being connected with any conversation or admission offered by the state, was not admissible on the trial of a man and woman jointly indicted for fornication. And a conversation shortly before the birth of a child between the mother of the female defendant and a physician who attended her during her confinement, as to the means by which the physician was to obtain his fee, during which conversation she remained silent, was

not admissible against the female defendant on an indictment of her and her codefendant for living together in fornication.

VI. Sufficiency of Evidence.

a. **In General.**—It is the province of the jury, as triers of fact, after hearing witnesses testify, and observing their demeanor while on the witness-stand, to sift the testimony submitted to them, reject that unworthy of belief, and from all the evidence ascertain the truth or untruth of the charge. And if there is testimony, the competency of which cannot be questioned, which, if believed by the jury, establishes all material allegations of the information or indictment for fornication, excluding every rational hypothesis save that of the guilt of the accused, a verdict of guilty will be sustained: *Musfelt v. State*, 64 Neb. 445, 90 N. W. 237. Where, however, it appears from the record that a verdict of guilty of fornication is based upon suspicion and prejudice, and there is a miscarriage of justice, a court will not allow the verdict to stand: *Bartelle v. United States*, 2 Okl. Cr. App. 84, 100 Pac. 45.

And in jurisdictions where the authorities hold that, in order for a person to be convicted of fornication, it must appear that both the man and the woman who participated in the criminal act were unmarried when the offense was committed, failure on the part of the state to show that either the accused or the female named in the indictment was unmarried when the criminal act was committed, will be ground for setting the verdict of guilty aside: *Neil v. State*, 117 Ga. 14, 43 S. E. 435. And where the evidence showed that the female was a married woman, and there was no legal testimony to show that her husband was dead at the time of the alleged criminal act, a verdict of guilty was held contrary to the evidence: *Williams v. State*, 86 Ga. 548, 12 S. E. 743.

If on the trial of a man for fornication and adultery with a woman who lived at his house it does not appear that the woman was single when the act is alleged to have been committed, nor that her child, born while she lived at his house, is a bastard, nor that the woman is not the defendant's wife, there is insufficient evidence to go to the jury: *State v. Pope*, 109 N. C. 849, 13 S. E. 700.

In *Ham v. State* (Tex. App.), 15 S. W. 405, on a trial for fornication, the testimony showed that the defendant was a bachelor, and that the husband of the woman with whom he is alleged to have committed the offense lived on defendant's place six or seven years; and that since the woman's husband died, she occupied the defendant's house, in which he also lived. The woman had given birth to two children since her husband's death. The house in which the defendant and the woman lived contained two rooms; in one room there was one bed, and in the other room two beds. None of the witnesses knew who occupied the several beds. None of the witnesses had ever seen the defendant and the woman in bed together. A number of other men lived in the same neighborhood. It was held that the evidence was insufficient to support a verdict of guilty.

b. **Silence.**—When before prosecution, and while not under restraint, parties are accused of living together in a state of fornication, and make no denial, or are silent, this may be shown in evidence as an inculpatory circumstance to be weighed and considered by the

jury in determining the truth of the charge preferred against them. And when conflicting testimony is fairly submitted to a jury, a new trial will not be granted, if the testimony is sufficient to sustain the verdict: *Musfelt v. State*, 64 Neb. 445, 90 N. W. 237.

c. **Alibi.**—In *Mitchell v. State*, 81 Ga. 458, 8 S. E. 444, a conviction for fornication was affirmed where it appeared that the female swore positively to the commission of the offense, and she was not impeached, and the defendant did not deny her testimony under his oath, but attempted to prove an alibi, in which he failed.

d. **Corroboration.**—In some states the rule requiring accomplice testimony to be corroborated applies on trials for fornication. In *State v. Collett*, 20 Utah, 290, 58 Pac. 684, it was held that under section 4862, Revised Statutes of 1898, the corroborating evidence, in addition to the testimony of the accomplice, necessary to sustain a conviction on a charge of fornication, need not be a corroboration of every material fact, but only of such material facts as constitute a necessary element in the crime charged. And in *State v. Seiler*, 106 Wis. 346, 82 N. W. 167, it was held that under Revised Statutes, paragraph 4580, as amended by the laws of 1899, providing a punishment for fornication with a sane female, of previous chaste character, under eighteen years of age, the testimony of the complaining witness as to her previous chaste character need not be corroborated of that fact.

On a trial for fornication, the fact that the defendant was found on the bed with the girl with whom the alleged crime was committed, in the night-time, and had been there for twenty minutes before he was disturbed, is a sufficient corroboration of a confession by him to authorize the jury to return a verdict of guilty: *Burger v. State*, 81 Ga. 196, 6 S. E. 282. In *Townser v. State*, 58 Tex. Cr. App. 453, 137 Am. St. Rep. 976, 126 S. W. 572, the female accomplice testified on the trial for fornication that she and the defendant had been living together as man and wife for several years; that they had never been married, and she had four children born to her by the defendant; that they engaged in sexual intercourse with each other as often as they desired, and joined a church as man and wife under the same surname. It was held that the evidence did not sufficiently corroborate the testimony of the woman. Said the court: "There was no testimony offered whatever on the part of the state by any witness to show either intercourse or that appellant was ever seen in the presence of the prosecuting witness, Mattye Townser, or that they ever lived together."

In *Mitchell v. State*, 38 Tex. Cr. 325, 42 S. W. 989, in reversing the judgment of conviction, the court says: "On accomplice testimony, the court gave only this charge: 'You are further instructed that the defendant in this case cannot be convicted on the unsupported evidence of the accomplice, Leah Sinyard.' Appellant reserved an exception to this charge, and requested one in writing, submitting an appropriate instruction on this subject. This charge was refused by the court, and appellant again excepted. The court might, under the evidence, well assume that Leah Sinyard, who testified that the acts of fornication were committed by defendant with her was the accomplice alluded to, although there was another Leah Sinyard who testified in the case; but the vice in the charge was the failure of the court to properly define to the jury the character of corroboration, and that

they must find, before they could convict the appellant, that the accomplice was corroborated by other testimony, and should have also defined to the jury the nature of the corroborative testimony required. This was not done by the charge given by the court, and the requested charge should have been given."

In *Hofer v. State*, 130 Wis. 576, 110 N. W. 391, it is held that as a rule of law there is no legitimate basis for a conviction in a prosecution of a man for fornication, if he denies the charge; there is nothing suggestive to the contrary in the mere meeting of the parties under the circumstances; and there is neither direct nor indirect evidence of the main fact, nor direct corroborative evidence of the female as to circumstances bearing thereon and her evidence as to such circumstances may be regarded as self-destructive by reason of willful false swearing at material points.

VII. Instructions.

On a trial for an act of fornication a charge to the jury that if, "they believed the parties were found on the bed together, that the door of the room was closed, that there was no one else present in the room, that the woman was a prostitute, and that the defendant was frequently in the habit of visiting her house, they were bound to find the defendant guilty," was held rather too strong: *Ells v. State*, 20 Ga. 438. "The charge," says the court, "amounts to this: that certain circumstances are such, that if they exist, they conclusively call for the presumption of guilt. And its effect upon the jury, if respected by them, must have been to exclude from their consideration every circumstance in the case, except the circumstances referred to by the charge itself; and every conclusion possible to be drawn even from these circumstances, except the one drawn by the charge. Now, circumstances, as we think, can hardly be such that they shall be conclusive of guilt. They may easily be such that they shall raise a 'strong' or a 'violent' presumption of guilt. And they were such, no doubt, in this case; but we cannot say that we regard them as having been conclusive of guilt."

An instruction, on a trial for fornication and adultery, that it was competent for the jury to consider the relations between the parties as subsisting more than two years before the finding of the bill of indictment, and the other circumstances in evidence, including the fact that for the past two years and up to the trial they had lived alone in the same house, was held proper in *State v. Pippin*, 88 N. C. 646. And in *Bass v. State*, 103 Ga. 227, 29 S. E. 966, it is held that mere failure to charge upon the law relating to the impeachment of witnesses is not a cause for a new trial, when it appears that the attention of the court was not directed to this matter, and that no request to charge concerning it was made.

VIII. Defense of Former Acquittal.

An acquittal on an indictment for seduction is a good plea in bar of a subsequent indictment charging the same offense as fornication and bastardy: *Dinkey v. Commonwealth*, 17 Pa. 126, 55 Am. Dec. 542. But in *Ledbetter v. State*, 21 Tex. App. 344, 17 S. W. 427, it is held that the acquittal of one defendant, jointly indicted and tried with another for fornication, will not constitute an acquittal of the other.

KORBLY v. LOOMIS.

[172 Ind. 352, 88 N. E. 698.]

MECHANICS' LIENS.—Title of Statute Excludes Contractors and Subcontractors.—The "mechanic's lien law" (Burns Rev. Stats. 1908, sec. 8305, Acts 1889, p. 257, sec. 6) only embraces mechanics, laborers, and materialmen, and does not include contractors or subcontractors, for the reason that they are not within the scope of the title of the act. (p. 380.)

BUILDING CONTRACT—Architect's Certificate—Pleading.—When the parties to a building contract have made the certificate of an architect or engineer a condition precedent to the assertion of a right thereunder, such provision is valid, and the party claiming such right must show, by proper allegations, the performance of the conditions, a valid reason for noncompliance therewith, or a waiver thereof. (p. 381.)

CONTRACTS—Condition Precedent to Right of Action.—When parties capable of contracting have deliberately entered into a written contract, by which there is created a condition precedent to a right of action, such condition must be performed or its requirements waived. (p. 381.)

CONTRACT—Condition Precedent—Pleading.—In an action for the breach of a contract, the party seeking to enforce the same must allege, as to conditions precedent, that he has complied with all such conditions on his part, or state facts showing a proper excuse for not having performed the same. (p. 382.)

CONTRACT—Condition Precedent—Pleading.—The performance of a condition precedent may be alleged by the general allegation provided for by statute (Burns' Rev. Stats. 1908, sec. 376; Rev. Stats. 1881, sec. 370); otherwise the performance must be alleged with the particularity required by the rules of the common law. (p. 382.)

George A. Knight, Frank L. Littleton, John H. James, Roemler & Chamberlain and Carson, Thompson & Dowden, for the appellants.

353 MONKS, J. Appellees, subcontractors, brought this suit against appellants on a railroad construction contract, and on February 10, 1908, recovered a personal judgment against appellant bridge company, the general contractor, and a decree declaring and enforcing a lien on the right of way and track of appellant railway company, under an amendment of what is known as the "mechanic's lien law" of this state: Burns' Rev. Stats. 1908, sec. 8305; Acts 1889, p. 257, sec. 6.

It is first insisted that the court erred in overruling the demurrer for want of facts of each appellant to the complaint.

It was held by this court in Fleming v. Greener, 173 Ind. 260, 87 N. E. 719, 90 N. E. 72, and Cleveland etc. R. Co. v. Defrees, 173 Ind. 717, 87 N. E. 722, that section 8305, supra, which governs the rights of the parties in this case, only embraced mechanics, laborers and materialmen, and did not in-

clude contractors or subcontractors, ³⁵⁴ for the reason that they were not within the scope of the title of said act.

We therefore hold, upon the authority of said cases, that as appellees, being subcontractors, were not entitled, under said section of the mechanic's lien law, to a lien upon said property of appellant railway company, the court erred in overruling the demurrer of said appellant to the complaint.

Appellees' complaint is in one paragraph, and the written contract sued on is filed with and made a part of the complaint, and appellees agree therein to construct certain concrete arches, abutments and culverts along the right of way of the appellant railway company in Putnam county, Indiana. Appellees also agreed in said contract among other things, that, before they should be entitled to bring any action on said contract against the Collier Bridge Company, they would perform the following express conditions, to wit:

"(23) Before final settlement is made between the parties hereto for the work done and materials furnished under this contract and before any right of action shall accrue to the contractor against the company [the Collier Bridge Company] therefor, said contractor shall furnish evidences satisfactory to the engineer of the railway company that the work covered by this contract is free and clear from all liens for labor and material, and that no claims then exist against the same for which any lien could be enforced. (24) Whenever, in the opinion of the engineer of the railway company, this contract and all things agreed to be done by the contractor shall have been completely performed and finished according to the provisions hereof and within the time herein limited, said engineer shall make and return a final estimate of the work done and materials furnished by the contractor under this contract, together with a statement of the amount due to him therefor and remaining unpaid, and shall certify to the same in writing under his hand, and the company [the Collier Bridge Company] shall, within sixty days after the completion of the work aforesaid and the return of said final estimate pay to the contractor the full amount so found to be due him and remaining unpaid, including the percentages ³⁵⁵ retained on former estimates as aforesaid, as except in this contract is otherwise provided. Procuring of such certificate and final estimate shall constitute a condition precedent to any right of action by the contractor against the company [the Collier Bridge Company]. Before final payment shall be required to be made by the company [the Collier Bridge Company] under this contract, the contractor shall acknowledge and deliver, under his hand and seal, a

release and discharge of and from all and any such claims and demands for and in respect of all matters and things growing out of or connected with this contract or the subject matter thereof, and of and from all claims and demands whatsoever."

When the parties to a building contract have made the certificate of an architect or engineer a condition precedent to the assertion of a right thereunder, such provision is valid, and the party claiming such right must show, by proper allegations, the performance of the conditions, a valid reason for noncompliance therewith, or a waiver thereof: *White v. Mitchell*, 30 Ind. App. 342, 65 N. E. 1061, and cases cited; *Hanley v. Walker*, 79 Mich. 607, 45 N. W. 57, 8 L. R. A. 207, and authorities cited; *Boettler v. Tendick*, 73 Tex. 488, 11 S. W. 497, 5 L. R. A. 270, and cases cited and note on pages 272-274; *Barney v. Giles*, 120 Ill. 154, 11 N. E. 206; *Arnold v. Bournique*, 144 Ill. 132, 36 Am. St. Rep. 421, 33 N. E. 530, 20 L. R. A. 493, and cases cited; *Gilmore v. Courtney*, 158 Ill. 432, 41 N. E. 1023; *Crouch v. Gutmann*, 134 N. Y. 45, 30 Am. St. Rep. 608 (and note on page 617), 31 N. E. 271; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442. In *Hanley v. Walker*, 79 Mich. 607, 45 N. W. 57, 8 L. R. A. 207, the court said: "When parties capable of contracting have deliberately entered into a written agreement in which, by all just rules of construction, the certificate of the architects is made a condition precedent to a right of action, such condition must be performed or its requirements waived. The authorities holding contracts like the one in question here valid are numerous: ³⁵⁶ *Leake on Contracts*, 3d ed., 557; *Benjamin on Sales*, 3d Am. ed., sec. 575; *Morgan v. Birnie*, 9 Bing. 672; *Grafton v. Eastern Counties R. Co.*, 8 Ex. *699; *Clarke v. Watson*, 18 Com. B., N. S., *278; *Goodyear v. Mayor etc.*, 1 Har. & R. 67; *Ferguson v. Town of Galt*, 23 U. C. C. P. 66; *Smith v. Briggs*, 3 Denio, 73; *North Lebanon R. Co. v. McGrann*, 33 Pa. 530, 75 Am. Dec. 624; *Reynolds v. Caldwell*, 51 Pa. 298; *O'Reilly v. Kerns*, 52 Pa. 214; *Gray v. Central R. etc. Co.*, 11 Hun, 70; *Tyler v. Ames*, 6 Lans. 280; *Spring v. Ansonia Clock Co.*, 24 Hun, 175; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Wyckoff v. Meyers*, 44 N. Y. 143; *Wangler v. Swift*, 90 N. Y. 38; *Tetz v. Butterfield*, 54 Wis. 242, 41 Am. Rep. 29, 11 N. W. 531; *Kirtland v. Moore*, 40 N. J. Eq. 106, 2 Atl. 269; *Hot Springs R. Co. v. Maher*, 48 Ark. 522, 3 S. W. 639; *Stose v. Heissler*, 120 Ill. 433, 60 Am. Rep. 563, 11 N. E. 161; *Boettler v. Tendick*, 73 Tex. 488, 11 S. W. 497, 5 L. R. A. 270; *Byrne v. Sisters of Charity etc.*, 45 N. J. L. 213; *Elliott v. Royal Exch. Assur. Co.*, L. R. 2 Ex. *237."

It is settled in this state that, in an action for the breach of a contract, the party seeking to enforce the same must

allege as to conditions precedent that he has complied with all such conditions on his part (Burns' Rev. Stats. 1908, sec. 376; Rev. Stats. 1881, sec. 370), or state facts showing a proper excuse for not having performed the same. If such party does not avail himself of the provisions of section 376, supra, by making the general allegation thereby authorized as to the performance of such conditions, he must allege the performance of all such conditions with the particularity required by the rules of the common law: *Collins v. Amiss*, 159 Ind. 593, 65 N. E. 906, and cases cited; *Magic Packing Co. v. Stone-Ordean etc. Co.*, 158 Ind. 538, 64 N. E. 111; and cases cited; *Mondamin etc. Dairy Co. v. Brudi*, ³⁵⁷ 163 Ind. 642, 72 N. E. 643, and cases cited. On account of the failure of the appellees to comply with this rule, the complaint was bad as to appellant bridge company. It follows that the court erred in overruling the demurrer of appellant bridge company to the complaint.

Judgment reversed, with instructions to sustain the demurrer of each appellant to the complaint, and for further proceedings not inconsistent with this opinion.

Conditions Precedent must be Performed before there can be a recovery on an entire contract: Note to *Huyett & Smith Co. v. Chicago Edison Co.*, 59 Am. St. Rep. 281.

The Right of a Building Contractor to Recover for a substantial performance of his contract is the subject of a note to *Handy v. Bliss*, 134 Am. St. Rep. 678.

A Provision in a Building Contract That in Each Case of Payment a certificate shall be obtained from and signed by the architects to the fact that the work is done in strict compliance with the plans and specifications, and that they consider the payment properly due, creates a condition precedent to the maintenance of suit by the contractor against the owner: *Bannon v. Jackson*, 121 Tenn. 381, 130 Am. St. Rep. 778.

An Agreement That an Architect's Certificate shall be a Condition Precedent to a contractor's right to payment is valid, but is always deemed to embody the condition that the architect shall exercise his function as arbitrator in good faith: *Halsey v. Waukesha Springs etc. Co.*, 125 Wis. 311, 110 Am. St. Rep. 838. As to when the refusal of an architect to give a certificate is unreasonable, and when a failure to obtain it does not bar a recovery by the contractor, see *Crouch v. Gutmann*, 134 N. Y. 45, 30 Am. St. Rep. 608.

A Stipulation in a Building Contract that payment shall be made on the estimate and certificate of the architect is a condition precedent and should be pleaded, and its performance alleged and proved, or a valid and reasonable excuse for nonperformance shown: Note to *Baltimore etc. Ry. Co. v. Scholes*, 56 Am. St. Rep. 312; *Winstead v. Reid*, *Busb.* 76, 57 Am. Dec. 571; and see *Randabaugh v. Hart*, 61 Ohio St. 73, 76 Am. St. Rep. 361.

In *Knight & Jillson Co. v. Castle*, 172 Ind. 97, 87 N. E. 823, 18 Ann. Cas. 1146, it was expressly stipulated in a bond given for the performance of a building contract, that the liability of the surety company depended upon the condition, among others, "that the surety shall be notified, in writing, of any act on the part of said principal or their

agents or employees which may involve a loss for which said surety is responsible hereunder, within ten days after the occurrence of such act, with a verified statement of the facts," etc. A materialman had furnished material to the contractor, whose contract was guaranteed by the bond containing the above condition, but the material had not been paid for. The materialman brought an action against the contractors and the surety company to recover for the materials furnished, the plaintiff claiming to have had knowledge of the execution of the bond in suit and averring a reliance upon the same to secure payment for said materials. But it did not appear that the plaintiff had given any notice to the guarantor, the surety company, of any act on the part of the contractors which might subject the surety company to a loss, and thus enable the guarantor at once to take such steps as were available to secure itself from loss. In view of these facts the court held that such stipulation was a condition precedent to recovery and that a compliance therewith must be averred and proved.

It was also stipulated in the bond, in substance, that the principal should pay all claims for material when due, upon condition that written notice of default should be given the surety company within ten days after its occurrence. The court considered this to be an enforceable condition, and held that it was a prerequisite to the plaintiff's right to recover that it show performance of all conditions on its part to be performed, or an adequate excuse therefor, neither of which facts was alleged.

MCDONALD v. STATE.

[172 Ind. 393, 88 N. E. 678.]

RULES OF COURT—Adoption and Promulgation.—There can properly be no such thing as an oral rule of court. Rules of court, when legally adopted and promulgated, have the effect of positive laws, and they ought not only to be formally promulgated, but they should be definitely stated. They should be published and made known in some permanent form so that they may be known to all. (p. 385.)

JURORS.—The Right of Peremptory Challenge is not denied where it is restricted to a defined number of opportunities. There need not be a definite rule fixing the time when, or the manner in which, the right must be exercised; it may be controlled either by a fixed rule, or by any reasonable limitation imposed in any specific case, so long as the right of peremptory challenge is not taken away. (p. 386.)

JURORS—Challenge to Array or Panel.—At common law no challenge to the array or panel could be made until the full jury was present, and the statute of this state upon the subject was evidently adopted with this practice in mind. (p. 386.)

APPEAL—Review of Instructions.—Where No Question as to the giving of an instruction is presented by the motion for a new trial, it will not be reviewed on appeal. (p. 389.)

APPEAL—Review of Instructions—Evidence not in Record.—Where there is no showing that the instructions contained in the record were all the instructions given and the evidence is not set out, the judgment will not be disturbed on account of certain instructions

unless they were irrelevant and incorrect upon any supposable state of facts given in evidence. (p. 389.)

CONSPIRACY.—Evidence of the Nature and Properties of Phosphorus is Admissible in a prosecution for conspiracy to defraud an express company by preparing and shipping a package, securely wrapped, represented to contain valuable papers, but in reality containing phosphorus and other materials so arranged that when sufficiently dried the phosphorus will ignite and the contents of the package be burned and consumed. (pp. 384, 389.)

Clifford C. Kealing, for the appellant.

James Bingham, attorney general, Alexander G. Cavins, Edward M. White and William H. Thompson, for the state.

³⁹⁴ MYERS, J. Appellant was convicted on an indictment charging him and another with conspiring for the purpose and with the intent unlawfully, feloniously and designedly to defraud the Adams Express Company, by preparing a package, securely wrapped, which package contained, among other things, two damp sponges, excelsior and damp phosphorus, so arranged that when sufficiently dried the phosphorus would ignite and cause such package and its contents to be burned and consumed; that, in pursuance of the conspiracy, they delivered the package to said express company to be transported from Indianapolis, Indiana, to Louisville, Kentucky, and falsely represented that the package contained papers of the value of ten thousand dollars; that the conspirators intended, by the preparation of such package, and ³⁹⁵ its delivery to the express company, that the contents of the package, while in possession of the company, should become sufficiently dry to ignite, burn and destroy the package, and to claim to have been damaged in the sum of ten thousand dollars, and fraudulently and unlawfully to make demand upon the company therefor, and cheat and defraud the latter by obtaining money from such company by virtue of such false pretenses.

The only error assigned is upon the overruling of the motion for a new trial.

The questions sought to be presented arise upon alleged error in refusing the peremptory challenge of a juror on his voir dire, and in giving instructions. The evidence is not in the record. A bill of exceptions discloses that in impaneling the jury, when the jury had been passed back to the defendant's counsel for re-examination for the third time, and defendant had used but three peremptory challenges, being entitled to ten, the defendant peremptorily challenged a juror who had been in the jury-box from the time the impaneling of the jury began, and the challenge was disallowed, "for the reason that, under a rule of said

court, which had been in existence for many years, the defendant's peremptory challenge was made too late," said rule was stated by the court at the time as follows: "That each side, the defendant and the state, is entitled to examine each juror twice, and challenge, if desired, but cannot challenge a juror after the jury has been passed twice with each juror in the box. Said rule is an oral rule, and is not entered in the records of the court, but has been regularly enforced for many years." It is further recited that the defendant and his attorney, at the time of the challenge, did not know of the rule, but they did not inform the court on being advised of such rule that either or both of them were ignorant of it, and did not ask that it be suspended, nor that an exception be made to its enforcement, on account of such ignorance. We ³⁹⁶ think it quite clear that there can properly be no such thing as an oral rule of a court. Rules of court, when legally adopted and promulgated, have the effect of positive laws; Burns' Rev. Stats. 1908, sec. 1443; Rev. Stats. 1881, sec. 1323; Magnuson v. Billings, 152 Ind. 177, 52 N. E. 803; State v. Van Cleave, 157 Ind. 608, 62 N. E. 446; Smith v. State, 137 Ind. 198, 36 N. E. 708; 11 Cyc. 742.

They ought not only to be formally promulgated, but they should be definitely stated, which could not be true of a practice reposing solely in the breast of a judge. They should be published and made known in some permanent form, so that they might be known to all. The so-called rule was clearly not a rule at all, and binding upon no one—clearly not upon one who has no notice of it. The statutory provision (Burns' Rev. Stats. 1908, sec. 2099; Acts 1905, pp. 584, 634, sec. 228) is as follows: "In prosecutions for capital offenses, the defendant may challenge, peremptorily, twenty jurors; in prosecutions for offenses punishable by imprisonment in the state prison, ten jurors; in other prosecutions, three jurors. When several defendants are tried together, they must join in their challenges."

Irrespective of the so-called rule, was appellant denied a statutory right? No provision is made by statute or by rule as to how or when the right shall be exercised, and it is claimed by appellant that it may be done at any time until the jury is sworn. In some jurisdictions the passing of a juror after he has been examined, tendered to and accepted by the other party is a waiver of the right to challenge. In others, the right to challenge is in the sound discretion of the court. In others, a party who accepts a juror with knowledge of an objection waives the objection, but if a cause of objection is afterward discovered, it is not waived, unless he is guilty of negligence in not discovering the ob-

jection: 24 Cyc. 322, 323. There is no showing made that appellant did not know from the beginning the grounds for the peremptory challenge, and he stands here ³⁹⁷ upon the bare proposition that he was entitled to the challenge in any event, without offering any excuse to the court, or making any request for exemption or relief from the local practice. Had any request for exemption upon the ground that the so-called rule was void, or that the appellant or his counsel had no knowledge of it, been made, or if any reason were shown why the juror twice passed by appellant as satisfactory had been discovered to be unacceptable, a different question would be presented, for, independently of the so-called rule, appellant shows no ground for relief from his own act and acquiescence.

We think it cannot be said that the right of challenge is denied where it is restricted to a defined number of opportunities for challenge, nor that there must be a definite rule fixing the time when, or the manner in which, it must be exercised, for we think it may be controlled either by a fixed rule, or by any reasonable limitation imposed in any specific case, so long as the right of peremptory challenge is not taken away; in other words, that, when reasonable opportunity is given to challenge, the spirit of the statute is complied with, and that it does not mean that the right is an open one at all times until the jury is sworn, irrespective of all else; that there is no good reason why there may be speculation as to what the opposite party may do, and the jury passed backward and forward to await the action of the adversary; that the statute means that when the jury is passed to a party, he must challenge peremptorily if he would challenge, in the absence of an after-arising condition, and that, when the opportunity was twice given, as here, and not exercised, a party cannot complain, unless new conditions arise, calling for an exception to, or relaxation of, the practice or the order in the particular case, and that if a given practice, not rising to the dignity of a rule, is invoked, as here, one to be exempt from its operation, on account of his ignorance of it, must seasonably apply to be relieved from its operation. At common law no challenge to the array or ³⁹⁸ panel could be made until the full jury was present: 1 Chitty's Criminal Law, 4th Am. ed., *544. Our statute (Burns' Rev. Stats. 1908, sec. 2101; Acts 1905, pp. 584, 634, sec. 230) was evidently adopted with this practice in mind, and the right to challenge contemplated the right to challenge as the panel thus full stood, or as it might stand, and not that the right should be one arising out of indefinitely passing the jury as acceptable.

In *Ward v. Charlestown City R. Co.*, 19 S. C. 521, 45 Am. Rep. 794, after a plaintiff had announced that she had no

objection to the jury, the defendant challenged two jurors, and plaintiff then claimed the right of peremptory challenge. The court said: "There was no denial on the part of the court; on the contrary, the right was tendered to her at the proper time, and having waived the exercise of it then, for the reasons given by the circuit judge, we think it was too late to demand it after the defendant had exercised his right." It is said in *Mayers v. Smith*, 121 Ill. 442, 448, 13 N. E. 216: "Under the practice at common law, no such case would arise as is here presented, of a party reserving his power of peremptory challenge until after he had examined and passed upon the whole twelve jurors, or eight of them, for causes of challenge, and then to claim the exercise of such right of peremptory challenge as to jurors who had previously been passed upon and accepted, for the reason that the practice there was to require each juror to be sworn when his examination was completed."

In *State v. Potter*, 18 Conn. 166, a talesman was called and examined by the counsel for defendant as to his bias, or for cause of challenge, and no objection appearing, the court informed defendant's counsel that they could challenge him peremptorily. They declined to exercise the right at that time, as the panel was not full, and after it was full they challenged the juror peremptorily, and the court inquired whether any cause then existed which did ³⁹⁰ not exist when they first declined the right. They answered in the negative, and the court held that the challenge came too late, and this ruling was upheld. The reasoning, which is pertinent here, is as follows: "Again, it is said, the prisoner has been deprived of a right to a peremptory challenge, which he was entitled to. It is not denied that time and opportunity were given to the prisoner to challenge a juror; but it is claimed that he had not all the time the law allows him. *Dickerman*, a talesman, had been examined, and there was no cause of challenge known against him. The court then told the counsel, if they intended a peremptory challenge, they must make it at that time. They then had a reasonable opportunity to make their challenge; but they claim they may make it at their own time, provided it is done before the jurors are sworn. The statute, it is said, gives them power to challenge peremptorily twenty jurors summoned and impaneled—and much criticism has been had upon the word 'impaneled.' It is claimed that it means the jury sworn to try the cause; and that until sworn, they are not impaneled. . . . But it is said that by the English practice, the party has a right to challenge until the jury is sworn. There, each juror is sworn as soon as he has been examined and opportunity given for challenge. By our practice,

jurors are none of them sworn until all have been examined and an opportunity offered for challenge."

Under the statute of Arkansas the state in criminal cases is required to exhaust its challenges before passing a jury to the defendant, and it was held that when the state had passed a jury to the defendant, it was error to permit a peremptory challenge by the state: *Williams v. State*, 63 Ark. 527, 39 S. W. 709.

Where, upon impaneling a jury, the judge announced that he would require the defendant to make his challenges as he desired, to each juror as called, it was held not error to refuse a peremptory challenge after the juror was sworn and accepted, and it was held that, when there was a fair opportunity ⁴⁰⁰ to interpose a peremptory challenge, the defendant cannot complain of a refusal to be allowed the further exercise of the right: *People v. Carpenter*, 102 N. Y. 238, 6 N. E. 584.

We are not unaware that in the earlier cases in this state and in other states it is held that the right of challenge continues up to the swearing of the jury, but we are unable to perceive that any substantial right of a defendant is invaded when an opportunity for challenge of the full number is afforded and it is not availed of up to the time the jury is sworn. The object to be attained is an impartial jury, and while the right of peremptory challenge is an absolute one, it is not, we think, so far so that it may be exercised under all conditions. If, by the introduction of new men upon the panel, a cause for challenge should arise—such as the coming on of a person at such enmity to one already passed that they could not work in harmony, or the introduction of anything which might prejudice the right of a defendant—he would have a clear right to exercise his preference, and challenge the man already acceptable, rather than the new man, and the right would thus be preserved until the full panel is complete and the jury sworn. He has a right to a full panel to begin with, the right of canvass and comparison among jurors, and if his full right of challenge is preserved, within the line here indicated, it is practically a right of peremptory challenge until the jury is sworn, but it does not follow that the opportunity must be open under all circumstances or conditions, for it is a right which may be waived. Neither do we understand that the rule here declared is in conflict with the earlier holdings of the court, which upon examination are found to be general declarations as to the right of peremptory challenge extending until the jury is sworn, and did not involve any question of practice as to the mode of conducting the impaneling of juries, and of exercising the right of challenge, or of the ⁴⁰¹ right and power of courts to direct the manner of its exercise.

Complaint is made of the giving of instruction 2. No question as to the giving of the instruction was presented by the motion for a new trial. Objection is also made to instructions 10 and 11. There was no request for written instructions, and there is no showing that the instructions set out were all the instructions given in the cause, and without the evidence we cannot disturb the judgment on account of those instructions unless they were irrelevant and incorrect upon any supposable state of facts given in evidence. Neither of the instructions is set out in appellant's brief, as required by the rule of this court, but we have examined them from the record. Instruction 10 is quite as favorable to appellant as he could ask. The objection made to it is that it uses the expression, "and that phosphorus is a substance that when exposed to air will begin to burn." It will readily be discerned that it would have been proper to show by evidence the nature and properties of phosphorus.

As to instruction 11, certain language is referred to which the instruction does not contain. Counsel probably refers to instruction 10, and objects that it does not use the word "friction" in connection with the words "exposed to air," as a cause for ignition. We cannot know what the evidence was on the subject. No reversible error is shown, and the judgment is affirmed.

It is not a Ground of Challenge to the Array that an objection is made which does not affect the whole panel of jurors: *Commonwealth v. Chance*, 174 Mass. 245, 75 Am. St. Rep. 306.

The Supreme Court will not Review an assignment of error upon rulings of the trial court upon instructions which are not incorporated in the abstract: *People v. Weil*, 243 Ill. 208, 134 Am. St. Rep. 357.

Evidence in Cases of Conspiracy is discussed in the note to *Spies v. People*, 3 Am. St. Rep. 487-489.

INLAND STEEL COMPANY v. YEDINAK.

[172 Ind. 423, 87 N. E. 229.]

MASTER AND SERVANT—Minors—Violation of Statute.—*Allegations Showing* a violation of the terms of a statute prohibiting the employment of a minor in a certain business, and requiring him to work a number of hours in excess of the maximum fixed by law, are sufficient to show negligence per se, in an action for personal injuries received during such employment. (p. 393.)

NEGLIGENCE—Pleading.—*Contributory Negligence* constitutes an affirmative defense which the complaint need not disavow. (p. 393.)

MASTER AND SERVANT—Assumed Risk—Violation of Statute.—A master may not rightfully invoke the principle of assumed

risk to defeat an action for injuries caused by his violation of a specific statutory mandate or prohibition. (p. 393.)

MASTER AND SERVANT—Minor—Violation of Statute—Contributory Negligence.—A complaint by a boy thirteen years old, employed in a factory in violation of law, showing that by reason of exhaustion occasioned by excessive labor he fell asleep in a position, not ordinarily dangerous, where he was injured by the defendant moving cars contrary to its usual custom, does not show a case of contributory negligence. (p. 393.)

MASTER AND SERVANT—Minor—Violation of Statute.—The employment of a child of tender years and subjecting him to excessive hours of labor in violation of a statute, and the running of cars at unusual times whereby he is injured, constitute a violation of the master's duty not only to the servant but to the state as well. (p. 394.)

MASTER AND SERVANT—Minor.—The Violation of Statutes prohibiting the employment of children and fixing hours of labor constitutes negligence per se, but to make such negligence actionable it must be a proximate cause of the injury for which the action is brought. (p. 394.)

MASTER AND SERVANT—Minor—Duty to Instruct and Caution.—A master must give to a young and inexperienced servant such instruction and caution regarding the dangers of his employment as are reasonably calculated to enable him to avoid injury. This duty becomes imperative and inflexible when the servant is forbidden by law to assume the hazard to which he is exposed. (p. 394.)

MASTER AND SERVANT—Right to Rely on Customary Methods.—An employee has a right to rely upon the continued observance of proper and customary methods of conducting a particular business. (p. 394.)

MASTER AND SERVANT—Minor—Violation of Statute.—A master who, in violation of a statute, employs an infant for an excessive number of hours has an exceptional responsibility for the care of the infant cast upon him, and must anticipate the happening of accidents and give warning and take precautions commensurate with the danger to be apprehended. (p. 394.)

MASTER AND SERVANT—Minor—Violation of Statute.—The employer of a child in violation of a specific statute cannot screen himself from liability for an injury sustained by the child in the service, because the injury was occasioned through such negligence, imprudence or childish traits as gave rise to the statute. (p. 395.)

CONSTITUTIONAL LAW—Children.—A Statute Regulating the Hours of Employment in manufacturing establishments of persons under sixteen years of age, and forbidding the employment therein of children under fourteen years, is constitutional. (pp. 392, 399.)

CONSTITUTIONAL LAW.—The Fifth Amendment to the federal constitution operates exclusively in restriction of federal power, and has no application to the several states. (p. 397.)

CONSTITUTIONAL LAW.—The Fourteenth Amendment to the federal constitution was made for the protection of natural persons and cannot be invoked by a corporation. (p. 397.)

CONSTITUTIONAL LAW—Employment of Children.—The fourteenth amendment to the federal constitution is not violated by the law regulating the employment of children: Burns' Rev. Stats. 1908, sec. 8021 et seq.; Acts 1899, p. 231, secs. 1, 2. (p. 397.)

CONSTITUTIONAL LAW—Employment of Children.—Children under the age of sixteen years are wards of the state, and are pre-eminently fit subjects for the protecting care of its police power;

and laws prohibiting or regulating their employment constitute a valid exercise of that power. (p. 397.)

CONSTITUTIONAL LAW—Employment of Children.—The length to which the state may go in providing measures looking toward the physical, moral and intellectual well-being of its helpless wards is a question of expediency and propriety, which it is the province of the legislature to determine. (p. 399.)

CONSTITUTIONAL LAW—Employment of Children.—The law regulating the employment of children (Burns' Rev. Stats. 1908, sec. 8021 et seq.; Acts 1899, p. 231, secs. 1, 2) is not unconstitutional as class legislation. (p. 399.)

MASTER AND SERVANT.—Misrepresentation of Age by an Infant when seeking employment is no defense to the master who employs him under the age fixed by a statute and in violation of its provisions. (p. 401.)

William J. Whinery and John B. Peterson, for the appellant.

F. N. Gavit and J. E. Westfall, for the appellee.

⁴²⁵ **MONTGOMERY, J.** Appellee recovered judgment against appellant on account of personal injuries sustained while in its employ. Appellant charges the trial court with error in overruling its demurrer to each paragraph of the complaint, and in overruling motions for judgment on the answers of the jury to special interrogatories notwithstanding the general verdict, and for a new trial. The complaint is in two paragraphs, the first of which alleged substantially the following facts: Appellant was, at and before the time of the happening of the grievances complained of, a corporation engaged in the manufacture of iron and steel. Appellee was a minor under the age of sixteen years, was employed by appellant in its rolling-mill, and was required to work for twelve hours each night for six nights in each week. For more than a week prior to the time of receiving his injuries he had been compelled to and did work, under his employment, fourteen hours each night, but was not required so to work for the purpose of making a shorter day's work on the last day of the week. Under his employment appellee was required to and did open and hold open the doors of certain furnaces, while iron was being placed therein or taken therefrom, when requested so to do by appellant or by workmen whose duty it was to perform such work. Iron was so placed in said furnaces every half hour, and during the intervals appellee had no duty to perform except to wait in said mill, and be ready to open and hold such doors when so directed. Appellant furnished appellee no place in which to wait when not actively engaged, but directed him to wait in said rolling-mill. At 5 o'clock P. M. on October 5, 1903, appellee went to work, and was required to and did remain continuously at his said work until 4 o'clock A. M. of the fol-

lowing day, and was then in the performance of said work under his employment. He was then but thirteen years of ⁴²⁶ age, and became weary and exhausted from exertion and loss of sleep, caused by his continuous work in his said employment, and, having no duty to perform except to wait in attendance, sat down upon an iron door in said mill, four feet distant from and elevated two feet above a certain railroad track used by appellant to convey iron in cars to said furnaces, and for no other purpose. It was then the rule and custom of appellant to run no cars over said track after 1 o'clock A. M. of any day until after the iron then in the furnaces was removed therefrom, and appellee knew of such rule and custom at the time he sat down, as stated. Iron had been placed in said furnaces after 1 o'clock A. M. of October 6, 1903, and was still therein when appellee sat down near said track. No iron had been removed from such furnaces after 1 o'clock A. M. of said day, and none could be removed therefrom until appellee should assist in removing the same, as he well knew. Appellee had not been instructed nor notified as to any danger in sitting near said track, and, by reason of his youth, inexperience, exhaustion and sleepiness, he was incapable of appreciating any danger therefrom. Upon sitting down upon said iron door, because of such exhaustion and sleepiness, he immediately and involuntarily fell asleep and became unconscious, and while so asleep his foot and leg were involuntarily placed upon the rail of said track, and while so on said track, and before the iron in said furnaces had been removed therefrom, appellant caused a car loaded with iron to be moved along said track, over said rail and over appellee's foot and leg, thereby crushing the bones, muscles and flesh thereof and producing the injuries of which he complains. The second paragraph of complaint alleges the same general facts, and alleges as the basis of the actionable negligence that appellant wrongfully employed appellee when under fourteen years of age to work in said rolling-mill, and carelessly and negligently continued him in said employment until he was injured.

The first paragraph of this complaint is founded upon ⁴²⁷ section 8021 of Burns' Revised Statutes of 1908, Acts of 1899, page 231, section 1, which prohibits the employment of a person under sixteen years of age in a manufacturing establishment for more than sixty hours in any one week, or for more than ten hours in any one day, except for the purpose of making a shorter day of the last day of the week. The second paragraph is based upon section 8022 of Burns' Revised Statutes of 1908, Acts of 1899, page 231, section 2, which forbids the employment of a child under fourteen years of age in any manufacturing establishment within this state. The violation of these statutes is made a misdemeanor, pun-

ishable by fine, or fine and imprisonment for repeated offenses: Burns' Rev. Stats. 1908, sec. 8045; Acts 1899, p. 231, sec. 25. Appellant's counsel contend that neither paragraph of complaint alleges facts sufficient to bring appellee within the provisions of the statutes cited, nor shows freedom from fault or nonassumption of the risk on the part of appellee, nor the neglect of any duty owing to him by appellant, nor causal connection between the negligence charged and the injury of which complaint is made.

It is averred that appellant was engaged in the manufacture of iron and steel in this state, that appellee was under fourteen years of age, and that appellant employed him in its mill at an age prohibited, and required him to work a number of hours in excess of the maximum limit fixed by law. These allegations are clearly sufficient to show a violation of the terms of the statutes cited, and to make a case of negligence per se against appellant: Nickey v. Steuder, 164 Ind. 189, 73 N. E. 117.

In actions for personal injury caused by negligence, the plaintiff's contributory fault constitutes an affirmative defense, which the complaint need not disavow: Burns' Rev. Stats. 1908, sec. 362; Acts 1899, p. 58.

It is also well settled that a master may not rightfully invoke the principle of assumed risk to defeat an action for injuries caused by his violation of a specific statutory mandate or prohibition: Davis Coal Co. v. Pollard, 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492; Monteith v. ⁴²⁸Kokomo etc. Co., 159 Ind. 149, 64 N. E. 610, 58 L. R. A. 944; Island Coal Co. v. Swaggerty, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026; Green v. American Car etc. Co., 163 Ind. 135, 71 N. E. 268; Davis v. Mercer Lumber Co., 164 Ind. 413, 73 N. E. 899; Robertson v. Ford, 164 Ind. 538, 74 N. E. 1; Bessler v. Laughlin, 168 Ind. 38, 79 N. E. 1033.

The complaint clearly shows that the position assumed by appellee immediately before falling asleep was not ordinarily hazardous, nor, in the usual and customary conduct of affairs, could any danger from a moving car have threatened him without his previous knowledge. It is averred that he had no notice or warning of peril in that position, and that his youth and the exhausted condition of his body and mind, brought on by overwork, precluded appreciation of the danger which overtook him. In our opinion, the special facts alleged do not subject appellee to the charge of contributory negligence.

The suggestion that no neglected duty owing by appellant to appellee is shown requires but little comment. If this complaint is true, appellant violated a duty, not only owing to appellee but to the state, by employing a child

of tender years, subjecting him to excessive labor, and running one of its cars at an unusual time, without notice or warning, so as to inflict injury upon his person when he was asleep and not conscious of the impending danger.

Appellant's insistence that a causal connection must be shown between the negligence charged and the injury complained of is undeniably true. A violation of these penal statutes constitutes negligence per se, but to make such negligence actionable it must be a proximate cause of the injury for which the action is brought: *Nickey v. Steuder*, 164 Ind. 189, 73 N. E. 117; *Payne v. Chicago etc. R. Co.*, 129 Mo. 405, 31 S. W. 885; *Bluedorm v. Missouri Pac. R. Co.*, 121 Mo. 258, 25 S. W. 943; *Mathiason v. Mayer*, 90 Mo. 585, 2 S. W. 834; *Lincoln* ⁴²⁹ *Traction Co. v. Heller*, 72 Neb. 127, 100 N. W. 197, 102 N. W. 262; *Omaha St. R. Co. v. Duvall*, 40 Neb. 29, 58 N. W. 531; *Wise v. Morgan*, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 458; *Seibert v. McManus & Long*, 104 La. 404, 29 South. 108; *Kyne v. Wilmington etc. R. Co.*, 8 Houst. 185, 14 Atl. 922; *Gibson v. Leonard*, 143 Ill. 182, 36 Am. St. Rep. 376, 32 N. E. 182, 17 L. R. A. 588.

Appellant is charged, in the first paragraph of complaint, with the employment of a child to work in its mill, and with having subjected him to excessive labor, in violation of a penal statute. The mere performance of hard labor by an adult could rarely become the proximate cause of an actionable injury to himself, but would ordinarily constitute only the antecedent condition or occasion of the incurrence of any injury sustained. A different principle obtains when a child is employed and required to toil contrary to a positive law. The statute upon which this paragraph is founded was designed to protect children against the hardships and perils resulting from overexertion. A cardinal rule of law requires a master to give a young and inexperienced servant such instruction and caution regarding the dangers of his employment as are reasonably calculated to enable him to avoid injury. This duty becomes imperative and inflexible when such servant is forbidden by law to assume the hazards to which he is exposed. An employee has a right to rely upon the continued observance of proper and customary methods of conducting a particular business, and a slight departure therefrom might not constitute actionable negligence in favor of an adult in possession of all his faculties. A different case is presented when such deviation from custom results in injury to an uninstructed child overworked in violation of statute. The unlawful overtaking of appellee, as charged in the first paragraph, imposed upon appellant an exceptional responsibility, and required it to anticipate the happening of some such accident ⁴³⁰ as did befall appel-

lee, and to give warning and take precaution commensurate with the danger to be apprehended. Appellant, as alleged in this paragraph, employed a child under protection of the law, who in no case should have been admitted to undertake such service, and caused him to work at night for excessive hours until his endurance was overmastered, when, yielding to the inexorable demands of nature, he fell asleep, and unconsciously suffered his foot to be crushed under the wheels of a car operated at an unusual hour without notice or warning. We must assume, in this connection, that facts well pleaded are true, and upon this assumption our holding is that a cause of action is stated in this paragraph of complaint.

The second paragraph of complaint, as before shown, charges that appellant employed and caused appellee to work in its factory when he was under fourteen years of age, in violation of a statute forbidding such employment. This legislative interdiction, in effect, declares that children within the prohibited age are not possessed of that judgment, discretion and care requisite and necessary for their own safety while engaged in a hazardous vocation. Appellant is chargeable with knowledge of the legal disabilities of children to engage in its service, and must ascertain at its peril that a boy employed in the operations of its factory, which has been classified by the legislature as dangerous, is of the required age. The doing of a thing prohibited or the failure to do an act commanded by statute constitutes negligence per se, the natural consequence of which the master cannot escape on the ground that the employee knew of such disobedience and assumed the risk of injury. This rule of law has been declared most frequently in considering claims for injury resulting from the master's use of some appliance forbidden, or failure to use some safety device required, by statute, where the injured servant was lawfully employed. The employment in this case was ⁴³¹ wholly unlawful, and appellant by employing and retaining appellee in its business while within the prohibited age did so at its own risk; and, it appearing from the facts alleged that appellee was injured while engaged in the performance of forbidden duties in the line of his employment, appellant must be held liable for the injuries thus sustained. The employer of a child in violation of a specific statute cannot screen itself from liability for an injury sustained by the child in its service, because the injury was occasioned through such negligence, imprudence or childish traits as gave rise to the statute. It follows, therefore, that if appellee was employed and injured, as alleged in the second paragraph of complaint, under the law he cannot be chargeable either with having assumed any risks of the employment or with negligence contributing to his injury:

Marino v. Lehmaier, 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 811; *Lowry v. Anderson Co.*, 96 App. Div. 465, 89 N. Y. Supp. 107; *Iron etc. Co. v. Green*, 108 Tenn. 161, 65 S. W. 399; *Queen v. Dayton Coal etc. Co.*, 95 Tenn. 458, 49 Am. St. Rep. 935, 32 S. W. 460, 30 L. R. A. 82; *Morris v. Stanfield*, 81 Ill. App. 264; *Marquette etc. Coal Co. v. Dielie*, 110 Ill. App. 684; *American Car etc. Co. v. Armentraut*, 214 Ill. 509, 73 N. E. 766; *Perry v. Tozer*, 90 Minn. 431, 101 Am. St. Rep. 416, 97 N. W. 137; *Bromberg v. Evans Laundry Co.*, 134 Iowa, 38, 111 N. W. 417, 13 Ann. Cas. 33; *Nairn v. National Biscuit Co.*, 120 Mo. App. 144, 96 S. W. 679; *Lenahan v. Pittston Coal etc. Co.*, 218 Pa. 311, 120 Am. St. Rep. 885, 67 Atl. 642, 12 L. R. A., N. S., 461; *Stehle v. Jaeger A. Mach. Co.*, 220 Pa. 617, 69 Atl. 1116, 14 Ann. Cas. 122; *Sullivan v. Hanover Cordage Co.*, 222 Pa. 40, 70 Atl. 909; *Sipes v. Michigan Starch Co.*, 137 Mich. 258, 100 N. W. 447; *Leathers v. Blackwell etc. Tobacco Co.*, 144 N. C. 330, 57 S. E. 11, 9 L. R. A., N. S., 349; *Rolin v. R. J. Reynolds Tobacco Co.*, 141 N. C. 300, 53 S. E. 891, 7 L. R. A., N. S., 335, 8 Ann. Cas. 638.

⁴³² A causal connection between the unlawful employment and the injury of which complaint is made must be shown. If the child should die of some organic disease, or be injured by a stroke of lightning, or other intervening act beyond the master's control, and not reasonably to be foreseen and anticipated, the master could not be held liable: *Nickey v. Steuder*, 164 Ind. 189, 73 N. E. 117.

The state has said in positive terms that employers must not take children under fourteen years of age into the service of their factories and subject them to the danger of being mangled or killed by machines propelled by the powerful agencies of steam or electricity. This mandate, it is alleged, appellant disobeyed, and appellee was injured in the mill and by the agencies against which the law sought to protect him. The connection between the unlawful employment and the injury in this case is as direct as cause and effect, and brings appellant within the operation of the statute, and a cause of action is stated, unless the statute itself is invalid: *Starnes v. Albion Mfg. Co.*, 147 N. C. 556, 61 S. E. 525, 17 L. R. A., N. S., 602, 15 Ann. Cas. 470; *American Car etc. Co. v. Armentraut*, 214 Ill. 509, 73 N. E. 766; *Morris v. Stanfield*, 81 Ill. App. 264; *Iron etc. Wire Co. v. Green*, 108 Tenn. 161, 65 S. W. 399.

Appellant's counsel next contend that both paragraphs of complaint are insufficient, for the reason that the statutes upon which they are founded (sections 8021, 8022, Burns' Revised Statutes of 1908, Acts of 1899, page 231, sections 1, 2,) are unconstitutional and void. It is argued that article 1, section 10 of the constitution of the United States, and

article 1, section 24 of the constitution' of this state, which prohibit the passage of a law impairing the obligation of contracts, are infringed. These constitutional restrictions were manifestly intended to prohibit the enactment of laws impairing such valid contracts only as shall be in existence and outstanding at the time of the adoption of the law. These statutes were in force long prior to the making of any contract involved in this action, and the constitutional provisions cited have no application to this controversy.

433 It is stated that the fifth amendment to the federal constitution, which declares that no person shall be deprived of liberty or property without due process of law, is also violated. This amendment operates exclusively in restriction of federal power, and has no application to the several states: *Thorington v. Montgomery*, 147 U. S. 490, 13 Sup. Ct. Rep. 394, 37 L. ed. 252; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 22 Sup. Ct. Rep. 120, 46 L. ed. 171.

It is contended that these statutes unlawfully abridge the privileges and immunities of appellant as a citizen of the United States, in violation of the fourteenth amendment to the federal constitution. Appellant is a corporation, and not a citizen within the meaning of that term as used in this connection, and cannot invoke the benefit of this provision which was made for the protection of natural persons: *Pembina etc. Milling Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. Rep. 737, 31 L. ed. 650; *Schmidt v. City of Indianapolis*, 168 Ind. 631, 120 Am. St. Rep. 385, 80 N. E. 632, 14 L. R. A., N. S., 787.

The next insistence is that these statutes deny appellant the equal protection of the laws, and deprive it of property without due process of law, in violation of the fourteenth amendment, *supra*. Children under sixteen years of age are wards of the state, and are pre-eminently fit subjects for the protecting care of its police power. This power is an inherent attribute of sovereignty, and may be exercised to conserve and promote the safety, health, morals and general welfare of the public. The liberty and property of the individual citizens are held subject to such reasonable conditions as the state may deem necessary to impose in the exercise of this power. Such regulations and conditions will not fall within the inhibitions of the fourteenth amendment, unless they are palpably arbitrary, extravagant and unreasonably hurtful, and unnecessarily and unjustly interfere 434 with private rights: *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205; *In re Kemmler*, 136 U. S. 436, 10 Sup. Ct. Rep. 930, 34 L. ed. 519; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. Rep. 13, 34 L. ed. 620. In the case of *Barbier v. Connolly*, 113 U. S. 27, 5

Sup. Ct. Rep. 357, 28 L. ed. 923, Mr. Justice Field comprehensively stated the principle applicable in the following terms: "The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the police of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. . . . Regulations for these purposes may press with more weight upon one than upon ⁴³⁵ another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

The doctrine thus declared had reference to the rights of adults, and may be stated even more strongly when addressed to laws regulating the rights of minors to contract. The employment of children of tender years in mills and factories not only endangers their lives and limbs, but hinders and dwarfs their growth and development physically,

mentally and morally. The state is vitally interested in its own preservation, and, looking to that end, must safeguard and protect the lives, persons, health and morals of its future citizens. Acting upon this wise and humane principle, nearly all, if not all, other states of the Union and most other enlightened governments of the world have enacted laws very similar to our own, prohibiting the employment of young children in mines, factories and other establishments imperiling their health, lives and limbs, and at the same time affording them an opportunity to attend school, and to grow and develop in safe and wholesome surroundings free from the cares which generally engross the attention of adults in this commercial age. The validity of such laws has seldom been challenged, and, so far as our research extends, never denied. The length to which the state may go in providing measures looking toward the physical, moral and intellectual well-being of its helpless and dependent wards is a question of expedience and propriety which it is the province of the ⁴³⁸ legislature to determine. Mr. Tiedeman, speaking of this subject, says: "So far as such regulations control and limit the powers of minors to contract for labor, there has never been, and never can be, any question as to their constitutionality. Minors are the wards of the nation, and even the control of them by parents is subject to the unlimited supervisory control of the state": 1 Tiedeman on State and Federal Const., p. 335. The statutes under consideration have a direct and appropriate relation to the end sought by the legislature in their enactment, and are in nowise an unreasonable, unnecessary or arbitrary interference with the property of appellant or with its right to make contracts: Freund on Police Powers, sec. 259; Bryant v. Skillman Hardware Co., 76 N. J. L. 45, 69 Atl. 23; State v. Shorey, 48 Or. 396, 86 Pac. 881, 24 L. R. A., N. S., 1121; In re Spencer, 149 Cal. 396, 117 Am. St. Rep. 137, 86 Pac. 896, 9 Ann. Cas. 1105; Starnes v. Albion Mfg. Co., 147 N. C. 556, 61 S. E. 525, 17 L. R. A., N. S., 602, 15 Ann. Cas. 470; People v. Ewer, 141 N. Y. 129, 38 Am. St. Rep. 788, 36 N. E. 4, 25 L. R. A. 794.

It is finally claimed that article 1, section 23, of the constitution of Indiana is violated, inasmuch as these statutes are a species of class legislation. The statutes, as we have seen, forbid the employment and overworking of certain children in any manufacturing or mercantile establishment, mine, quarry, laundry, renovating works, bakery or printing office. The classification is natural, just and reasonable, and no substantial objection to its validity on this ground has been advanced: State v. Hogreiver, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504; Barrett v. Millikan, 156 Ind.

510, 83 Am. St. Rep. 220, 60 N. E. 310; Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787; In re Spencer, 149 Cal. 396, 117 Am. St. Rep. 137, 86 Pac. 896, 9 Ann. Cas. 1105. Our conclusion is that the statutes in question are valid, and that no error was committed in overruling appellant's demurrer to either paragraph of the complaint.

The remaining inquiry is whether the court was justified in overruling appellant's motion for judgment upon the answers of the jury to interrogatories and its motion for a ⁴³⁷ new trial. The denial of the motion for judgment was clearly right, in view of what has already been said and what follows.

Appellant contends that the verdict is not sustained by sufficient evidence, and that the court erred in giving and in refusing to give certain instructions. In answer to interrogatories the jury found that appellee was born January 29, 1890, was employed by appellant May 6 and injured October 6, 1903. That during the two nights immediately preceding the time of receiving his injury he had worked twenty-two and one-half hours. It thus appears that he was under fourteen years of age, and the evidence warranted this finding. During an intermission in his active work he left the place he occupied when operating the furnace doors and went a distance of fifty feet or more and sat down near one of the furnaces. He was asked why he sat down there, and responded in a characteristic way as follows: "Kind of chilly that night, and I didn't have nothin' to do for that twenty minutes or so, and I sat down there, and I was so sleepy I couldn't—I don't know—I didn't go over to sit down, but I just sat down there to take a rest while they were gone—then they would go to feed ore again—I sat down to take a rest, and before I knew it I was dreaming—almost fell asleep, and I heard the cars coming, but I couldn't get up; it was just like dreaming; I tried to get up but I couldn't; I was dreaming like—so sleepy." He had sat down with his legs doubled up and his hands clasped about his knees, and said further: "I was sitting down, that is all; I know I had my feet up when I sat down, and all at once—I don't know how the car happened to get it—I saw two cars go past me, and then the third one happened—my leg was under the third one, that is all I know." Appellant's counsel insist in this connection that appellee was clearly guilty of contributory negligence, and that a new trial should have been granted.

The doctrine of contributory negligence cannot be employed ⁴³⁸ to defeat the claim of a child injured in a service prohibited by statute. Appellant's counsel contend that if appellee was under age, he procured the unlawful

employment by falsely representing his age to be over fourteen years, and therefore he cannot avail himself of exemption from responsibility for contributory negligence, and profit by his own wrong. Appellant's timekeeper testified that when appellee applied for work he said he was over fourteen and under sixteen years of age, and thereupon was furnished a suitable blank to be filled out so as to show his exact age, and be sworn to by his mother; that appellee returned this paper, subscribed and sworn to by his mother, showing that he was born February 22, 1889, and he was then set to work. Appellee denied making any statement concerning his age, but testified that the superintendent or timekeeper furnished him a blank affidavit to be made by his mother, which he returned, but that he did not read it and had no knowledge of its contents. If appellee was in fact under fourteen years of age when he was employed, and under the evidence we think he was, then it is immaterial which of these conflicting statements is true. Appellant was positively forbidden to employ him until he was fourteen years old, and was bound, at its peril, to know that while in its service he was not within the inhibited age. If appellant were of a lawful age to be employed in such vocation, he should be held accountable for his acts, and precluded from gaining any advantage over his employer by means of his own misrepresentation; but if he was within the prohibited age, the application of such a doctrine would defeat the purpose of the statute. The frightful abuses and distressing consequences of the employment of children in mines and factories both in England and in this country prior to the enactment of prohibitory and regulative statutes are too well known to require extended mention. These laws were not passed primarily for the personal benefit of the individuals ⁴³⁹ abused, but in the exercise of the police power and for the welfare of the state. The state is vitally concerned that her children be not killed, maimed, stunted in growth nor enfeebled in strength at the important period of development, so as to become a public charge, and seeks to afford them an opportunity for healthy growth in wholesome surroundings, and for acquiring an education, so that they may reach majority possessed of a sound mind in a sound body, and be capable of earning an independent livelihood and of serving the state as her needs may require. It is well known that parents often connive at and compel the overworking of their children. The object of the law cannot be thwarted by the misstatement of a parent. A child seeking work, driven by necessity or the avarice of parents, might be expected to make any statement with respect to its age requisite to secure the desired employment. No such temp-

tation to the child should be allowed, and no such premium on the perjury of the parent should be permitted, as a release of the employer from the obligations of the statute, upon a misstatement of the child's age would afford. In disposing of a similar contention the supreme court of Illinois, in the case of *American Car etc. Co. v. Armentraut*, 214 Ill. 509, 73 N. E. 766, said: "This doctrine is not applicable, for the reason that the statute under consideration is aimed at the master and not at the servant. The act of the child in accepting or entering into the employment is not unlawful. Moreover, if the child's statement to the effect that he was above the age of sixteen would constitute a defense, the law could never be enforced in any case where the child was willing to make a false statement in reference to his age for the purpose of obtaining employment. The object of this statute was entirely to prevent the employment of children under the age of fourteen in the occupations named, and it should be given a construction that will effectuate that purpose, if that end ⁴⁴⁰ can be attained, as we think it can, without doing violence to the letter of the enactment": See, also, *City of New York v. Chelsea Jute Mills*, 43 Misc. Rep. 266, 88 N. Y. Supp. 1085; *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415, 81 Pac. 869.

The governing rule of law should not be relaxed because in this case appellee suffered only an impairment of his earning powers, instead of total disability that would have rendered him a helpless dependent upon public charity. The pecuniary compensation for injury sustained recovered in a civil action serves to prevent the sufferer from becoming an involuntary object of charity, and thus accords with the spirit and purpose of the enactment. The cases cited and relied upon in appellant's brief as declaring a contrary doctrine did not involve the violation of an express statutory prohibition. In the case of *Norfolk etc. R. Co. v. Bondurant's Admr.*, 107 Va. 515, 122 Am. St. Rep. 867, 59 S. E. 1091, 15 L. R. A., N. S., 443, the distinction is stated in the following terms: "In the case of *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415, 81 Pac. 869, the railroad company had violated a positive law by employing an infant within the prohibited age, and it differs in its facts from the case before us." In this view of the law the instructions given to the jury, so far as they related to the second paragraph of complaint, were more favorable to appellant than it had a right to ask them to be.

Other alleged errors of minor importance have been discussed, but the disposition made of the controlling question renders their consideration unnecessary, since a right result

was reached. There was no error in overruling appellant's motion for a new trial.

The judgment is affirmed.

The Constitutionality of Child Labor Laws is Upheld in Re Spencer, 149 Cal. 396, 117 Am. St. Rep. 137; *Stehle v. Jaeger Automatic Machine Co.*, 225 Pa. 348, 133 Am. St. Rep. 884; *Mt. Vernon-Woodberry Co. v. Frankfort Co.*, 111 Md. 561, 134 Am. St. Rep. 636.

An Employer's Liability in Damages for Injuries Sustained by a Minor While Employed in Violation of child labor laws is considered in Lenahan v. Pittston Coal Min. Co., 218 Pa. 211, 120 Am. St. Rep. 885; *Strafford v. Republic Iron Co.*, 238 Ill. 371, 128 Am. St. Rep. 129; *Stehle v. Jaeger Automatic Machine Co.*, 225 Pa. 348, 133 Am. St. Rep. 884. The legislature, under its police power, can fix an age limit below which boys should not be employed, and when the age limit is so fixed, an employer who violates the act by engaging a boy under the statutory age does so at his own risk. If the boy is injured while engaged in the performance of the prohibited duties for which he is employed, his employer is liable in damages for the injuries thus sustained: *Lenahan v. Pittston Coal Min. Co.*, 218 Pa. 311, 120 Am. St. Rep. 885. In such a case, the illegal employment, not the imprudence or negligence of the employee, is the proximate cause of the injury: *Stehle v. Jaeger Automatic Machine Co.*, 225 Pa. 348, 133 Am. St. Rep. 884. A boy, employed under such circumstances, is not chargeable with contributory negligence, nor with having assumed the risks of employment in the business in which he is engaged: *Lenahan v. Pittston Coal Min. Co.*, 218 Pa. 311, 120 Am. St. Rep. 885.

As to the Duty of a Master to Instruct Young and Inexperienced Servants, see *Bare v. Crane Creek Coal etc. Co.*, 61 W. Va. 28, 123 Am. St. Rep. 966, and cases cited in the cross-reference note thereto.

In the United States Cement Co. v. Cooper, 172 Ind. 599, 88 N. E. 69, an action was brought by a young man, eighteen years of age, to recover damages for personal injuries alleged to have been caused by the negligence of the defendant company in failing, among other things, to place a top on a "screw conveyer," in its plant. The plaintiff was employed to attend to the conveyer, and superintend the proper distribution of the crushed stone delivered in the bins, and his duties required him occasionally to step across the conveyer-box. He had been engaged at the place two days, and, while in the act of crossing the conveyer-box at a place where it was not covered, stumbled and threw his foot into the box, and was injured by the revolving screw. The box could have been covered without impairing its usefulness, and, for the use of employees in crossing was, in fact, covered with the exception of a few feet at the point where the plaintiff attempted to cross at the time of his injury.

The action proceeded upon the theory that the plaintiff was injured because of the failure of the master to perform a statutory duty, "and in such cases," said the court, "the doctrine of assumed risks does not apply." The court held that it is the imperative duty of the master of a manufacturing establishment to guard dangerous machinery therein, as specified in the statute; that a failure to do so is negligence per se; that the conveyer was a piece of machinery which should have been guarded; that the mere fact that the employee continued his work with and about the machine did not convict him of contributory negligence; and that whether, while so engaged, he used ordinary care and prudence, was a question of fact to be determined by evidence.

That Contributory Negligence is a Matter of Defense, to be proved by the defendant, see *Gentzkow v. Portland Ry. Co.*, 54 Or. 114, 135 Am.

St. Rep. 821; Queen Anne's R. R. Co. v. Reed, 5 Penne. (Del.) 226, 119 Am. St. Rep. 301; and numerous cases cited in the note to Chicago etc. Ry. Co. v. Wilson, 116 Am. St. Rep. 115. Where this rule prevails, the plaintiff is not required to show that he was free from negligence: Gentzkow v. Portland Ry. Co., 54 Or. 114, 135 Am. St. Rep. 821.

TRUELOVE v. TRUELOVE.

[172 Ind. 441, 86 N. E. 1018.]

DESCENT AND DISTRIBUTION—Foundation of Right Statutory.—The statute of descents of Indiana covers the entire subject, and one claiming an interest in the estate of a deceased person must point to some provision of the statute giving it to him. (p. 405.)

DESCENT AND DISTRIBUTION—Construction of Statute.—In construing the statute of descents and determining the meaning of the words and terms employed therein, we must look to the meaning attached to them by the common law. (p. 406.)

STATUTES—Construction—Reference to Common Law.—Statutes which are intended to remedy defects in or supersede the common law must be read and construed in the light of that law. When words of a definite signification under the common law are used in such statutes, and there is nothing to show that they are used in a different sense, they are deemed to be employed in their known and defined common-law meaning. (p. 407.)

DESCENT AND DISTRIBUTION—Illegitimate Child.—At common law an illegitimate child had no inheritable blood. (p. 407.)

DESCENT AND DISTRIBUTION.—When the Word "Child" or "Children" or "brother" or "sister" is used in a statute of descent, it must be held to mean legitimate child, children, brother or sister, unless the language of the statute clearly shows it was used in a different sense. (p. 407.)

DESCENT AND DISTRIBUTION.—An Illegitimate Brother is not entitled to share with a legitimate brother in the estate of a sister dying without other heirs. (p. 407)

DESCENT AND DISTRIBUTION.—The Statute Making an Illegitimate child an heir of its mother does not entitle it to inherit property after her death which she would have inherited if living. (p. 407.)

APPEAL—Direction for New Trial.—Although an appeal is taken on exceptions to the conclusions of law, the supreme court may direct a new trial of the cause. (p. 408.)

Willis Hickam, for the appellants.

Inman H. Fowler, John C. Robinson and H. C. Allen, for the appellees.

442 MONKS, J. This was a suit for partition and to quiet title to the real estate described in the complaint. The questions involved are presented by the exceptions of appellants to the conclusions of law.

It appears from the special finding that on October 1, 1903, Caroline E. Coats died intestate, the owner in fee simple of the land in controversy. She left surviving her no children, or their descendants, no husband, and no father nor mother. The mother of said Caroline E. Coats was the mother of two legitimate children, said Caroline and her brother, Timothy W. Truelove, and of two illegitimate sons by an unknown father. Said Caroline left surviving her, her said brother, Timothy W. Truelove, and the descendants of the two illegitimate sons of her mother, both of whom were dead at the time of her death. Appellants claim to own all of said real estate as the heirs of Timothy W. Truelove, the brother of the deceased. Appellees claim an interest in said real estate as heirs of said Caroline through their fathers, her illegitimate half-brothers.

The conclusions of law were to the effect that appellants, as the heirs of Timothy W. Truelove, were the owners in fee simple of the undivided one-third of said land, and that the descendants of each of said illegitimate half-brothers of the deceased were the owners in fee simple of the undivided one-third of said land.

Sections 2992, 2993, 2996, Burns' Revised Statutes of 1908, sections 2469, 2470, 2472 of Revised Statutes of 1881, are as follows:

"Section 2992. If any intestate shall die without lawful issue or their descendants alive, one-half of the estate shall go to the father and mother of such intestate, as joint tenants, or, if either be dead, to the survivor, and the other half to the brothers and sisters and to the descendants of such as are dead, as tenants in common.

"Section 2993. If there be neither father nor mother, the brothers ⁴⁴³ and sisters of the intestate living, and the descendants of such as are dead, shall take the inheritance as tenants in common. If there be no brothers or sisters of the intestate or their descendants, the father and mother shall take the inheritance as joint tenants; and if either be dead, the other shall take the estate."

"Section 2996. Kindred of the half-blood shall inherit equally with those of the whole blood; but if the estate shall have come to the intestate by gift, devise or descent from any ancestor, those only who are the blood of such ancestor shall inherit: Provided, that on the failure of such kindred, other kindred of the half-blood shall inherit as if they were of the whole blood."

It was held by this court in *Cloud v. Bruce*, 61 Ind. 171, that "our present statute of descents . . . covers the entire subject. It provides 'for every conceivable case.'" One claiming the estate of a deceased person or any interest therein must, in order to establish his claim, point

to some provision of the statute giving it to him. Appellants and appellees both point to sections 2992, 2993, *supra*, as establishing their respective claims to the property in controversy. Appellants contend that the terms "brothers and sisters" and their "descendants" mean and apply to legitimate brothers and sisters, either of the whole blood or half-blood or their descendants; while the appellees contend that these terms mean and apply to illegitimate as well as legitimate brothers and sisters and their descendants, and entitle them as the descendants of said illegitimate brothers to share with the heirs of the legitimate brother in the distribution of the estate of Caroline E. Coats. Appellees also contend that we cannot look to the rules of the common law when construing our statutes of descent; that they have no application to our law on that subject, and they refer to Webster's definition of "brother and sister" and "half brother and sister," as being the guide which should control us in construing said sections.

⁴⁴⁴ While it is true that the descent and distribution of the property in this state is governed entirely by statute, it is also true that in the construction of said statutes and in determining the meaning of the words and the terms employed, we are to look to the meaning attached to such words and terms by the common law. Statutes which are intended to remedy defects in or supersede the common law must be read and construed in the light of that law. When words of a definite signification under the common law are used in such statutes, and there is nothing to show that they are used in a different sense, they are deemed to be employed in their known and defined common-law meaning: Black on Interpretation of Laws, 232, 233; 2 Lewis' Sutherland on Statutory Construction, 2d ed., sec. 455, and cases cited in note 24; *Holt v. Agnew*, 67 Ala. 360; *Walton v. State*, 62 Ala. 197; *McCool v. Smith*, 1 Black, 459, 17 L. ed. 218; *Rice v. Minnesota etc. Co.*, 1 Black, 358, 17 L. ed. 147; *Mayo v. Wilson*, 1 N. H. 53; *Brocket v. Ohio etc. R. Co.*, 14 Pa. 241, 53 Am. Dec. 534; *Allen's Appeal*, 99 Pa. 196, 44 Am. Rep. 101; *Apple v. Apple*, 1 Head, *348; *Burk v. State*, 27 Ind. 430, 431; *State v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117.

It was said by this court in *Jackson v. Hocke*, 171 Ind. 371, 84 N. E. 830: "At common law an illegitimate child was considered the son of nobody; and sometimes called *filius nullius* (the son of no one), and sometimes *filius populi* (the son of the people): 1 Blackstone's Commentaries, *458, *459. See 2 Kent's Commentaries, *211, *212; 5 Cyc. 639-643; *Bingham on Descent*, 419; *Blacklaws v. Milne*, 82 Ill. 505, 25 Am. Rep. 339; *Simmons v. Bull*, 21 Ala. 501, 56 Am. Dec. 257, and note, pp. 258, 261-265." It is said in 1 Blackstone's Com-

mentaries, *459, that a bastard "cannot be heir to anyone, neither can he have heirs, but of his own body; for being nullius filius, he is therefore of kin to nobody, and has no ancestor from ⁴⁴⁵ whom any inheritable blood can be derived." It is a rule of construction that, *prima facie*, the words "child," "children," or other terms of kindred, when used either in a statute or will, mean legitimate child or children or kindred: 5 Cyc. 640; Bingham on Descent, 483; McDonald v. Pittsburgh etc. R. Co., 144 Ind. 459, 461, 55 Am. St. Rep. 185, 43 N. E. 447, 32 L. R. A. 309, and cases cited; Blacklaws v. Milne, 82 Ill. 505, 25 Am. Rep. 339; McCool v. Smith, 1 Black, 459, 17 L. ed. 147; Kent v. Barker, 2 Gray, 535; Curtis v. Hewins, 11 Met. 294; Minot v. Harris, 132 Mass. 528; Hayden v. Barrett, 172 Mass. 472, 70 Am. St. Rep. 295, 52 N. E. 530; Croan v. Phelps' Admr., 94 Ky. 213, 21 S. W. 874, 23 L. R. A. 753, and note, pp. 754-758. When, therefore, the word "child," or "children," or "brother," or "sister," is used in the statute of descent, it must be held to mean legitimate child, children, brother or sister, unless the language of the statute clearly shows that it was used in a different sense. It is evident, therefore, that the legislature employed the words "brother and sister or their descendants" in this sense in sections 2992, 2993, *supra*.

It is manifest that, had the mother, the legitimate brother and the two illegitimate brothers survived Caroline E. Coats, under section 2992, *supra*, the mother and the legitimate brother would have taken all of her estate, to the exclusion of the two illegitimate brothers.

It is earnestly insisted by appellees that, in determining the meaning of the sections in question, the court must look to the provision of section 2998 of Burns' Revised Statutes of 1908, section 2747 of Revised Statutes of 1881, which provides: "Illegitimate children shall inherit from the mother as if they were legitimate, and through the mother, if dead, any property or estate which she would, if living, have taken by gift, devise, or descent from any other person." Appellees' contention is that while this section of the law does not govern the descent of said real estate in this case, and appellees do not take under it, it must be considered in connection with sections 2992, 2993, 2996, ⁴⁴⁶ *supra*, in determining the meaning of the words "brothers and sisters" in said sections, and therefore the rights of appellees in this case. Section 2998, *supra*, while it enables the illegitimate child to inherit property its mother would have taken if living, does not by its terms grant to the children of such illegitimate child such right in case said parent is not living, and the terms thereof cannot be extended so as to give such right: Curtis v. Hewins, 11 Met. 294; Pratt v. Atwood, 108

Mass. 40; *Sanford v. Marsh*, 180 Mass. 210, 62 N. E. 268; *Williams v. Kimball*, 35 Fla. 49, 48 Am. St. Rep. 238, 16 South. 783, 26 L. R. A. 746. The case of *Parks v. Kimes*, 100 Ind. 148, is cited to support appellees' contention. In that case the claimant to the estate in controversy was plainly and clearly within the express words of section 2998, supra, and was therefore awarded the estate, because her mother if living would have inherited said estate from her son. Said section gave the illegitimate child that which the mother would have taken from her legitimate son had she survived him.

Numerous decisions of the courts of other states are cited as supporting appellees' contention that where the statute gives an illegitimate child the right to inherit what its mother would have taken if living, such right will be extended to its descendants, if the illegitimate child be dead, but these decisions are based, so far as we have been able to ascertain, upon statutes clearly conferring upon descendants of illegitimate children the right to inherit that which would have been taken by parents if living, provisions not contained in said sections of our statutes.

Under the facts shown by the special finding, the entire estate of Caroline E. Coats descended to her legitimate brother, Timothy W. Truelove, and from him to appellants.

Judgment reversed, and upon the authority of *Shoner v. Pennsylvania Co.*, 130 Ind. 170, 28 N. E. 616, 29 N. E. 775, *State v. Beckner*, 132 Ind. 371, 32 Am. St. Rep. 257, 31 N. E. 950, *McCoy v. Kokomo R. etc. Co.*, 447 158 Ind. 662, 64 N. E. 92, and cases cited, *Farmers' etc. Ins. Assn. v. Stewart*, 167 Ind. 544, 79 N. E. 490, and cases cited, and *Bemis Indianapolis Bag Co. v. Krentler*, 167 Ind. 653, 79 N. E. 974 (see, also, *Elliott on Appellate Procedure*, sec. 563, pp. 475, 476; *Buskirk's Practice*, 334), the trial court is instructed to grant a new trial of said cause.

At Common Law an Illegitimate had No Inheritable Blood. He could not be an heir, even of his mother. He could neither inherit nor transmit by inheritance save to those of his own body: *Norman v. Heist*, 5 Watts & S. 171, 40 Am. Dec. 493; *Orthwein v. Thomas*, 127 Ill. 554, 11 Am. St. Rep. 159; *Hayden v. Barrett*, 172 Mass. 472, 70 Am. St. Rep. 295. The right of an illegitimate to inherit property, and the right of others, though legitimate, to inherit from him through the maternal line, are conferred by the statute, and can have no existence in any case which does not come within the statute: *Hudnall v. Ham*, 183 Ill. 486, 75 Am. St. Rep. 124, 127. The power of illegitimates to inherit and to transmit inheritances, as enlarged by American statutes, is discussed in the note to *In re Ingram*, 12 Am. St. Rep. 101. See, also, *Blacklaws v. Milne*, 82 Ill. 505, 25 Am. Rep. 339; *Williams v. Kimball*, 35 Fla. 49, 48 Am. St. Rep. 238.

Bastards are not included by the Word "Children" in the statute of descents and distributions: Porter's Heirs v. Porter, 7 How. (Miss.) 106, 40 Am. Dec. 55; and see note to *Thomas v. Thomas*, 73 Am. St.

Rep. 415; Robinson v. Georgia R. R. etc. Co., 117 Ga. 168, 97 Am. St. Rep. 156; note to Thomas v. Thomas, 12 Am. St. Rep. 102.

In the Succession of Davis, 126 La. Ann. 178, 52 South. 266, it is decided that the child of a woman slave by a white man is a bastard, and cannot inherit the succession of the mother opened in the state of Louisiana since the adoption of Act No. 54 of 1894, page 63, prohibiting marriage between white persons and persons of color; and that under Civil Code of 1870, article 204, no illegitimate child can inherit from his parents unless they were capable of contracting marriage at the time of its conception.

CASES

IN THE

SUPREME COURT

OF

IOWA.

FOUNTAIN v. STICKNEY.

[145 Iowa, 167, 123 N. W. 947.]

RAILROADS—Receivers—Effect of Appointment.—The appointment of a receiver of the property of a railroad corporation has no effect to dissolve the corporation or to divest its title to its property, but the possession of such property passes, for the time being, to the receiver, who is usually empowered to operate the road. Except as thus interfered with, the corporation retains its corporate functions and may sue and be sued. (p. 411.)

RAILROADS—Receivers—Liability for Torts.—Receivers, upon taking temporary possession and control of the property of a railroad corporation for the purpose of preserving it pendente lite, do not assume liability for corporate torts, the injurious effects of which had culminated while the road was still operated by the corporation. (p. 411.)

RAILROADS—Receiver—Nature of Office.—A receiver of a railroad corporation is not a representative of the company, but is rather an officer or representative of the court. His relation to the corporation is analogous to that of a sheriff holding its property under judicial order or process. (p. 412.)

Carr & Carr and George H. Phillips, for the appellants.

E. J. O'Conner and C. H. Rohrig, for the appellee.

¹⁶⁸ **WEAVER, J.** The railway went into the hands of the defendants as receivers under the appointment of the circuit court of the United States on January 9, 1908. Prior to that date, and while said railroad was in the possession of the Great Western Railway Company, the plaintiff, an employee of said company in its shops at Oelwein, received an injury which he alleges was occasioned by the company's negligence. On April 24, 1908, he brought his action to recover damages resulting from said injury, making the receivers alone parties defendant. The defendants demurred to the petition on the ground that an action of this kind would not lie against the receiver upon a cause of action arising before their appointment to that position. The demurrer being overruled, the defendant pleaded the same matter in defense, and also took

issue upon the merits of plaintiff's claim. The cause was tried to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals.

As the point first made, if well taken, is fatal to plaintiff's right to maintain this action, we give precedence to its discussion. Will an action lie against the receiver of a railroad to recover damages resulting from an injury sustained by the plaintiff before the road passed into the receiver's possession or control? While the record does not show the terms of the order naming the receivers who are the defendants herein, it is manifest that they were not appointed to close up the business of the corporation, but rather to perform the usual office of a receivership which is a provisional and pro tempore scheme for the preservation of the property and estate of the corporation pending the adjustment of the rights which are involved in the litigation in which the appointment is made. It has no effect to dissolve the corporation or to divest its title to its property, but the possession of such property passes for ¹⁰⁰ the time being to the receivers, and, as its value is largely dependent upon the continued and regular operation of the road, the receivers are generally empowered and authorized to operate it. Except as thus interfered with, the corporation retains its corporate functions unimpaired, and may sue and be sued: *Ohio Ry. Co. v. Russell*, 115 Ill. 52, 3 N. E. 561; *Decker v. Gardner*, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480. Such receivers are neither bound nor authorized to pay corporate debts which accrued before their appointment, though by order of court operating expenses incurred within a limited time prior to such appointment are sometimes excepted from the rule here stated. Outstanding corporate contracts of the corporation cannot be enforced against the receivers unless the latter adopt them: 24 Am. & Eng. Ency. of Law, 2d ed., 22. If not liable on corporate contracts made before their appointment, it would seem to follow for equally strong, if not for stronger, reasons that the receivers, in taking temporary possession and control of the property for the purpose of preserving it pendente lite, do not assume liability for corporate torts, the injurious effects of which had culminated while the road was still operated by the corporation: *Northern Pacific Ry. Co. v. Heflin*, 83 Fed. 93, 27 C. C. A. 460; *Decker v. Gardner*, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480. This rule seems to be impliedly recognized by this court in *Brockert v. Central Iowa R. R. Co.*, 82 Iowa, 369, 47 N. W. 1026. Whether such action could be maintained against the receiver on leave being obtained therefor from the court having jurisdiction of the receivership proceedings we need not consider, as it is conceded that no leave was asked for or given.

The receiver, it must be borne in mind, is not the representative of the company, but is rather an officer or representative of the court, who holds the property as nearly as may be in the condition in which he receives it. As we have already said, he does not become a party to its ¹⁷⁰ outstanding contracts unless he sees fit to adopt them, and even in this his acts are subject to the approval and authority of the court. Instead of being an agent or representative of the corporation, his relation thereto is more analogous to that of a sheriff holding its property under judicial order or process awaiting final order for its disposition. Whether this rule would apply to a receiver in proceeding to wind up the corporate business and dissolve the corporation, or whether an action for the tort of the company may be maintained against the receiver on leave being granted by the court appointing him, we need not consider, as the record presents no such condition.

We are constrained to hold that under the record before us plaintiff shows no cause of action against the defendants, and the judgment of the superior court must therefore be reversed.

A Receiver is not Liable for a Tort committed by the corporation prior to his appointment, and hence is not a proper party in an action to recover damages therefor: Note to Shedd v. Seefeld, 120 Am. St. Rep. 279. In Emory v. Faith, 113 Md. 253, 77 Atl. 386, it is decided that no action can be maintained against the receiver of a partnership to recover damages for an injury occasioned by the negligence of the partners before the receiver was appointed. The remedy of the injured person is against the partners individually.

HALL v. HENNINGER.

[145 Iowa, 230, 121 N. W. 6.]

LANDLORD AND TENANT.—A Tenant Holding Over more than thirty days after the expiration of his lease becomes a tenant at will, and thirty days' notice in writing is necessary to terminate the tenancy. (p. 416.)

LANDLORD AND TENANT—Holding Over by Tenant.—After the death of a lessor, owning a life estate, the tenant, if he continues in possession, is one holding over after the expiration of his term, and may be dispossessed by an action for the recovery of real property or by an action of forcible entry under the code. (p. 416.)

LANDLORD AND TENANT—Holding Over by Tenant.—After the death of a lessor owning a life estate, the remainderman may elect to allow a tenant holding over to remain subject to the obligation to pay rent, or by proper steps to oust him from possession. If he elects to allow the tenant to remain for thirty days, he is not entitled to either remedy until after service of thirty days' notice to quit as provided by statute. (p. 416.)

INJUNCTIONS—Remedy at Law.—It is a Rule in equity, peculiarly applicable to actions in which an injunction is sought, that relief will not be granted where there is a plain, speedy and adequate remedy at law. (p. 417.)

EQUITABLE ACTIONS—Possession of Real Property.—Courts of equity are extremely reluctant to deal with questions affecting the possession of real estate, and will not, as a general rule, interfere to change the possession from one to another or to transfer it to one whose rights have not been established at law. (p. 417.)

INJUNCTIONS—Trespass on Real Property.—Courts of equity will, under certain circumstances, interfere by injunction to prevent trespasses upon real estate, but to authorize such interference there must exist some distinct ground of equitable jurisdiction. (p. 417.)

INJUNCTION—Recovery or Change of Possession of Realty.—Injunction is not a proper remedy to recover the possession of real property held by a tenant after the expiration of his lease under a claim of right to so hold. (p. 419.)

ACTION—Transfer to Law Calendar.—Where the relief asked in an action is such as equity only can grant, the cause will not be transferred to the law calendar, but will be dismissed, if the facts are not such as to entitle the plaintiff to such relief, although he might have a remedy in a proper action at law. (p. 419.)

Suit to enjoin defendant's ward from interfering with the possession of certain real estate and the alleged right of the tenant of the plaintiff to occupy such premises under a lease. A motion to dissolve a preliminary injunction was overruled, and in a trial on the merits a permanent injunction was granted. The defendant appealed.

O. S. Franklin and Mills & Perry, for the appellant.

Clark & Byers, for the appellee.

²³¹ **McCLAIN, J.** The real estate, possession of which is involved in this controversy, consists of a forty-acre tract of land belonging in 1907 to Mrs. Mary Racine, while another forty-acre tract adjoining the one above referred to on the south was owned by Mrs. Racine as life tenant with remainder over to the children of a second marriage. On her death in December of that year her children by the first marriage became under her will the owners in common of the north forty, and they are represented in this suit by the plaintiff, who, as administrator with the will annexed, on his appointment in January, 1908, became entitled ²³² to hold, manage and rent said north forty acres on behalf of the devisees and is practically their agent in charge of the land. For several years prior to the death of Mrs. Racine, her son Francis, who resided with her on the south forty-acre tract, was her tenant, at least as to the land in controversy, paying two hundred and seventy-five dollars per year rent for both tracts. The lease, as it would appear from the evidence, was originally written, but was orally continued from year to year. The evidence tends to show that prior to the death of his mother

Francis Racine had an oral arrangement with her to keep the land for another year commencing March 1, 1908, provided he should desire to do so. There had also been negotiations between one Milbourne and Mary Racine with reference to a lease of the land in the event that Francis did not desire to retain it for another year, and the latter had for a short time in the fall of 1907 been absent in Colorado with a view of locating a homestead; but no homestead was in fact located, and defendant returned before his mother's death, whereupon Milbourne abandoned his intention of taking the farm. During the fall of 1907 Francis had fall-plowed a part of the land with the prospect of having it for another year, and had an understanding with Milbourne that if the latter took the land Francis should be paid for his work. Soon after the death of his mother, Francis had a conversation with this plaintiff as to whether he should retain the north forty-acre tract, and expressed his desire to do so, but declined to agree to a rental of four dollars per acre, offering to pay three dollars. From this time forward there was no change in the situation of the parties until after March 1st, when Francis went upon the land in controversy, broke the corn-stalks on several acres thereof, and subsequently did some plowing. While thus engaged in plowing, one Huffman, who had on March 11th entered into a written contract of lease for the land with plaintiff, came to take possession of the land, but was refused permission to do so ²³³ by Francis and was excluded from possession. On April 8, 1908, plaintiff filed his petition in equity in the district court against Francis Racine, alleging right of possession under the devisees of Mrs. Racine's will, and charging that defendant, without any right whatever to do so, entered upon the premises and commenced to work thereon and refused to permit Huffman, as plaintiff's tenant, to enter upon said premises, and further charged that unless the said defendant was restrained by writ he would continue without right to hold possession of said premises and to evict therefrom and from the possession thereof the plaintiff and his tenant, said Huffman, wherefore plaintiff prayed a temporary writ of injunction restraining said defendant from interfering with said premises and from preventing said Huffman from occupying and using said premises under his lease, and further that upon final hearing said writ be made permanent. Subsequently in proper proceedings the defendant was found to be an incapable person, and one George Henninger was appointed guardian of his property and was on application substituted as defendant in this suit. In the meantime a temporary restraining order had been issued, which Henninger, as substituted defendant, moved to have dissolved on the ground that Francis Racine was in peaceable possession of the property at the time of the institution of plaintiff's

suit and continued in such possession, and that a temporary injunction had been issued without hearing or notice, and further that plaintiff had a plain, speedy and adequate remedy at law. On this motion to dissolve a hearing was had, as the result of which the court overruled defendant's motion to dissolve the temporary injunction. Thereafter the case came to final hearing on the same evidence which had been submitted for both parties on the motion to dissolve the temporary restraining order, and the court entered a decree making the temporary injunction permanent, and perpetually and forever enjoining and restraining Francis ²³⁴ Racine and his guardian from interfering with the possession of the premises and from in any manner preventing or interfering with Huffman's right as tenant under the plaintiff to occupy and use said premises. The appeal by defendant is from the ruling of the court on the preliminary hearing and from its decree on the final hearing.

1. The first question to be determined is as to the possession of the premises prior to and at the time of the institution of plaintiff's suit. Without setting out in full the evidence, it is sufficient to state our conclusion therefrom that Francis Racine, who will hereafter be designated as "defendant," although now represented by his guardian, was in continuous possession of the premises from a time antedating his mother's death until the institution of the suit. He had plowed the land in the fall under an arrangement with his mother that he was to have the premises for another year save on a contingency which did not happen. No one had asserted any right of possession as against him prior to the 1st of March. Whatever may have been the right of plaintiff after the death of Mary Racine to recover possession of the premises from defendant as her tenant, the conversation between plaintiff and defendant indicated that it was in the contemplation of these parties that defendant might on some condition continue in possession as tenant, and no steps had been taken by plaintiff to recover possession from defendant. In pursuance of a claim by defendant that he desired to retain the land for another year as tenant, he went upon the premises in March under an assertion of continuous right of possession, and exercised all the rights of possession which anyone could exercise or attempt to exercise with reference to the land. He was thus in possession when his rights were first questioned by Huffman attempting to take possession under his lease with plaintiff, and by reason of defendant's insistence on his present right to occupy, Huffman was prevented from ²³⁵ taking or exercising any of the rights of possession. Plaintiff's petition in itself recognizes defendant's actual possession, for it asserts that if not restrained he will continue to hold possession and to evict therefrom the plaintiff and his tenant. It

is plain, therefore, that there was neither allegation nor proof of any trespass by the defendant. His acts in March were done under claim of possession continuous from a time prior to his mother's death, when he was unquestionably a tenant, down to the time of suit. Counsel for defendant expressly avoided raising any issue of fact as to the possession by defendant as above recited. The court accepted this view of the case and made the issue to be determined turn on whether defendant had a contract with his mother whereby he was to farm the land for the year ending March 1, 1908. Evidently, however, this would not be controlling on the question of possession. Defendant might have been in actual and continuous possession without any express oral or written agreement. It did appear that he had paid rent for previous years, and that plaintiff asked him to pay for the year ending March 1, 1908.

2. On the death of his mother, defendant was a tenant holding over after the expiration of his lease: 1 McAdam on Landlord and Tenant, 37; 1 Tiffany on Real Property, secs. 32, 224. After that time defendant could have been dispossessed by plaintiff in an action for the recovery of real property (saving his right to emblements) (see Code, sec. 4183), or by an action of forcible entry, under Code, section 4208; but in order to secure the summary remedy for forcible entry and detention, three days' notice to quit would have been necessary: See Code, sec. 4217. After thirty days the defendant became a tenant at will, and to terminate such tenancy at will thirty days' notice in writing was necessary: *Heiple v. Reinhart*, 100 Iowa, 525, 69 N. W. 871; *McClelland v. Wiggins*, 109 Iowa, 673, 81 N. W. 156. The ²³⁶ property was agricultural land, and therefore the tenancy could be terminated only on March 1st: See Code, sec. 2991. But by serving a proper notice any time prior to thirty days preceding March 1, 1908, defendant's tenancy could have been terminated on that date. Therefore plaintiff, with knowledge that defendant was in possession of the land as tenant holding over after his mother's death, had his election to allow him to remain, subject to the obligation to pay rent, or by proper steps to oust him from his possession. If plaintiff elected to allow him to remain for thirty days, he was then not entitled to either remedy until after service of thirty days' notice to quit, as provided by statute. At the time this suit was instituted on April 8, 1908, defendant, theretofore in possession as tenant at will, had a legal right not to be deprived of possession without the statutory notice.

3. Plaintiff sought, however, to, in effect, deprive defendant of his possession without the statutory notice by instituting an action in equity for an injunction, under which he secured without notice a temporary restraining order depriving the

defendant of rights which he had at law to remain in possession until his rightful possession was terminated by proper notice. It seems to us quite evident that a court of equity should not in this summary manner deprive one in possession of the right secured to him by statute. Surely a court of equity has not jurisdiction to abridge rights which are specifically protected as against the usual legal remedies, or to ignore the limitations imposed upon the exercise of such remedies. In the first place, it is a rule in equity peculiarly applicable to actions in which injunction is sought that such relief will not be granted where there is a plain, speedy and adequate remedy at law: *Forbes v. Carl*, 125 Iowa, 317, 101 N. W. 100; *Home Sav. & T. Co. v. Hicks*, 116 Iowa, 114, 89 N. W. 103; *Ewing v. Webster City*, 103 Iowa, 226, 72 N. W. 511; *Waterloo v. Waterloo St. R. Co.*, 71 Iowa, 193, 32 N. W. 329.

²³⁷ In the second place, "courts of equity are extremely reluctant to deal with questions affecting the possession of real estate. Legal remedies are usually adequate for the protection of the parties, and equity will not, as a general rule, interfere to change the possession from one to another or to transfer it to one whose rights have not been established at law": *Forbes v. Carl*, 125 Iowa, 317, 101 N. W. 100. And in *Doidge v. Bruce*, 141 Iowa, 210, 119 N. W. 624, this court held erroneous a decree the effect of which was to transfer the possession from one person claiming to hold it rightfully under a tenant to another, who claimed right of possession as landlord, and the court remarks that, with reference to an action brought to secure and preserve to the landlord the possession of the property, "It is sufficient to say that defendant is in possession under a claim of right, and that plaintiff has not the possession of the property. Courts of equity will not in such cases attempt to adjudicate the title or right of possession."

In another case this court has said: "Courts of equity will under certain circumstances interfere by injunction to prevent trespasses upon real estate, but to authorize such interference there must exist some distinct ground of equitable jurisdiction, such as the insolvency of the party sought to be enjoined, the prevention of waste or irreparable injury, or multiplicity of suits": *Council Bluffs v. Stewart*, 51 Iowa, 385, 1 N. W. 628. And to the same effect, see *Minneapolis etc. R. Co. v. Chicago etc. R. Co.*, 116 Iowa, 681, 88 N. W. 1082.

This seems to be the uniform rule, not only in this state but elsewhere: *O'Neil v. McKeesport*, 201 Pa. 386, 50 Atl. 920; *Fredericks v. Huber*, 180 Pa. 572, 37 Atl. 90; *Vaughn v. Yawn*, 103 Ga. 557, 29 S. E. 759; *Wehmer v. Fokenga*, 57 Neb. 510, 78 N. W. 28. In the case of *Troy & Boston R. Co. v. Boston etc. R. Co.*, 86 N. Y. 107, the court says: "The cause of action, if anything, is a trespass, and that

will not authorize the ²³⁸ interference of a court of equity. Without going further back, we may recall with profit the words of Kent, C., in *Jerome v. Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 484. 'The objection to the injunction,' he says, 'in cases of private trespass, except under very special circumstances, is that it would be productive of public inconvenience by drawing cases of ordinary trespass within the cognizance of equity and by calling forth on all occasions its power to punish by attachment, fine and imprisonment for a further commission of trespass, instead of the more gentle common-law remedy by action and the assessment of damages by a jury.' "

And where, as here, the action is not one of trespass, but one of right to possession, the suggestion of Chancellor Kent is entitled to even greater force. An instructive case is that of *Black v. Jackson*, 177 U. S. 349, 20 Sup. Ct. Rep. 648, 44 L. ed. 801, which was an appeal from a judgment in the supreme court in the territory of Oklahoma awarding a mandatory injunction to one who claimed possession of land under a homestead entry as against another claimant in possession under an entry which had been declared invalid and canceled. After pointing out that by decisions of the lower court it had been well settled in other cases that ejectment might have been maintained by the plaintiff against the defendant, or an action for the recovery of possession by forcible entry and detainer, the court says: "If Black prevents Jackson from taking possession of the eighty acres in question, he is entitled to bring his action of forcible entry and detainer, unless it appears that the land office erred as a matter of law in deciding for him. It is not meant by this that the action for forcible entry and detainer is the only remedy that can be adopted by the plaintiff." And the court holds that to allow an injunction in such case is to deprive the defendant of his right to jury trial. Quoting with approval ²³⁹ from an Oklahoma case, the court further says: "We still hold to the well-settled, if not universally established, doctrine that, when a party has a plain and adequate remedy at law, he cannot invoke the powers of a court of equity to issue a writ of injunction." The court quotes further from *Lacassagne v. Chapuis*, 144 U. S. 119, 12 Sup. Ct. Rep. 659, 36 L. ed. 368, as follows: "The plaintiff was out of possession when he instituted this suit, and by the prayer of this appeal he attempts to regain possession by means of the injunction asked for. In other words, the effort is to restore to plaintiff by injunction rights of which he had been deprived. The function of an injunction is to afford preventive relief, not to redress alleged wrongs which had been committed already. An injunction will not be used to take property out of the possession of one party and put it into that of another. . . . The

plaintiff has a full, adequate and complete remedy at law, and the case is not one for the jurisdiction of a court of equity."

In *Bodwell v. Crawford*, 26 Kan. 292, 40 Am. Rep. 306, the court speaks of an action at law as being the ordinary remedy for the recovery of possession of real estate, and refers also to the remedy by forcible entry and detainer, and then says: "Both are actions at law. Has he the further remedy of injunction? Counsel for plaintiff concede that this is a case of first impression, and that a careful examination of the authorities discloses no precedent for such an action. They insist, however, that our statute concerning injunctions is very broad—broad enough to cover such a case as this—and that unless equity will interfere there is no adequate remedy." Section 238 of the Code authorizes 'restraining the commission or continuance of an act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff.' The unauthorized possession by defendant is, of course, an injury to plaintiff's rights, and entitles him ²⁴⁰ to relief; but no one will contend that a mere unlawful possession gives occasion for the interference of a court of equity. The reasons for this are familiar to every lawyer. In equity neither party is of right entitled to a jury, but the constitution preserves inviolate the right of trial by jury as it exists at the common law, and an action for the recovery of real estate is one in which at common law parties are entitled to a trial by jury. They have a right to the verdict of a jury upon the questions whether plaintiff was owner, whether the defendant was in possession, and whether, if so, the possession was unlawful." What is thus said by the supreme court of Kansas is pertinent to the claim that plaintiff in the case before us might have an injunction by way of auxiliary relief. The fact is, however, that an injunction was the only relief prayed for and constituted the very gist of plaintiff's action, and that on the final hearing the injunction was made perpetual, so that the practical effect of the decree was to adjudicate the right to possession of the property as between plaintiff and defendant.

It is urged that the form of the action is immaterial, and that, in the absence of a motion to transfer to the law docket, the court might properly proceed; but it is well settled that where the relief asked is such relief as equity only can grant, plaintiff's action will be dismissed if the facts are not such as to entitle him to that relief, although he might have a remedy in a proper action at law: *Cooper v. Cedar Rapids*, 112 Iowa, 367, 83 N. W. 1050; *Kelly v. Andrews*, 94 Iowa, 484, 62 N. W. 853; *Hartwig v. Iles*, 131 Iowa, 501, 109 N. W. 18. It would have been idle for defendant to move to transfer the case to the law docket, for the relief asked was such as could not be awarded in an action at law: Code, secs. 3427,

4354. While an injunction may under some circumstances be awarded as auxiliary relief in an action at law, we discover no authority for holding that, where injunction is ²⁴¹ the sole relief, the case may be transferred to the law docket and the issue determined by jury trial. If defendant was entitled to a jury trial, as the authorities already cited clearly show, then plaintiff's action in equity cannot be maintained. Even if defendant were in fact a trespasser, he had a right to a determination in law of that question, and only after the right of possession as between him and the plaintiff had been adjudicated would it be competent for a court of equity to enjoin him from a repetition of his trespass. The petition in this case avers no circumstances justifying the interference of a court of equity.

Finding, as we do, however, that defendant was not a trespasser, but was in actual and continuous possession of the real property in controversy, it is plain that plaintiff misconceived his remedy. He should have taken the proper steps to recover possession of the property, and the court should have dissolved the temporary injunction on defendant's motion, and should not have awarded him a decree for a permanent injunction.

The decree of the lower court is therefore reversed.

Weaver, J., dissented.

Tenants at Will are Entitled to Notice to Quit: Note to Washington v. Moore, 120 Am. St. Rep. 42.

Injunctions Against Trespass on Realty are discussed in the note to Moore v. Halliday, 99 Am. St. Rep. 731.

DIECKMANN v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

[145 Iowa, 250, 121 N. W. 676.]

CARRIERS—Passengers—When Relation Commences.—A person who goes to the station of a railway company within a reasonable time prior to the hour set for the departure of a train, with the bona fide intention of taking passage thereon, and there, either by purchasing a ticket or in some other manner, indicates such intention to the carrier, is considered a passenger and entitled to all the rights and privileges which the law attaches to that relation. (pp. 423, 424.)

CARRIER—Injury of Passenger at Railway Station.—A person at a railroad station, within a reasonable time prior to the hour set for the departure of a train, with the bona fide intention of taking passage thereon, is entitled to the degree of care due a passenger; and when he is there injured by a train, the burden is cast on the carrier to negative the inference or presumption of negligence by it. (p. 424.)

RAILROADS—Speed in Open Country.—No conceivable rate of speed of a railroad train in the open country will be held to constitute negligence as a matter of law. (p. 424.)

RAILROADS—Speed Over Streets and Through Stations.—The running of railroad trains over streets or crossings, or on station grounds where passengers may rightfully be, at a high rate of speed, may constitute negligence as a matter of fact. (pp. 424, 425.)

CARRIERS—Care Due Passenger at Station.—The rule of care due a passenger applies from the moment he enters the station for the purpose of embarking upon an approaching train, and he has the right to expect that in going to the train and entering the cars at the place prepared for that purpose his safety will be vigilantly guarded. (p. 425.)

CARRIERS—Care Due Passengers at Station.—Where the tracks at a station are so arranged that passengers intending to take a certain train must cross some of them, if due care requires the timely announcement of the approach of a train, the illumination of the path, or the services of a guide or escort, the failure to provide such safeguards, or properly to use the same, is negligence. (p. 426.)

CARRIERS—Invitation on Direction of Agent.—The untimely invitation or direction of an agent of a railroad company to passengers to cross certain tracks to embark on a waiting train, whereby they are led into danger and injured, constitutes negligence for which the carrier is liable unless relieved by showing want of care on the part of the passenger. (p. 426.)

CARRIERS—Crossing Tracks at Station.—The fact that a passenger undertakes to cross a track at a station on which he knows a train is approaching is not necessarily negligence in law or in fact. (p. 427.)

CARRIER—Crossing Tracks at Invitation of Agent.—Where a railroad station is so arranged that certain tracks must be crossed in order to reach a train, a waiting passenger is entitled to assume a reasonably safe way has been provided and that an announcement and invitation by the agent to cross is given in due time; and he is not, as a matter of law, guilty of contributory negligence in crossing the tracks, escorted by the agent, in the face of an approaching train. (p. 427.)

NEGLIGENCE—Contributory Negligence as a Question of Law. Contributory negligence is peculiarly a question of fact, and the court should not attempt to dispose of it peremptorily, save where the circumstances are clear and undisputed, and are of such character that fair and unprejudiced minds cannot arrive at different conclusions therefrom. (p. 427.)

CARRIERS—Crossing Tracks—Invitation of Agent.—An invitation, express or implied, by a gateman, station agent, conductor, or other employee of a railroad company, to cross a track, either for access to or exit from a train, excuses the person attempting the crossing from the ordinary obligation to stop, look, and listen for approaching trains, and he may ordinarily rely upon the invitation as an assurance of safety, and may assume that the movement of cars and trains over the crossing will be regulated with due regard to his safety. (pp. 432, 434.)

RAILROADS.—The Crossing of Railroad Tracks with knowledge of an approaching train is not, under all circumstances, negligence. The question is one of fact, depending upon the relative distance of the person and the train from the crossing and all the circumstances of the particular case. (p. 435.)

Charles A. Clark & Son and Wm. G. Clark, for the appellant.

James C. Davis, Clark & McLaughlin and Grimm, Trewin & Moffit, for the appellee.

252 WEAVER, J. The following facts are undisputed: The defendant operates a double track railway, passing east and west through the town of De Witt, Iowa. The ticket office, waiting-room, and main platform of the station are north of the tracks. Trains move eastward on the north track and westward on the south track, and west-bound passengers are required to pass from the main platform over a planked way across both tracks to a platform on the south side in order to board their trains. At about 11 o'clock of the night of March 31, 1902, Frederick J. Dieckmann, a traveling salesman, went to the station to take the west-bound train, which was due there about twenty minutes later. He purchased a ticket from De Witt to Cedar Rapids, and when the approach of the train was announced, or very soon thereafter, he picked up the grips which he was carrying and started in the direction of the south platform. At or about the same time the station agent, taking a lantern, went in the same direction, and both he and Dieckmann were struck by the train, the **253** former being instantly killed, and the latter mortally injured, dying the next day.

Concerning the details with which this general outline of conceded facts is to be filled, there is some dispute and uncertainty. There is, however, evidence which tends to show that it was the custom or practice of the agent, on the approach of west-bound trains, to call out, "Train west! All passengers cross over to the south side." At night he carried a lantern, and, after announcing the train, crossed over to the south platform. In so doing he was in the habit of showing the planked way or crossing to the passengers about to depart, and assisting them over, if assistance appeared to be needed. On the night in question he was heard to make the usual announcement; then, taking his lantern and some mail in his hand, started from the office in the direction of the south platform, followed by the deceased. The engineer in charge of the locomotive testifies that the train was moving at probably forty miles per hour, and was one minute ahead of schedule time as it entered the De Witt yards and sixteen miles per hour at the east end of the platform, which speed he thinks had been reduced to eight miles when the collision occurred. The headlight would not distinctly reveal to the engineer the form of a man at the distance of one hundred feet, but in his judgment it would do so at fifty feet. For an instant, as he approached, his eye was diverted to the air gauge of the engine, and, as he looked forward again when

very near the crossing, he distinctly saw two men apparently running across the track to the south, one being slightly ahead of the other, the one in the rear carrying a lantern. Almost at the same instant, and before any effective measure could be taken to stop the train, both men were struck, with the results already mentioned. A witness for defendant, who claims to have seen the collision, states that the agent and himself crossed the tracks in safety to the south platform, and on turning saw Dieckmann ²³⁴ coming carrying three grips. On reaching the north track witness says Dieckmann fell, and arising and hurrying forward he fell again on the south track, when the agent went back and laid hold of him, and was trying to drag him from the track when the engine came upon them. This witness and the engineer are the only persons testifying as eye-witnesses of the accident, and it is evident that one of them is mistaken as to some of its material circumstances. In corroboration of the engineer's statement it may also be said that the body of the agent was found under the north wheel of the engine or on the north rail; while the body of deceased lay on the platform on the south side of the south rail. Which story is the more worthy of credit is not a question for the court to consider; nor are we prepared to say that if the latter version is correct, it is decisive of the case.

Plaintiff's claim for damages is based upon the theory that, when Dieckmann went to the station and purchased a ticket for passage on a train nearly due, the relation of carrier and passenger then became effective, and that the railway company thereupon became bound to exercise the highest degree of care for his safety, and to provide him a safe way to the train and opportunity to reach the platform without injury, as well as to furnish proper escort and direction to the passenger if reasonably necessary to insure such safety. In these respects it is alleged the company was negligent. The defendant denies negligence on its part, and insists that the intestate was clearly guilty of contributory negligence. Upon a former submission the ruling of the trial court directing a verdict for defendant was sustained, but, a petition for rehearing having been granted, the case has been reargued by counsel on both sides with great thoroughness. The material questions may be considered in the following order:

1. We will first inquire as to the relation existing between the appellant and the deceased at the time of the ²⁵³ accident and the measure of the duty, if any, which the former owed to the latter. Mr. Hutchinson states the general rule to be that a person who goes to the station of a railway company within reasonable time prior to the hour set for the departure of a train, with the bona fide intention of taking passage thereon, and there, either by purchasing a ticket, or in some

other manner, indicates such intention to the carrier, he is considered to be a passenger, and entitled to all rights and privileges which the law attaches to that relation: 2 Hutchinson on Carriers, 3d ed., 1006. Such is also the rule of the decisions and text-books generally: 1 Fetter on Carriers of Passengers, sec. 55; Chicago etc. R. R. Co. v. Walker, 217 Ill. 605, 75 N. E. 520; Warren v. Fitchburg R. R. Co., 8 Allen (Mass.), 227, 85 Am. Dec. 700; Knight v. Portland etc. R. R. Co., 56 Me. 234, 96 Am. Dec. 449; Gaynor v. Old Colony & N. R. R. Co., 100 Mass. 208, 97 Am. Dec. 96; Chicago etc. Ry. Co. v. Ryan, 165 Ill. 88, 46 N. E. 208; Warner v. Baltimore & O. R. R. Co., 168 U. S. 339, 18 Sup. Ct. Rep. 68, 42 L. ed. 491; Norfolk & Western Ry. Co. v. Gallier, 89 Va. 639, 16 S. E. 935; Baltimore & O. Ry. Co. v. State, 63 Md. 135, 81 Md. 371, 32 Atl. 201; Central Ry. & B. Co. v. Perry, 58 Ga. 461; St. Louis S. W. Ry. Co. v. Franklin (Tex. Civ. App.), 44 S. W. 701; Rogers v. Kennebec Steamboat Co., 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491; Atchison etc. R. Co. v. Holloway, 71 Kan. 1, 114 Am. St. Rep. 462, 80 Pac. 31, 1 L. R. A., N. S., 113; Jordan v. New York etc. R. R. Co., 165 Mass. 346, 52 Am. St. Rep. 522, 43 N. E. 111, 32 L. R. A. 101. This court is also committed to the same doctrine: Allender v. Chicago etc. R. R. Co., 37 Iowa, 264; Ramm v. Minneapolis & St. L. R. R. Co., 94 Iowa, 296, 62 N. W. 751. We must therefore consider the deceased to have been a passenger at the time he attempted to cross the tracks, and the degree of care which the company was bound to exercise for his safety must be measured accordingly. It is also to be observed that, when it was shown that deceased sustained the relation of passenger, ²⁵⁶ and that he was killed by a train under the management and control of the defendant as carrier, the burden was cast upon it to negative the inference or presumption of negligence on its part: 5 Hutchinson on Carriers, 3d ed., sec. 1413.

2. It is claimed by appellant that the railway company negligently failed to control or reduce the speed of the train in approaching the station. Upon the former hearing to this appeal the court in its opinion held that the case would have been one for the jury on the question of excessive speed but for the fact that the contributory negligence of the deceased exonerated the company from liability. Counsel for appellee insist that no rate of speed in the movement of a railway train can be negligence per se, and that the case before us presents no circumstances from which a finding of want of reasonable care by the company in this respect can be sustained. We have quite frequently said that no conceivable rate of speed by a railway train in the open country will be held negligent as a matter of law, but we have nowhere held that the rate of speed upon or across city streets or

public crossings, or on station grounds where passengers may rightfully go, may not under some circumstances be found negligent as a matter of fact: *Kinyon v. Chicago etc. R. R. Co.*, 118 Iowa, 349, 96 Am. St. Rep. 382, 92 N. W. 40; *Artz v. Chicago etc. R. R. Co.*, 44 Iowa, 284.

In the case before us the company required its passengers desiring to board the west-bound train to leave its waiting-rooms and cross both tracks to the south platform. The approach of these tracks from the east was from a straight line of several miles. At night, in the very nature of things, the view of a locomotive headlight coming straight on through the darkness would give the ordinary observer a very inadequate idea of its distance, or of the speed of its approach. Of all these things the company must be held to have had knowledge,²⁵⁷ and we think it a fair question for the jury to say whether, in view of the known danger to which the company's method of business exposed its passengers in this respect, and all the circumstances attending the accident, the train at that moment was or was not being operated at a reasonable speed. While the engineer estimates that he entered the yards at forty miles per hour, and had reduced the speed to eight miles at the place of the accident, and there is no reason to question his good faith, there are admitted circumstances from which the jury could reasonably conclude that his estimate of speed is too low. We are therefore inclined to reaffirm our former conclusion on this branch of the case, and say that the jury was entitled to consider whether due care in approaching the platform was exercised.

Moreover, under the rule above cited, which casts upon the railway company the duty of negating the inference of negligence arising from the injury of plaintiff by the movement of its train, it was very clearly for the jury to say whether the evidence offered in defense was sufficient to overcome the *prima facie* case thus made. That rule of care due the passenger applies from the moment he enters the station for the purpose of embarking upon an approaching train, and he has the right to expect that in going to the train and entering the cars at the place prepared for that purpose his safety will be vigilantly guarded by the carrier's agents.

Directly in point upon this subject is the language of the supreme court of Maryland: "Carriers of passengers have in their charge the lives and safety of those they undertake to transport, and are subjected to a responsibility proportioned to the gravity of the trust reposed in them. They are bound to use the utmost degree of care, skill and diligence in everything that concerns the safety of passengers, nor are their duties limited to the mere transportation of them. They are bound to provide safe and convenient²⁵⁸ modes of access to their trains, and of departure from them": *Phila-*

delphia, W. & B. Ry. Co. v. Anderson, 72 Md. 519, 20 Am. St. Rep. 483, 20 Atl. 2, 8 L. R. A. 673. In the same case it is held that, where the relation of carrier and passenger exists, and the latter is injured by the movement of the carrier's train, these facts being shown, the onus is upon the carrier to show that it was guilty of no negligence with respect to the accident. And this, says the court, can only be done by proving the facts and circumstances explaining the cause of the accident, and showing it to be such as could not have been guarded against by the utmost degree of diligence; or, in other words, quoting the language of Chief Justice Shaw, "the most exact care and diligence, not only in the management and care of the train and cars, but also in the construction and care of the track, and in all subsidiary arrangements necessary to the safety of passengers." That the station agent in the present instance invited the deceased to cross the track, and thereby led him into imminent peril, is shown beyond all question, and that he, or the engineer in charge of the train, or both, were negligent is so clear that to say as a matter of law they were both exercising due care for the passengers' safety would be a palpable absurdity.

3. Another ground of alleged negligence, as stated in the petition, is that the defendant by its agent carelessly and negligently notified and directed the deceased to cross the tracks, and negligently undertook to, and did, escort and direct or lead him upon the crossing in front of the train by which he was run down. Here, too, we think the testimony makes a case on which the plaintiff was entitled to go to the jury. The arrangement of the station, tracks and platform to which we have referred, and the necessity thus created for west-bound passengers to cross said tracks in front of the coming train, made it incumbent on the defendant company to provide at least a reasonably safe way for such crossing to be made, ²⁵⁹ and to exercise the highest degree of care to protect them from injury in making the passage. If due care in this respect required a timely announcement of the approach of the train, or the use of a light by lantern or lamp to illuminate the path, or the services of a guide or escort to conduct the passengers to the proper platform (and that was for the jury to say), the failure to provide these safeguards would be negligence; and if, having provided them, the announcement is delayed so long, or the other service is so carelessly or inefficiently performed, that a passenger is exposed or led into danger which proper care on the part of the company's agents would have avoided, it is properly held liable for the consequences, unless relieved therefrom by a failure to show reasonable care on part of the passenger. This rule has not infrequently been applied to cases very similar in their facts to those now under consideration: Gulf

etc. *R. R. Co. v. Morgan*, 26 Tex. Civ. App. 378, 64 S. W. 688; *Shearman & Redfield on Negligence*, sec. 525; *Warner v. Baltimore & O. R. R. Co.*, 168 U. S. 339, 18 Sup. Ct. Rep. 68, 42 L. ed. 491; *Warren v. Fitchburg R. R. Co.*, 8 Allen (Mass.), 227, 85 Am. Dec. 700; *Chicago etc. R. R. Co. v. Ryan*, 165 Ill. 88, 46 N. E. 208; *Beecher v. Long Island R. R. Co.*, 161 N. Y. 222, 55 N. E. 899; *Wheelock v. Boston & A. R. R. Co.*, 105 Mass. 203; *Chaffee v. Boston & L. R. R. Co.*, 104 Mass. 108.

4. If we are correct in the foregoing conclusion, and the question of due care on part of the company was one of fact for the jury, the ruling of the trial court in directing a verdict for defendant cannot be upheld, unless we are able to say as a matter of law that the deceased was guilty of contributory negligence. On the affirmative of this proposition the appellee lays great stress in argument; but, after re-examining the record with much care, we are strongly of the opinion that this, too, was a question for the jury. The fact that deceased undertook to cross a track on which he knew a train was approaching was not necessarily negligent ²⁶⁰ in law or in fact. The construction and arrangement of the station and platform made the crossing necessary. There was no other way provided for boarding the train. The defendant must be held to have invited the deceased to go to the platform, and by such invitation have given him implied assurance that the train was at such distance, and moving at such rate, that he could cross the track with safety. In accepting that invitation and acting upon it he cannot be charged with culpable negligence, unless the danger of collision was so manifestly imminent that he knew, or as an ordinarily prudent person under all the circumstances he should have known, of the peril to which he was thereby exposed. We are not ready to say that a passenger waiting at a station in the night-time is negligent as a matter of law because he relies upon the agent, and acts upon his announcement of the approach of a train, and follows or accompanies him across the track to the appropriate platform. The circumstances may have been such that he ought to have disregarded the invitation and refused to attempt the crossing, but certainly that conclusion is not so clear or so imperative as to compel the assent of all reasonable minds. Contributory negligence is peculiarly a question of fact, and the court should not attempt to dispose of it peremptorily, save where the circumstances are clear and undisputed, and are of such character that fair and unprejudiced minds cannot arrive at different conclusions therefrom. The deceased was entitled to the highest degree of care by the defendant for his protection. He was entitled to assume that a reasonably safe way had been provided for his access to the platform. He was justified

in assuming that the announcement was made in due time, so that, acting with proper dispatch, he could pass in safety from the waiting-room to the platform.

True, these things did not absolve him from the duty to exercise reasonable care for his own safety, but they are material and necessary elements for consideration in ²⁶¹ determining what were the requirements of reasonable care on his part under all the circumstances, and this is a question of fact, and not of law, to be answered only by duly weighing all the testimony bearing thereon: *Warner v. Baltimore & O. R. R. Co.*, 168 U. S. 339, 18 Sup. Ct. Rep. 68, 42 L. ed. 491; *Brassell v. New York etc. R. R. Co.*, 84 N. Y. 241; *Gaynor v. Old Colony & N. R. R. Co.*, 100 Mass. 208, 97 Am. Dec. 96; *Beecher v. Long Island R. R. Co.*, 161 N. Y. 222, 55 N. E. 899; *Atchison etc. R. Co. v. Holloway*, 71 Kan. 1, 114 Am. St. Rep. 462, 80 Pac. 31, 1 L. R. A., N. S., 113.

In *Mayo v. Boston & M. R. R. Co.*, 104 Mass. 141, the court, speaking with reference to alleged contributory negligence of a passenger while crossing a track at a railway station, says: "Although the burden of proof still remains upon the plaintiff in these cases to show the exercise of such degree of care as was appropriate to the place and occasion, yet the court will not attempt to decide the question of due care upon the preponderance of evidence. The surrounding circumstances, and the whole conduct of plaintiff in reference thereto, will ordinarily afford ground for such a variety of inferences as to make the verdict of a jury the only proper means to determine the essential fact. However indicative of carelessness the circumstances may seem to the court, if there be any evidence on which it is competent for the jury to find that reasonable care was in fact exercised, it is proper to submit it to them." The same court, in *Gaynor v. Old Colony & N. R. R. Co.*, 100 Mass. 208, 97 Am. Dec. 96, discussing the same question of contributory negligence in crossing a railway track, makes use of the following expression: "When the circumstances under which the plaintiff acts are complicated, and the general knowledge and experience of men do not at once condemn his conduct as careless, it is plainly to be submitted to the jury. What is ordinary care in such cases, even though the facts are undisputed, is peculiarly a question of fact, to be determined by the jury under proper instructions. It is the ²⁶² judgment and experience of the jury, and not of the judge, which is to be appealed to." The Illinois court has said: "It is always a question for the jury to determine from the evidence whether the person injured has exercised proper care and caution in crossing a railroad track, and not a question of law": *Pennsylvania Co. v. Frana*, 112 Ill. 398; *Chicago etc. R. R. Co. v. Hutchison*, 120 Ill. 587, 11 N. E. 855.

Since this case was originally submitted several decisions quite in point have been announced in other jurisdictions, and to some of these we call attention. *Chunn v. City & Suburban Ry. Co.* (decided by the supreme court of the United States, November 8, 1907), 207 U. S. 302, 28 Sup. Ct. Rep. 63, 52 L. ed. 219, presents a case where the plaintiff went at night to the station to take passage on a car soon to arrive. The road was double-tracked, and a platform for the use of the passengers had been provided along the outside. The narrow space between the tracks was also planked, and passengers sometimes stood there when waiting to board the cars. Plaintiff took her stand upon this narrow place. From this position she could, if she looked, see an approaching car from either direction for a distance of at least a quarter of a mile. Standing there, as the train she was expecting approached, she was struck and injured by another car coming in from the opposite direction on the other track. Having brought action to recover damages, the trial court directed a verdict for the company, on the theory that plaintiff was guilty of contributory negligence as a matter of law. This judgment was affirmed by the court of appeals of the District of Columbia, which decision was reversed by the supreme court. After first finding that the plaintiff was not a trespasser, the court proceeds to say that: "She was not as a matter of law guilty of negligence in failing to appreciate accurately the boundaries of the narrow zone of safety which the defendant's conduct had left her."

²⁶³ More closely parallel to the case at bar is *Karr v. Milwaukee etc. Traction Co.*, decided by the Wisconsin court, and reported in 132 Wis. 662, 122 Am. St. Rep. 1017, 113 N. W. 62, 13 L. R. A., N. S., 283. There the defendant operated a double-track electric railway. At one of its stations or stopping-places, where no agent or attendant was in charge, it erected between its tracks a device for giving the stop signal by passengers awaiting at night. It was so arranged that, when a lever attached to the device was lifted, a light would be displayed from the top of a pole, and on releasing the lever the light would be extinguished. Attached to the device was a printed card instructing the passengers to hold up the handle until the car was in sight. As the entrance to the cars was from the outside of the track, the passenger, after giving the signal, was of necessity obliged to pass back again across the track in front of the approaching car, or wait until it stopped, and then walk around it to the opposite side. On a dark night the plaintiff, desiring to take a car, went to the signal post, and, when he saw or heard the car approaching, displayed the signal, and on hearing the whistle sounded by the motorman, undertook to cross the track, and was run down. When the light was displayed

the car was only about one hundred and ten feet distant, and running very rapidly, and plaintiff had taken but two or three steps from the signal post when he was struck. To the contention of the defendant that in crossing the track in front of the rapidly moving car plaintiff was guilty of contributory negligence as a matter of law, the court, after reciting the conditions under which the accident occurred, says:

"One who had by daylight observation become familiar with these conditions and these measurements, and the place of stopping the north-bound car, might, and probably would, remain between the tracks after he had held up the signal light and until the train arrived, but a person not possessing this familiarity, and arriving on a dark ²⁶⁴ night where distances cannot be so accurately estimated, might ordinarily and usually, in view of the position of the signal light on the center pole, the printed and inadequate instructions thereon, and the necessity of boarding the car from the outside, cross over from that side immediately upon letting go of the signal light. This was for the jury to decide. . . . The reason for the distinction between the case of a passenger crossing a track under such circumstances and the ordinary pedestrian bearing no such relation to the railway company appears to rest upon the possibility or probability that a reasonably prudent man, in the exercise of ordinary care, might well believe, in the face of such implied invitation to cross, the movements of passing trains would be so regulated or adjusted as to permit his crossing in safety. The jury was authorized to infer from the evidence that the plaintiff as a reasonably prudent man understood that he was obliged to cross the east track in order to board the car in question, and to cross at the time and in the manner in which he did cross, and that due care would be exercised by the defendant, for the safety of those crossing by stopping south of or at the signal light. The jury had also the right to consider that the plaintiff was so near the inner rail, and in such a position in giving the signal, that an ordinarily prudent man, knowing that the car would stop for only a moment to permit him to embark, might have considered it the proper course for him to cross the track at the time and in the manner he did cross it in order to enter the car. It was essentially a question of fact, and not one of law, whether or not an ordinarily prudent man would, under the circumstances, have done as plaintiff did."

These words apply with increased force to the case before us. The deceased was a passenger and entitled to protection as such. He was not only impliedly, but expressly, invited to cross the track in front of the incoming train. It was the only method provided to enable him to take passage upon it. The place, except the small area illuminated by the

agent's lantern, was enveloped in the darkness of night. The only visible sign of the approaching ²⁶⁵ train was the headlight of the engine coming "head on" through the darkness up a long stretch of straight track, a situation in which it was manifestly difficult, if not impossible, to judge accurately of its speed or distance. The agent to whom was intrusted the duty to guide him across the track, and on whom he as a passenger had a legal right to rely, directed him to take the south platform, and in following this direction the collision occurred. Nor is it to be overlooked that the train was a minute ahead of time, and this fact is not without material bearing upon the question whether deceased as a reasonably prudent person may not have believed he had ample time to make the crossing in safety. We can imagine no state of circumstances calling more loudly for the application of the principles stated by the Wisconsin court, *supra*, justifying the passenger, as a reasonably prudent man, in believing that in the face of such invitation to cross the track, the movements of trains thereon would be so regulated and adjusted as to permit his crossing in safety.

A discussion by the court in *Doyle v. Boston & A. R. R. Co.*, 145 Mass. 386, 14 N. E. 461, is also quite pertinent to the question here presented. The deceased was driving in the night-time over a crossing of the defendant's tracks in the city of Boston. The crossing was guarded with gates, operated by a gateman, and was also protected by a gong, which sounded on the approach of a train. The gates being open, the deceased undertook to cross; but, before he reached the track on which the train was coming, the alarm was sounded, and the gateman, seeing him, called to him to stop, and, as was claimed, immediately called to him again to go on. The deceased evidently either heard the alarm or saw the approach of the train, for he was seen to start suddenly, whip up his horses, and endeavor to make the passage, but failed, and was killed. ²⁶⁶ The opinion, delivered by Holmes, J., says of the question of contributory negligence: "We cannot say as a matter of law that deceased was guilty of gross negligence. The plaintiff's evidence tended to show that he had got half-way across before there was any warning, and before the gates were shut; that the first warning he received was when the gates were shut, and the gateman shouted 'Stop!' a shout which he may have heard only as an alarming sound; that then, practically all at once, the deceased whipped his horse, the gateman shouted to him to 'Come on!' and opened again the gate in front of him. We do not say that this seems to us the most probable view of the facts, but it is one which the jury might have taken on the evidence. Going on under the circumstances was a mistake, but we cannot say it was gross negligence. Something must be allowed for the nat-

ural impulse which some people feel when suddenly startled and alarmed to leap forward, and more for the natural tendency to follow the gateman's directions."

We have ourselves, within the last few weeks, held it error for the court to direct a verdict for the defendant in a crossing accident case where the alleged negligence of the company and freedom from contributory negligence by the plaintiff were sustained by evidence far less persuasive than is presented by the record now before us: See *Calwell v. Minneapolis & St. L. R. R. Co.*, 138 Iowa, 32, 115 N. W. 605.

The effect of an invitation, express or implied, by a gateman, station agent, conductor, or other employee to a passenger to cross a railway track, either for access to, or exit from, a train, has often been considered by the courts in relation to the question of contributory negligence. It has also frequently arisen in cases of injury to highway travelers; and, even in this class of cases, where the rule of care by the railway company is must less stringent than in the case of injury to passengers, it is universally held that such invitation excuses the person attempting the crossing from the ordinary obligation to stop, look and listen for approaching trains, and that he may ordinarily rely upon the invitation as an assurance of safety, and may assume that the movement of cars and trains over such crossing will be regulated with due regard to his safety: See *Glushing v. Sharp*, 96 N. Y. 676; *Palmer v. New York Cent. etc. R. R. Co.*, 112 N. Y. 234, 19 N. E. 678; *French v. Taunton Branch R. R. Co.*, 116 Mass. 537; *Sweeny v. Old Colony & N. R. R. Co.*, 10 Allen (92 Mass.), 368, 87 Am. Dec. 644; *Sonier v. Boston & A. R. R. Co.*, 141 Mass. 10, 6 N. E. 84; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 10 Am. St. Rep. 136, 20 N. E. 843; *Chicago etc. R. R. Co. v. Clough*, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; *Cleveland etc. R. R. Co. v. Schneider*, 45 Ohio St. 678, 17 N. E. 321; *Terry v. Jewett*, 78 N. Y. 338.

In the *Sweeny* case (10 Allen (92 Mass.), 368, 87 Am. Dec. 644) it was claimed that the company's agent gave the plaintiff a signal to cross the track, and the court says: "No express invitation need to have been shown. It would have been only necessary for the plaintiff to prove that the agent did some act to indicate that there was no risk of accident in attempting to pass over the crossing." In the *Glushing* case (96 N. Y. 676) the question was upon an implied invitation offered by an open crossing gate, and the court uses this language: "The raising of the gate was a substantial assurance to him of safety, just as significant as if the gateman had beckoned to him, or invited him to come on, and that any prudent man would not be influenced by it is against all human experience."

In *Hartzig v. Lehigh Val. R. R. Co.*, 154 Pa. 364, 26 Atl. 310, the plaintiff was acting under the direction of a brakeman in making her exit from a train, and was injured. The court there says: "In such circumstances she cannot be charged with contributory negligence for doing what she was told to do by the brakeman. She was still in the charge of the defendant company, and was therefore not a discharged passenger. She was using the means for alighting which were provided for her, and with the assistance of their agent." The same rule is affirmed in ²⁶⁸ *Filer v. New York Cent. R. R. Co.*, 59 N. Y. 351. In *Jewett v. Klein*, 27 N. J. Eq. 550, the plaintiff, a passenger, was injured in crossing the track to take his train, and the court there uses language peculiarly applicable to the present case. It says: "The complaint had provided no way of approach to the passenger train except by crossing on a level the eastern track of the railroad, and in my opinion the passenger was fully justified in concluding that he would be safe from harm from a train on the track which he was thus obliged to cross in order to secure his passage. The company had, in effect, assured him that he would at that time be safe in going in the usual way from the station to the passenger train. Acting upon such assurance, the plaintiff did no more or less than ordinarily prudent and careful persons do almost every day under like circumstances, and may be expected and have the right to do."

We quote also from the Michigan court: "Where passengers are at the appointed place for embarking, with no fences or gates to keep them back, they must generally have the right, if they do so in good faith, to assume that no dangerous orders will be given, and that they may safely act on the direction of those whose legal duty it is to protect them from risk, and who are supposed to know what is safe. Some allowance must also be made for such conditions as stand in the way of full deliberation. It is applying too harsh a rule to hold that persons, who have apparently few moments to decide between the direction of the officers and losing their last chance of passage, should be held negligent in doing as they are invited to do, unless the danger is very obvious": *Clinton v. Root*, 58 Mich. 182, 55 Am. Rep. 671, 24 N. W. 667; *Pool v. Chicago etc. R. R. Co.*, 56 Wis. 227, 14 N. W. 46.

Very closely resembling the case at bar is *Warren v. Fitchburg R. R. Co.*, 8 Allen (90 Mass.), 227, 85 Am. Dec. 700. There the plaintiff was required to cross the track to reach his train. While awaiting its arrival at the station, ²⁶⁹ the agent announced, "The train is coming! We will cross over." Following this direction, plaintiff undertook to make the crossing, and was struck by a moving train, which he could have seen and avoided had he looked. Holding that he was

not negligent as a matter of law, the court says: "Whether in this connection of things, in his anxiety to seasonably reach the train, which would stop but a moment, the plaintiff, at a station with which he was not familiar, would have been likely to be thrown off his guard by the direction to cross over, given without any caution or qualification, whether he might naturally, and without subjecting himself to the imputation of want of care, have considered himself in the charge of the defendant's agent, with an assurance that it was safe and proper to go directly to the cars, were questions for the jury, and not for the court."

It needs no argument to demonstrate the manifest application of these cases, and the law therein announced, to the case at bar. We further cite, without quotation, *Boesen v. Omaha St. R. R. Co.*, 79 Neb. 381, 112 N. W. 615; *Chesapeake & O. R. R. Co. v. King*, 99 Fed. 251, 40 C. C. A. 432, 49 L. R. A. 102; *Warner v. Baltimore & O. R. R.*, 168 U. S. 339, 18 Sup. Ct. Rep. 68, 42 L. ed. 491; *Betts v. Lehigh Val. R. R.*, 191 Pa. 575, 43 Atl. 362, 45 L. R. A. 261; *Graven v. McLeod*, 92 Fed. 846, 35 C. C. A. 47; *Chicago etc. R. R. v. Lagerkrans*, 65 Neb. 566, 91 N. W. 358, 95 N. W. 2; *Atlantic City R. R. v. Goodin*, 62 N. J. L. 394, 72 Am. St. Rep. 652, 42 Atl. 333, 45 L. R. A. 671.

The only possible escape from this conclusion is for this court to say, as a matter of law, that the danger in making the crossing was so obvious that, as a man of ordinary prudence, the deceased should have refused to follow the agent to the platform. But when we stop to consider what such a holding would involve, it is very clear that we would be thereby invading the province of the jury. In the first place, as the cases hold over and over ²⁷⁰ again, the invitation was an assurance of safety held out by the defendant. It was given by the person whom the defendant had placed in charge of its station for that purpose. The deceased had a right to assume that the agent's knowledge, experience and judgment as to the safety of the crossing was superior to his own. The jury could rightfully have found that, had the train not been moving at a negligently high rate of speed, deceased would have reached the platform in safety. The court is not in position to say that in the darkness of the night, and in his natural haste and anxiety to make the train, deceased ought to have discovered the excessive speed of the train approaching, and refused to attempt the crossing. Indeed, it is quite obvious that the agent himself, with all his experience, was deceived concerning the speed of the train, and was thereby misled to his own death. It is admitted that the train entered the station yard at the rate of at least forty miles an hour, and was moving at the rate of sixteen miles an hour when it reached the end of the platform. But

how was the deceased to be held to a discovery of this negligence in time to have avoided injury? He had the undoubted right to assume that the defendant company having so arranged its station as to require him to cross from the waiting-room to the opposite side of the track in front of a train known to be approaching, it would so govern the movement of such train that the passenger rightfully availing himself of this means of access to the train upon which he was to be transported would not be unreasonably exposed to danger. He had to act quickly. If he would not lose his train, he could not stop to make a careful examination of his surroundings, or to enter upon deliberate calculation as to the degree of danger to be apprehended in going ahead: *Waldele v. New York Cent. etc. R. R. Co.*, 4 App. Div. 549, 38 N. Y. Supp. 1009.

Indeed, if, under such circumstances, the court is to hold the deceased guilty of contributory negligence as a ²⁷¹ matter of law, it would be exceedingly difficult to imagine a case in which the question may ever be submitted to a jury. It has never been held by any court that a person crossing a railway track with knowledge of an approaching train is, under all circumstances, negligent as a matter of law. That question depends entirely upon the relative distance of the person and the train from the crossing; and, if the train is so near, and moving at such a rate of speed that the traveler as a reasonably prudent person knows, or ought to know, that he cannot cross the track without exposing himself to a collision, then his attempt to do so is negligent. But if the train is at such distance that a reasonably prudent man may fairly believe that he can cross in safety, then the act is not negligent, and the question whether he is justified in so believing is, under all ordinary circumstances, for the jury. If he is a traveler at a public crossing, or a passenger waiting at the station to board the train, and the darkness of the night prevents his seeing the speed of the approaching train, he may rightfully assume that it is not being operated at an excessive or reckless pace, and that the approach will be made with due regard for his safety, and he is not negligent in governing his movements accordingly. If to the darkness of the night and to this reasonable presumption we add the presence of the railway company's agent pointing out the way, and directing him to cross, it would, as one of the authorities above cited says, be contrary to all human experience if even the most prudent traveler be not influenced by it.

In *Detroit & M. Ry. Co. v. Van Steinburg*, 17 Mich. 99, we have a case where the plaintiff, the keeper of a hotel located on the opposite side of the track from a station, after hearing the whistle of an approaching train, left his place of

business to go to the station, and in attempting to make the crossing ahead of the train was struck and injured. The principal negligence charged against the railway company ²⁷² was in making the approach at an alleged reckless rate of speed. The case, as will be seen, was very much less favorable for the plaintiff than is presented by the case at bar. In an opinion by Chief Justice Cooley the question whether under such circumstances, the plaintiff was chargeable with contributory negligence as a matter of law is considered with great fullness; and, after an elaborate review of the authorities, it is held to be a jury question. The discussion by the learned Chief Justice is worth careful examination by any court, when urged to dispose of questions of negligence and contributory negligence as matters of law, and we will prolong this opinion, already too extended, only to give his application of the law to the particular facts, which are in a great measure parallel with those we are now considering. He says: "It certainly cannot be said, on any view of the evidence, that the plaintiff observed the highest degree of prudence in his conduct. He stepped on the track on which he knew the train was approaching, without turning to see how near it was, and the injury has resulted in consequence. Thus stated, the fact would appear to be gross negligence, if not utter recklessness; but there are other circumstances to be taken into consideration before judgment can be pronounced upon the character of the act. The plaintiff heard the whistle a half a mile off. He knew he had the time, which would be required for the train to pass over that distance, in which to cross over to the depot, a distance of less than one hundred feet. He also knew that all trains coming on this track stopped at the depot, and that they checked their speed and approached it slowly. He had also some reason to expect the ringing of the bell. But whether the bell was rung or not it may well be claimed he had abundant reason to believe there was ample time to cross the track before the train in the ordinary course could possibly arrive, even though he walked along leisurely as he must have done. He looked for the train, indeed, as he came out of his hotel, but he had less than the usual occasion for looking when he knew about how far off the train was, and that, relying upon the ordinary mode of management, as he ²⁷³ had a right to, he could not be in danger from it in passing over, and, if we are to believe his evidence, he was entirely correct in his calculations, and it was only because the train came up at a speed twice as great as he had any right to anticipate that he found himself in danger. He may claim, therefore, that he was not guilty of want of ordinary care

and prudence because the ordinary condition of things, which was what he was to look for, would not have made his position dangerous."

The case of *McIntyre v. New York Cent. R. R. Co.*, 37 N. Y. 287, is also so directly in point, and the discussion of the subject of contributory negligence in following the direction of the carrier's agent is so applicable to the circumstances now under consideration, that at the risk of seeming tedious we now quote therefrom. The passenger, laden with a handbox, bundle, basket, and flower-pot, and piloting her aged parent, also encumbered with baggage, undertook to pass from one car to another while the train was in motion, and the platforms slippery with sleet and ice, fell between the cars. She attempted to make the passage because the seats in the car were all filled, and the brakeman told her to go into the next car, where she would find room. In an opinion by Fullerton, J., it is said: "She had a right to a seat, and it was the duty of the defendant to provide her with one. If in discharging that duty they required her to perform an act which was perilous in itself, and in doing which she lost her life, the negligence, if any the act involved, should be imputed to the company alone. . . . I admit that passing from one car to another in a dark and stormy night, encumbered with baggage, and having charge of an aged person, was an act fraught with imminent peril, and, if done without sufficient reason, one involving great negligence. But, having been undertaken at the request of the company, it is to be regarded as their act, and attempted at their risk. Unless this view of the case is adopted, railroad companies may be guilty of the grossest wrongs without incurring liability."

²⁷⁴ The following precedents are worthy of note, not so much because of the similarity of facts involved with these presented by the instant case, but for their discussion and elucidation of the law of negligence and contributory negligence in personal injury cases, and the limitation upon the authority of the court to dispose of such questions as matters of law: *Ernst v. Hudson River R. R. Co.*, 35 N. Y. 9, 90 Am. Dec. 761; *Walker v. St. Paul City R. R. Co.*, 81 Minn. 404, 84 N. W. 222, 51 L. R. A. 632; *Benjamin v. Holyoke St. R. R. Co.*, 160 Mass. 3, 39 Am. St. Rep. 446, 35 N. E. 95; *Pennsylvania R. R. Co. v. Ogier*, 35 Pa. 60, 78 Am. Dec. 322; *Correll v. Burlington etc. R. R. Co.*, 38 Iowa, 120, 18 Am. Rep. 22; *Grand Trunk R. R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679, 36 L. ed. 485; *Chicago & N. W. R. R. Co. v. Prescott*, 59 Fed. 237, 8 C. C. A. 109, 23 L. R. A. 654; *Beisiegel v. New York Cent. R. R. Co.*, 34 N. Y. 622, 90 Am. Dec. 741; *Tilden v. Rhode Island R. R. Co.*, 27 R. I. 482, 63 Atl. 675; *Chicago & A. R. R. Co. v. Winters*, 175 Ill. 293, 51

N. E. 901; *Bucher v. New York Cent. R. R. Co.*, 98 N. Y. 128; *Holden v. Great Northern R. R. Co.*, 103 Minn. 98, 114 N. W. 365; *Pennsylvania R. R. Co. v. White*, 88 Pa. 327; *Atchison etc. R. R. Co. v. Shean*, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729.

The trial court erred in refusing to submit the case to the jury, and a new trial must be ordered.

Reversed.

Judge Sherwin Dissented, believing that the opinion of the majority on the question of contributory negligence was based on an erroneous conception of the evidence.

Passengers, Who are, and When They Become Such, is the subject of a note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 75. As to when one acquires the status of a passenger, see, also, *Atchison etc. Ry. Co. v. Holloway*, 71 Kan. 1, 114 Am. St. Rep. 462.

Reasonable Railroad Stational Accommodations and Safeguards must be provided by railroad companies where they usually take on and put out passengers. This rule not only requires them to furnish safe platforms and suitable station approaches, but also that their stations be open and lighted at night, and that ample and sufficient lights be then furnished to safely guide their passengers; and that necessary employees be present to inform and direct passengers as to the correct location of their trains, and the usual and safest way of reaching or leaving them: *Moses v. Louisville etc. R. R. Co.*, 39 La. Ann. 649, 4 Am. St. Rep. 231. See, also, as to the duty of a railroad company to keep its passenger stations and premises free from danger for its patrons: *Johns v. Charlotte etc. R. R. Co.*, 39 S. C. 162, 39 Am. St. Rep. 709; *Fullerton v. Fordyce*, 121 Mo. 1, 42 Am. St. Rep. 516; *Klugherz v. Chicago etc. Ry. Co.*, 90 Minn. 17, 101 Am. St. Rep. 384; *Pineus v. Atlantic etc. R. R. Co.*, 140 N. C. 450, 111 Am. St. Rep. 856; *Abbott v. Oregon R. R. Co.*, 46 Or. 549, 114 Am. St. Rep. 885; *Mangum v. North Carolina R. R. Co.*, 145 N. C. 152, 122 Am. St. Rep. 437.

It is not Always the Duty of a Passenger Before Attempting to Cross Tracks which are necessary to be crossed after alighting from a train to reach the station to observe the rule compelling a person crossing the tracks of a railway on a highway to stop, look and listen. He has a right to assume that no train will be run between the station and the train from which passengers are alighting, and he is not necessarily negligent in failing to look for a train when thus crossing a track nor in assuming that no train will be so run: *Besecker v. Delaware etc. Ry. Co.*, 220 Pa. 507, 123 Am. St. Rep. 714. See, too, *Birmingham Ry. etc. Co. v. Landrum*, 153 Ala. 192, 127 Am. St. Rep. 25; *Weeks v. New Orleans etc. R. R. Co.*, 40 La. Ann. 800, 9 Am. St. Rep. 560.

If a Railroad Company Stops a Passenger Train on a Sidetrack so that there are other tracks between the train and the depot platform, the entire space between the depot and the train must, with regard to people having business at the train, be regarded the same as if it constituted the platform. They therefore have a right to assume that they will be protected by the company, and they need not be on their guard against approaching trains. The ordinary rule of "look and listen" has no application to such a situation: *Atchison etc. Ry. Co. v. McElroy*, 76 Kan. 271, 123 Am. St. Rep. 134, and see cases cited in the cross-reference note thereto.

STATE EX REL. JONES v. SARGENT.

[145 Iowa, 298, 124 N. W. 339.]

OFFICERS—Selection from Different Political Parties.—A statute providing that fire and police commissioners shall be appointed by the mayor and be selected by him "from the two leading political parties, so that, as far as practicable, two members of the board shall be members of the dominant political party and one member of the board shall be a member of the political party next in numerical strength as shown by the votes cast at the last state or national election," does not prescribe qualifications for the office, and leaves in the mayor some discretion to determine whether it is practicable to have the board selected as indicated. (p. 442.)

OFFICERS—Appointment from Leading Political Parties.—A statute requiring the appointment of fire and police commissioners to be made, so far as practicable, from the two leading political parties, is not violative of the constitutional guaranty that all laws shall be of uniform operation. (p. 443.)

OFFICERS—Appointment from Leading Parties.—A statute providing for the appointment of fire and police commissioners from the members of the two leading political parties is not an unconstitutional limitation upon political rights, as interfering with the privileges of electors or imposing unconstitutional restraints upon them. (p. 443.)

OFFICERS—Right to Hold Office.—There is no such thing as a right to hold office. This is a mere privilege at all times within the control of the legislature, save where limited by some constitutional provisions. (p. 444.)

OFFICERS—Appointment from Leading Parties.—A statute providing for the appointment of fire and police commissioners from the two leading political parties does not contravene a constitutional provision that the legislature shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens. That provision does not apply to legislative enactments fixing the qualifications for municipal office. (p. 445.)

OFFICERS—Statute Prescribing Qualifications.—The constitutional guaranty of a republican form of government is not violated by a statute prescribing certain qualifications for the holding of certain offices. (p. 445.)

OFFICERS.—The Fixing of Qualifications for office is a legislative, not a judicial, function, and it cannot be said, as a matter of law, that any qualification for office fixed by the legislature is arbitrary or oppressive, or so much so as to be set aside by the courts. (p. 445.)

OFFICERS—Qualifications—Political Test.—In the absence of constitutional limitation imposing restraints upon the legislature with reference to qualifications for office, political tests or other qualifications may be used. (p. 446.)

OFFICERS—Prescribing Qualifications.—In the Absence of constitutional prohibition the legislature has plenary power in fixing the qualifications of municipal officers. In creating such an office and delegating power to it, the legislature has the right to say who shall exercise the functions so delegated. (p. 447.)

Quo warranto to test the validity of defendants' appointments as members of the board of fire and police commission-

ers and oust the defendants from their positions as such. The petition was dismissed and plaintiff appealed.

Saunders & Stuart, for the appellant.

Jerry Sullivan and S. B. Wadsworth, for the appellees.

²⁹⁹ DEEMER, C. J. Relator was duly chosen chief of the fire department of the city of Council Bluffs in the year 1906, and at the time of the commencement of this suit was acting as such. On or about April 8, 1907, the then mayor of said city appointed defendants B. M. Sargent, a Republican, and Hubert Tinley and L. Zurmuehlen, ³⁰⁰ Democrat, as members of the board of fire and police commissioners for the city under the provisions of Acts of Thirty-second General Assembly, chapter 29, and Acts of Twenty-ninth General Assembly, chapter 31, all appearing now as chapter 2A, title 5, of the Code Supplement of Iowa. It is alleged that the law under which the appointments were made is unconstitutional and void, and that the members so appointed were not qualified to serve. It is further alleged that defendants were about to interfere with plaintiff in the performance of his duties as fire chief, and that their act in so doing was without authority of law. That the exact questions presented may be fully understood, we here quote the provisions of the statutes involved:

"Sec. 679a. . . . There is hereby created and established a board of police and fire commissioners in cities of the first class and cities under special charter which, according to any state or national census heretofore or hereafter taken, are shown to have a population of more than twenty thousand.

"Sec. 679b. Said board of police and fire commissioners shall consist of three members, who shall be citizens of the state of Iowa, and who shall have been residents of the city in which they are appointed for more than five years next preceding their appointment; they shall, except as herein-after specified, hold their office for six years and until their respective successors have been appointed and qualified. All vacancies in such board by death, resignation, removal or for any other cause, shall be filled as soon as practicable in the same manner as provided for appointment. Said commissioners shall receive no compensation for their services."

"Sec. 679d. Immediately upon the taking effect of this act the mayor of such city shall appoint said board of police and fire commissioners, who shall be confirmed by the city council, and the said commissioners so appointed shall hold their office, one of them until the first Monday in April, 1904, one of them until the first Monday in April, 1906, and

one of them until the first Monday in April, 1908, and on the last Monday in March, 1904, and ³⁰¹ on the same day in each even-numbered year, thereafter, the mayor shall appoint one commissioner in such city to take the place of the commissioner whose term of office expires the first Monday in April following such appointment, and the members so appointed shall serve for the term of six years following the said first Monday in April. The chairman of the board for each biennial period shall be the member whose term first expires. The said commissioners shall be selected from the two leading political parties, so that, as far as practicable, two members of the board shall be members of the dominant political party and one member of the board shall be a member of the political party next in numerical strength, as shown by the votes cast at the last state or national election. And any commissioner who during his term of office becomes a candidate for or accepts any other place of public trust or emolument, or who during the same period knowingly consents to his nomination for any office elective by the people, or fails to publicly decline the same within twenty days succeeding such nomination, shall be deemed to have thereby vacated his office, and a successor shall be appointed as provided in this act. The majority of said board shall constitute a quorum for the transaction of business. Any of said commissioners may be removed for misconduct or malfeasance in office, by the mayor of said city, with the consent and approval of a majority of the city council."

It will be observed that the law applies only to cities having a population of more than twenty thousand; that the mayor shall appoint the board thereby created, which shall consist of three members, who shall be citizens of the state and residents of the city for more than five years next preceding their appointment; and that they shall be selected from the two leading political parties, so that so far as practicable two members shall be of the dominant political party and one of the next in numerical strength, as shown by the votes cast at the last state or national election. It is conceded in argument that the city of Council Bluffs had a population exceeding twenty thousand when the appointments were made, that the two dominant political ³⁰² parties were the Republican and Democratic, and that the Republican party was the dominant one in the city as shown by the last preceding election. It also appears that, while the two Democrats were named instead of two Republicans, the place was offered by the mayor to four Republicans before he named the second Democrat, and that these four men declined the appointment and refused to serve as members of the commission. We quote this admission from the

record: "It is admitted of record that, at the time the fire and police commission were appointed by Donald Macrae, there were more than a thousand persons who were members of the Republican party in the city of Council Bluffs, Iowa, and all of them voters, and that prior to making said appointments that the mayor of the city of Council Bluffs requested four members of the Republican party to act as members of the fire and police commission, and that they declined the appointment and requested not to name them members of said commission. It is admitted of record that there are numerous voters in the city of Council Bluffs, Iowa, who had been residents of said city less than five years at the time the police and fire commission was appointed."

The exact points relied upon for a reversal are so succinctly stated in the brief of appellant's counsel that we here quote therefrom as follows: "(1) Defendants were appointed in violation of law; two of them being members of the Democratic party, whereas the Republican party was, at the time of their appointment, the dominant political party. (2) Chapter 2A, title 5 of the Supplement, is void because it requires a political test as a qualification for the right to be appointed to the office of member of the board of police and fire commissioners. (3) Section 2A, title 5 of the Supplement is void because it controverts section 1, article 2, of the constitution of Iowa, by placing a burden and penalty upon electors otherwise qualified by hindering and hampering them in their freedom of choice as such electors."

303 These we shall take up in order.

The general qualifications for appointment are stated in section 679b as follows: They shall be citizens of the state and residents of the city for more than five years next preceding their appointment. That defendants possessed these qualifications is admitted. But it is further provided in section 679b that "they shall be selected from the two leading political parties, so that, as far as practicable, two members of the board shall be members of the dominant political party and one member of the board shall be a member of the political party next in numerical strength as shown by the votes cast at the last state or national election." It will be observed that this last provision does not go to the qualifications for the office. It says they shall be selected by the mayor in the manner directed, and contains a qualification to the effect that so far as practicable they shall be made up as directed. Manifestly some discretion is left in the appointing power, and primarily he is to determine whether it is practicable to have the board selected as indicated. In the absence, then, of proof, either

direct or circumstantial, that the mayor was guilty of some fraud or collusion or was acting perversely and in open disregard of the law, his discretion cannot be interfered with by the courts. It seems that he offered the position to four Republicans before selecting the second Democrat, and evidently was endeavoring to find a proper appointee of the Republican faith. The proffer of the place was not accepted, and the mayor then turned to a second Democrat, who, we must assume, in the absence of a showing to the contrary was deemed better fitted than some Republicans who might be induced to accept. As the members appointed were each and all qualified, and as there is no showing of any fraud or favoritism on the part of the mayor or any intentional disregard of the law or abuse of discretion, we are not ³⁰⁴ justified in sustaining the first point made by appellant's counsel. *Sanborn v. Mason City*, 114 Iowa, 189, 86 N. W. 286, is not in point. If there were no qualifications upon the duty to select two from the majority and one from the minority party, we might have a different situation. But here there are certain qualifications, and a discretion is vested in the mayor with regard to this very matter.

2. Claim is made that, as the statute limits the appointees to membership of the two leading political parties, it is unconstitutional and void, because it grants special privileges and immunities, because it is not uniform in its operation, and because it interferes with and lessens the right or franchise conferred upon electors. The law is certainly uniform in its operation, and, if there be anything in the argument against the validity of the law, it is to be found in that part of it which limits the mayor's choice to the members of the two leading political parties. The electors are not hampered in their choice, for they have no right to vote for members of the board. They do have free and equal opportunity to vote for the appointing power, the mayor, and there is no claim that the members of such a board cannot be created by appointment at the hands of some other official. The only point, if there be any, to the last proposition, is that it forces an elector, if he would stand any show of appointment to the board, to ally himself with one or the other of the two dominant parties, thus destroying his free agency in matters political. There is no merit, as we think, in this argument. In order to secure nonpartisan action, it is very common for legislatures in creating boards and commissions to provide that the members thereof shall not all be of the same political faith and to direct that they shall be selected from the dominant political parties. We have never heard it claimed before that this in any manner interfered with the privileges of electors or imposed any

unconstitutional restraints ³⁰⁵ upon them. It certainly does not add any new qualifications, nor to our minds does it interpose any restraint. In no election may a voter cast his ballot for whom he will. He is of necessity limited in his choice to those who have the necessary qualifications to hold office, and these are of necessity arbitrary and sometimes perhaps unreasonable. True, an elector who did not ally himself with one or the other of the dominant parties could not be appointed to membership upon the board; but there is no such thing as a right to hold office. This is a mere privilege at all times within the control of the legislature, save where limited by some constitutional provision. We shall presently see that there is no such limitation in our fundamental law.

We shall and must assume that an elector, in exercising his privileges at the polls, does so from some higher motive than to place himself in line for a future appointment to some office. If the desire to hold office predominates, then he may easily qualify himself by voting a party ticket, and, if that be the dominant idea with him, he is not deprived of much when compelled, in order to place himself in line, to vote a party ticket. No case has been called to our attention which holds that such a law as is now under consideration is invalid because it interferes with the freedom or rights of an elector. Appellant relies upon the expression found in *Edmonds v. Banbury*, 28 Iowa, 267, 4 Am. Rep. 177, reading as follows: "Those whom the constitution declares to be electors cannot be disfranchised; and not one jot or tittle can lawfully be added to or taken away from the qualifications which the constitution prescribes." Granted that this expresses a correct rule of law, which it undoubtedly does, still there is nothing in the statute under consideration which in any manner attempts to fix the qualifications of electors. *Attorney General v. Detroit Common Council*, 58 Mich. 213, 55 Am. Rep. 675, 24 N. W. 887, also relied upon by appellant, is not in point for the reason that the constitutional provision is quite different ³⁰⁶ in Michigan from our fundamental law, in that it provides, in substance, that no other oath than the one prescribed, declaration, or test shall be required as a qualification for any office or public trust.

3. The point most relied upon by appellant is that the law in question sanctions or requires a political test as a qualification for office, creates special privileges, and is in contravention of section 6 of article 1 of the constitution, which provides, in substance, that the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens. That the act in question does not

violate this constitutional provision is held in *Shaw v. City of Marshalltown*, 131 Iowa, 128, 104 N. W. 1121, 10 L. R. A., N. S., 825, 9 Ann. Cas. 1039, to which is appended a valuable note containing reference to the more recent cases upon the propositions involved: See, also, *Goodrich v. Mitchell*, 68 Kan, 765, 104 Am. St. Rep. 429, 75 Pac. 1034, 64 L. R. A. 945, 1 Ann. Cas. 288. The *Shaw* case is also reported with annotations in 10 L. R. A., N. S., 825, and it appears from these various annotations that the rules therein announced are in accord with the great weight of authority upon the question. That is to say, it is there held that the constitutional provision relied upon does not apply to legislative enactments fixing the qualifications for municipal office.

Recognizing the force of this decision, appellant's counsel say: "In view of the decision of this court in the *Soldiers' Preference* case, we shall consider only one question in reference to this branch of the argument, and that is our claim that the classification made is arbitrary and unreasonable; that it is not only violative of the expressed constitution, but is utterly repugnant to the spirit of our institutions, and, if carried to its logical and legitimate ³⁰⁷ conclusions, utterly subversive and destructive of free government." The right to hold an act of the legislature invalid because repugnant to the spirit of our institutions and destructive of free government is a very delicate and perhaps doubtful one. Of course, the constitution guarantees a republican form of government, but there is nothing in the constitution or in a republican form of government which prevents the legislature from fixing qualifications for office. This matter of declaring a statute invalid because of some implied limitations upon the power of the legislature was fully considered in *Eckerson v. City of Des Moines*, 137 Iowa, 452, 115 N. W. 177, and what is there held need not be repeated here. It cannot be said as a matter of law that any qualification for office fixed by the legislature is arbitrary or oppressive, or so much so as to be set aside by the courts. Wherever qualifications are fixed there is a division into classes; that is to say, there is a class which may serve, and another which may not. Whenever qualifications are fixed, there is a discrimination, a granting of special privileges, and a denial of the right of some to hold office, and it is not for the courts to say that such provisions are arbitrary or unreasonable. The fixing of qualifications for office is a legislative and not a judicial function.

Appellants rely, in this connection, upon *Evansville v. State*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; *Attorney General v. Detroit*, 58 Mich. 213, 55 Am. Rep. 675, 24 N. W. 887; *Bowden v. Bedell*, 68 N. J. L. 451, 53 Atl. 198; *Rath-*

bone v. Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408; and Mayor v. State, 15 Md. 376, 74 Am. Dec. 572. In the Evansville case (118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93) it is held the legislature cannot make a requirement of five years' residence as a qualification for office, and that a provision to the effect that officers and patrolmen of a fire and police department should be selected equally from the two leading political parties is void. In the Shaw case (131 Iowa, 128, 104 N. W. 1121, 10 L. R. A., N. S., 825, 9 Ann. Cas. 1039) we disregarded that decision, and the ³⁰⁸ court which pronounced it in a subsequent opinion in Hovey v. State, 119 Ind. 386, 21 N. E. 890, held that "it is within the authority of the legislature, by virtue of its general power, to require that the officers of this class shall be selected from the different political parties, or that they shall be persons of peculiar skill and experience." Bowden v. Bedell, 68 N. J. L. 451, 53 Atl. 198, does not decide the point, although the question is mooted and some expressions used which indicate that the New Jersey court regarded such qualifications for office as are provided in the act before us inimical to our form of government. Mayor v. State, 15 Md. 376, 74 Am. Dec. 572, really does not decide the question. The judges in that case were of the opinion that the qualifications fixed by the act could not be understood, so they expressed no opinion regarding the matter, and upon the validity of another qualification the judges were equally divided in opinion. Attorney General v. Detroit Common Council, 58 Mich. 213, 55 Am. Rep. 675, 24 N. W. 887, involved the appointment of election inspectors by a board to be appointed, consisting of two persons from each of the two leading political parties. The act providing therefor, was held unconstitutional because of its interference with the rights of electors, in that it imposed new conditions on the right of suffrage. The constitutional limitation involved there provided that "no other oath, declaration or test should be required as a qualification for any office or public trust." Membership of a political party was not one of the permissible tests under the constitution. We have no such constitutional provision. Rathbone v. Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408, gives support to appellant's contention, but the case was decided by a bare majority of the court. On the other hand, it is very clear that a residential test is not obnoxious to any clause of our constitution: Edmonds v. Banbury, 28 Iowa, 267, 4 Am. Rep. 177. Moreover, in the absence of constitutional limitation imposing restraints upon the legislature with reference to qualifications ³⁰⁹ for office, it is held in many cases that political tests or other qualifications may be

used: *State v. Bemis*, 45 Neb. 724, 64 N. W. 348; *State v. Smith*, 35 Neb. 13, 52 N. W. 700, 16 L. R. A. 791; *Rogers v. Common Council*, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579; *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788; *Patterson v. Barlow*, 60 Pa. 54; *Commonwealth v. Plaisted*, 148 Mass. 375, 12 Am. St. Rep. 566, 19 N. E. 224, 2 L. R. A. 142.

It must be remembered, in this connection, that we have no constitutional provision fixing the qualifications for municipal office. The constitution does provide, however, that no religious test shall be required as a qualification for any office of public trust: See Bill of Rights, sec. 4, art. 1. In this respect it differs from the fundamental law of many of the other states, which provide that no religious or political test shall be required. There is no absolute right to hold office or to be a candidate therefor; and the legislature, in the absence of constitutional prohibition, has plenary power in fixing the qualifications therefor. The act in question is largely advisory in character, and the requirement that the commissioners shall be selected from the two dominant political parties was intended to make the board when appointed nonpartisan in character and to give the minority representation. The office is not one created by the constitution, but is municipal in character, and the legislature in creating such an office, and in delegating its power to these public corporations, has the right to say who shall exercise the functions so delegated. The office is not elective, but appointive, and exists only by reason of legislative enactment, and there is, as was said by Justice Peckham in the *Rogers* case (123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579), no analogy between the cases of elective officers and those where the office is to be filled by appointment, and no argument which rests for its foundation ³¹⁰ upon the constitutional provision for voting for elective officers gives any light upon the question under discussion.

We need not pursue the argument further. The case is governed in principle by *Shaw v. Marshalltown*, 131 Iowa, 128, 104 N. W. 1121, 10 L. R. A., N. S., 825, 9 Ann. Cas. 1039, and other like cases. No constitutional provision is violated by the act in question, and we are constrained to hold that, as applied to municipal appointive boards, there is nothing contrary to the spirit of our institutions or inimical to our free government in such an enactment.

The judgment of the trial court is correct, and it is affirmed.

Judges Weaver and Evans dissented, the former writing an extended opinion.

The Power of Appointment to Office may be regulated by statute, except where the constitution provides for the mode of appointment, and prescribes the duties of the office: *Warner v. People*, 2 Denio, 272, 43 Am. Dec. 740; *People v. Freeman*, 80 Cal. 233, 13 Am. St. Rep. 122; *State v. George*, 22 Or. 142, 29 Am. St. Rep. 586; *Fox v. McDonald*, 101 Ala. 51, 46 Am. St. Rep. 98. A statute conferring on the central committee of one political party only the power to name certain persons from whom the governor must appoint an election commissioner violates a constitutional prohibition against the passing of any local or special law granting to any "corporation, association or individual any special or exclusive right, privilege or immunity." Such a statute confers a special privilege on the committee of one political party, and withholds it from the committee of all other political parties: *State v. Washburn*, 167 Mo. 680, 90 Am. St. Rep. 430.

A Statute Providing for the Appointment of election inspectors in Detroit by a board which was to be appointed by the mayor and council, and to consist of two persons from each of the two leading political parties was pronounced unconstitutional in *Attorney-General v. Board of Councilmen*, 58 Mich. 213, 55 Am. Rep. 675; but a statute creating a board of police for the city of Boston, whose members were to be appointed by the governor, with the advice and consent of the council, from the two principal political parties, was declared not unconstitutional because it took from the city the power of self-government in matters of internal police, or because it fixed the qualifications of members of the board: *Commonwealth v. Plaisted*, 148 Mass. 375, 12 Am. St. Rep. 566. A statute which provides that a certain municipal board shall be composed of four members, "not more than two of whom shall be members of the same political party," is not unconstitutional: *McCarter v. McKelvey*, 78 N. J. L. 3, 138 Am. St. Rep. 583.

WALLACE v. TINNEY.

[145 Iowa, 478, 122 N. W. 936.]

GUARDIANSHIP—Nonresident Incompetent—Determination of Incompetency.—The fact of the incompetency of a nonresident, for the protection of whose property the appointment of a guardian is sought, must be judicially determined, but this may be done on the hearing of the application for the appointment of the guardian. It need not be determined in an independent proceeding. (p. 450.)

GUARDIANSHIP—Nonresident Incompetent.—Notice of an application for the appointment of a guardian of the estate of a nonresident incompetent is not required, either by statute or general principles of law, to be given to the incompetent. (pp. 450, 451.)

GUARDIANSHIP—Nonresident Incompetent—Collateral Attack.—Proceedings for the appointment of a guardian for a nonresident incompetent, in a court having jurisdiction thereof, are not subject to collateral attack. (p. 452.)

GUARDIANSHIP—Nonresident Incompetent—Collateral Attack.—The finding of incompetency in a proceeding for the appointment of a guardian of a nonresident incompetent is not subject to collateral attack. (p. 452.)

Action to quiet title. A demurrer to the answer was sustained, and on election of the defendant to stand on

his pleading, a decree was entered for the plaintiff. The defendant appealed.

Shull, Farnsworth & Sammis and O. D. Nickle, for the appellant.

E. P. Farr, for the appellee Margaret Tinney.

F. B. Robinson and Jepson & Jepson, for the appellees Margaret Wallace and Letitia Wallace.

⁴⁸⁰ DEEMER, J. One branch of this case has already been before this court: See *Wallace v. Wallace*, 141 Iowa, 306. After the bringing of that action Margaret Wallace, plaintiff herein, commenced this suit against defendant Margaret Tinney, her sister in law, being the sister of her husband, James Wallace, to quiet her title to the same property which was involved in the case which reached this court on the former appeal. Margaret Wallace, who was defendant in that action and the mother of plaintiff's husband and of John Wallace, deceased, intervened, claiming title to the property. Letitia Wallace was upon her own application appointed by the district court of Woodbury county, sitting as a court of probate, guardian of the property of Margaret Wallace, who, it is claimed, was insane, and a resident of County Antrim, Ireland. It was also alleged that Margaret Wallace was a spendthrift, and incapable of attending to her property in Woodbury county. Thereafter the guardian filed a report in which she set forth that her ward was interested in this suit, that she had employed F. B. Robinson, Esq., to look after her interests, and asked for the approval of her acts. This approval was granted, and thereupon the order of substitution was asked and obtained. The appeal is from the order of substitution, and also from the ruling on pleas in abatement filed to the petition of intervention.

The principal contention made for plaintiff and appellant is that the order for the appointment is void, for the reason that the said ward, Margaret, was not given ⁴⁸¹ notice of the application; that she was a resident of a foreign country over whom the court had no jurisdiction; that the hearing was *ex parte*; and that there was no finding of facts sufficient to justify the appointment. Our statute (Code, sec. 3202) provides: "A guardian may be appointed for a nonresident minor, idiot, lunatic, or person of unsound mind, who has property in this state, on application to the district court or judge of the county in which such property, or any part thereof, may be, who shall qualify in the same manner, have the same powers, and be subject to the same rules as guardians of resident

minors." It is argued that no appointment can be made for a nonresident lunatic or person of unsound mind unless the fact of incompetency is first found by a court of competent jurisdiction. In other words, it is insisted that the status of the party must first be fixed by judicial decree. This is a strained construction of the statute. Of course, the fact of incompetency must be established; but, in our opinion, this may be done under the application for appointment, and need not precede the application. This view is confirmed by reference to section 225 of the Code, which reads as follows: "The district court of each county has original and exclusive jurisdiction . . . to appoint guardians of the property of all such persons, nonresidents, of or who have property within the county, subject to guardianship, or whose property is afterward brought into the county." A court would have no jurisdiction of a purely personal action against a nonresident of the state, and could not appoint a guardian of the person of a nonresident. If appellant's contention were correct—that no appointment may be made of a guardian of the property of a nonresident, and that there should first be a judicial determination of the fact of insanity in an independent suit—this would, in effect, deprive a probate court of its power to protect the property of a nonresident laboring ⁴⁹² under a disability. It will be observed that the appointment here was of the property, and not of the person, and it follows that the trial court must have held that Mrs. Wallace was a person of unsound mind, or a lunatic: *Harkins v. Edwards*, 1 Iowa, 426; *Hartford Bank v. Green*, 11 Iowa, 476; *Cook v. Tallman*, 40 Iowa, 133; *Scotfield v. McDowell*, 47 Iowa, 129; *Ockendon v. Barnes*, 43 Iowa, 615; *Seerley v. Sater*, 68 Iowa, 375, 27 N. W. 262; *Guthrie v. Guthrie*, 84 Iowa, 372, 51 N. W. 13.

Again, it is argued that, as no notice was ever served upon Margaret Wallace of the application for the appointment of a guardian, the proceedings were void for want of notice. The allegations in the plea of abatement with reference to this matter are as follows: "Par. 6. Plaintiff further alleges that the proceedings had in the matter of appointment of said Letitia Wallace as guardian of Margaret Wallace, aforesaid, are shown by the said exhibits A, B, C, and D to be absolutely void, and that no notice was ever given to the said Margaret Wallace of said appointment, either actual or constructive." The exhibits referred to are the application for appointment, the report of the guardian, and the order of court thereon, and the order appointing the guardian. These do not show that no notice was given. But we do not think that either the statute or any rule of constitutional law requires the giving of notice

of an application for the appointment of a guardian of the property of a nonresident. Surely our statute does not require any notice, and, if it be required, it must be in virtue of some general rule of law or constitutional requirement. Doubtless no guardian may be appointed for the person of another without notice, and this is what the cases for appellant seem to hold. Some of them perhaps go so far as to hold that notice must be given if the appointment is to be of a guardian for the property. But we are constrained to take a different view. Our view is ⁴⁸³ well explained in two cases, one from Minnesota and the other from Maryland. In *Kurtz v. St. Paul & D. R. Co.*, 48 Minn. 339, 31 Am. St. Rep. 657, 51 N. W. 221, the supreme court of Minnesota said: "The power to appoint a guardian of the estate of a nonresident minor situated in this state is unquestioned, and the purpose of so doing is the same as in appointing a guardian of the person and estate of a resident minor. Notice of the hearing of such appointment is not a constitutional prerequisite to the jurisdiction to name a guardian. Appointing a guardian deprives no one of his property, and does not change or affect the title to it. Letters of guardianship are merely a commission which places the property of the ward in the care of an officer of the court as custodian, and in its effect is not essentially different from the appointment of a receiver or temporary administrator, a jurisdiction which can be, and frequently is, exercised before service of any process. The matter of notice of an application for the appointment of a guardian is therefore purely a matter of statutory requirement."

The supreme court of Maryland had this question before it, and in the course of its opinion said: "It had been held that proceedings in lunacy had without notice to the party alleged to be insane are void so as to render absolutely null decrees and orders passed in the cause, or by virtue of such proceedings. But the better opinion seems to be, the court having jurisdiction of the subject matter of the proceedings, that want of notice will merely have the effect to render the proceedings voidable by the party himself, but not void as to other parties. Nor can advantage of want of notice be taken in collateral proceedings. The law is so stated in *Van Fleet on Collateral Attack*. In section 413 the author says: 'An insanity inquest held without notice is not void when collaterally attacked. In all proceedings where the court has the control and possession of property, holding it in trust for the rightful owner, such as proceedings in administration, admiralty, attachment, bankruptcy, and insolvency, and seizures for breach of the criminal, penal, or revenue laws, the

⁴⁸⁴ seizure of the property gives jurisdiction, and notice is a mere matter of courtesy. So in regard to notices to infants and non compotes.' . . . In cases of adjudication of insanity and the appointment of a guardian all necessary prior steps are presumed; so, where the record in such a case was silent as to service, it was presumed. In a collateral case the record was silent as to whether the defendant had been produced in court, or his presence dispensed with, and it was held that the presumption was that he was produced, or that the court dispensed with his production, and the text is fully sustained by the case of *Ockendon v. Barnes*, 43 Iowa, 615." See *Packard v. Ulrich*, 106 Md. 246, 67 Atl. 246, 12 L. R. A., N. S., 895. Of course, if notice were essential to jurisdiction and none was given, the appointment would be void and of no effect; but it does not sufficiently appear that none was given, and, if it did so appear, we are of opinion that no notice was required. *Letitia Wallace* had letters of appointment from the probate court, and the trial court was justified in substituting her in place of her ward.

The plea in abatement of the petition of intervention was a collateral attack upon the appointment made by the probate court. It is said that the hearing in the probate court was *ex parte*, based entirely upon the averments of the application that no testimony was adduced, and that the proceedings were *coram non judice*. These claims are not sustained by the record. Moreover, the probate court clearly had jurisdiction to appoint a guardian of the property of a nonresident lunatic or insane person. Such an appointment was made, and the plea in abatement filed in this case is a collateral attack upon the probate proceedings. The sufficiency of the showing, the court having jurisdiction, cannot be raised by collateral attack. This is sustained by the unbroken voice of authority: *Guthrie v. Guthrie*, 84 Iowa, 372, 51 N. W. 13; *Ockendon v. Barnes*, 43 Iowa, 615; ⁴⁸⁵ *Minnesota Loan & Trust Co. v. Beebe*, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418; *Pick v. Strong* 26 Minn. 303, 3 N. W. 697.

The last and only other proposition made for appellant is that the probate record does not show a finding that *Margaret Wallace* was insane, but, on the contrary, simply finds that it was for the best interest of the property and the estate that a guardian be appointed of the property. This is too narrow a construction of the order, which should be considered and construed in its entirety. That shows a finding of *Mrs. Wallace's* incompetency, and it also appears that letters of guardianship were issued. That such appointment is conclusive against a collateral attack,

see *Moreland v. Lawrence*, 23 Minn. 84; *Ockendon v. Barnes*, 43 Iowa, 615.

Our conclusions in this case are bottomed upon the fact that the appointment here was of a guardian of the property of a nonresident, insane person. Had the appointment been of a guardian of the person or of a guardian of the person and property, a different rule would doubtless obtain upon the question of notice.

There was no error in the order of substitution or in the ruling sustaining the demurrer to the plea of abatement. They must therefore be affirmed.

The Propositions of Law Announced in the Principal Case are supported by *Kurtz v. St. Paul etc. R. R. Co.*, 48 Minn. 339, 31 Am. St. Rep. 657, and cases cited in the cross-reference note thereto.

LUERS v. LUERS.

[145 Iowa, 600, 124 N. W. 603.]

WILLS—After-acquired Property—Code Provision.—The purpose of section 3271 of the Code is to make the rule that a will speaks from the time of the death and not from the date of its execution applicable to real as well as personal property, and to allow a devise of after-acquired real property. (p. 454.)

WILLS—Presumption Against Intestacy.—There is a presumption against one's intending a partial intestacy which may aid in construing a will. (p. 455.)

WILLS—The Word "Now" as Used in wills has been construed in different ways, the construction depending always upon the intent of the testator as gathered from the whole will. (p. 455.)

WILLS—Devise Carrying After-acquired Property.—A devise of "all my real estate which is," followed by a description of specific lands, and then, "also including all other real estate now owned by me," passes real property acquired after the execution of the will. (pp. 454, 456.)

C. M. Brown, for the appellant.

Stockman & Baker, for the appellees.

601 SHERWIN, J. This is an action for the partition of real estate which involves the construction of a will made by Margaret Steigleder in July, 1882. Only a part of the third clause of the will is material, and it is as follows: "I hereby give and bequeath unto the heirs of my brother Herman Luers children of his body now born or to be born to him all my real estate which is the south half of the northeast quarter of section No. fourteen (14), township No. seventy-five (75) north, of range eleven west

situated in Keokuk County, Iowa, also including all other real estate now owned by me, also all my personal property of every name and nature to the said heirs." After the execution of the will the testator acquired other real estate which the appellant claims was devised by the third clause of the will. On the other hand, the appellees contend that as to the after-acquired real estate Margaret Steigleder died intestate. The case was determined by the trial court in favor of the appellees on a demurrer to the appellant's cross-petition.

Section 3271 of the Code provides that "property to be subsequently acquired may be devised when the intention is clear and explicit." In *Briggs v. Briggs*, 69 Iowa, 617, 29 N. W. 632, this court considered the statute in connection with a will which devised "the whole of my real estate." In that case the contest was over after-acquired real estate, and we held that it passed under the language of the will which we have quoted above. It was held that the same rules of construction should be applied in determining whether subsequently acquired real estate passes by devise, which before the enactment of the statute were applied in determining the same question with reference to personal property, and it was said: "The meaning of the section is, we think, that subsequently acquired property shall be held to pass by the bequest, whenever the intent of the testator ⁶⁰² to have it so pass is fairly to be inferred from the provision of the will, when construed according to the established rules for the construction of such instruments; and it is not necessary that the intention be expressed in direct language." And speaking of the date from which the will speaks with reference to personal property, it was further said: "As to that class of property the rule is that the will speaks from the time of the death, and not from the date of its execution. . . . It was not the intention of the legislature in enacting the statute in question to change the rule; but it was enacted for the purpose of extending the operation of the rule, and making it applicable to real as well as personal property." The same question was again considered by us in *Re Will of Miller*, 128 Iowa, 612, 105 N. W. 105, and it was there said: "It has long been the law that a testamentary disposition of personal estate speaks from the date of the testator's death, and not from the date of the will, and the effect of the statute to which we have referred is to abolish the common-law distinction in this respect between the two classes of property, and apply to both the rule which has always obtained as to personalty." It is elementary that the language of a will must be construed as a whole, and that effect will be given to every part thereof, if possible,

for the purpose of carrying out the intent of the testator. With our previous construction of the statute, and the general rule in view, let us turn to the will in question.

The devise is, first, of "all my real estate which is"; then follows the description of specific lands, and then "also including all other real estate now owned by me." The first sentence of the clause declared what real estate the testator was then seised of and devised all of it. What, then, was the purpose of the language, "also including all other real estate now owned by me?" If we take the testator's own statement that she had no real estate other than that which she specifically described as true nothing further ⁶⁰³ was necessary to devise that, and the subsequent language was useless. On the other hand, if we assume, as we may, that she understood and had in mind that the will could not become effective until her death, it may fairly be said that she was speaking of all other real estate that she owned at the time of her death. Thus construed that part of the third clause is given effect, and the will is permitted to speak from the death of the testator instead of from its own date. The general rule is thus stated by Mr. Schouler: "The preferable rule as to after-acquired property stands thus, with the aid of the legislation; that descriptions whether of real or personal estate, or both together, the subject of gift, refer to and comprise prima facie the property answering to that description at the death of the testator." There is also a presumption against one's intending a partial intestacy which may aid in construing a will: *Shafer v. Tereso*, 133 Iowa, 342, 110 N. W. 846. The word "now" as used in wills has been construed in different ways, the construction depending always on the intent of the testator as gathered from the whole will. In the *Appeal of Allen*, 125 Pa. 544, 17 Atl. 453, the supreme court of Pennsylvania had under consideration a will which provided that the executors should carry on the testator's business as "now conducted by me." And it was held that the word "now" must refer to the time of the testator's death. And a bequest of a library of books "now in the custody of B" was held to pass books subsequently purchased and placed in the custody of B: *All Soul's College v. Coddington*, 1 P. Wms. 597. *Flynn v. Holman*, 119 Iowa, 731, 94 N. W. 447, relied upon by the appellees, is not authority for them, for the reason that there was in that case no general devise of land or real estate, and the only reference to that class of property was in specific devises of particular tracts which the testatrix owned at the date of the will.

We think the land acquired by the testatrix after the ⁶⁰⁴ date of her will passed to the devisees by the terms of

the will, and that the trial court erred in determining otherwise. Two or three other questions are argued by counsel for the appellees, but it is made to appear that the trial court was not asked to pass on them, and that the case was submitted on the single proposition which we have discussed. We cannot, therefore, now consider any other question. A motion to strike a part of the appellant's reply was submitted with the case, and it is overruled. The judgment is reversed.

The Devise of Subsequently Acquired Property is the subject of a note to *Wright v. Masters*, 135 Am. St. Rep. 794.

BAKER v. KENNEY.

[145 Iowa, 638, 124 N. W. 901.]

STANDING TIMBER—Construction of Instrument of Sale.—In the construction of an instrument for the sale of standing timber and the growth of timber on certain land, no consideration need be given the fact that its title or heading is "Bill of Sale," nor that a part of the description in the warranty clause is of "goods and chattels," nor that it is recorded in the chattel mortgage records, save as possibly throwing light on the intent of the parties. As against the plain terms of the recitals of the granting clause and covenant, such circumstances are entitled to no weight. (p. 459.)

STANDING TIMBER—Not Interest in Land.—A purchaser of standing timber to be cut and taken from land within a specified time acquires no interest in the land. (p. 459.)

STANDING TIMBER—License to Remove.—A license to cut and remove standing timber may be established by parol evidence, because it conveys no interest in land, and the right to the timber which the licensee is authorized to remove becomes vested only when the trees are severed and converted into chattel property. (p. 459.)

STANDING TIMBER—Sale—Right of Removal.—There may be an irrevocable license to cut and remove standing timber, created in writing or provable by parol evidence, on account of performance or payment of consideration, which is an interest in the land, and the right acquired under such a license is in effect an easement or right analogous thereto. (p. 459.)

EASEMENTS—"Profit à Prendre"—Appurtenant and in Gross. An easement giving the right to appropriate part of the land itself, generally described as "profit à prendre," is usually granted or reserved as appurtenant to other real property, and then passes only as an incident to the ownership of that property, but many rights of profit à prendre may be acquired and exercised in gross, and not merely as appurtenant. (pp. 459, 460.)

STANDING TIMBER—The Right to Cut and Remove standing timber may exist in gross and need not be appurtenant to any other land. (p. 460.)

STANDING TIMBER—Construction of Grant—Irrevocable License or Easement.—An instrument by which the owner of land

grants "all timber and growth of timber" thereon, with the privilege at all times to enter to cut and haul the same, etc., "to have and to hold the same unto the said party of the second part, his executors, administrators and assigns forever," may be construed to grant an interest in the land and a perpetual right to the timber and growth of timber with the right to remove the same. (p. 461.)

DEED—Use of Word "Heirs."—In Iowa the use of the term "heirs" or other technical words of inheritance is not necessary to create and convey an estate in fee simple. (p. 461.)

STANDING TIMBER—Sale.—The Terms "Timber" and "Growth of timber" in a contract for the sale of "standing timber" and "growth of timber" are not synonymous, the latter term meaning the future growth. (p. 462.)

W. W. Bulman, for the appellant.

Stuart, Stuart & Stuart, for the appellee.

⁶³⁹ **McCLAIN, J.** In 1893 William Lyons, who was then the owner of the ten-acre tract of land situated in Lucas county, to which this controversy relates, executed to defendant an instrument duly acknowledged and recorded, of which the following is the material portion:

"Know all men by these presents: That we, Wm. Lyons and Cecelia Lyons, his wife, of the township of Whitbreast, county of Lucas and state of Iowa, parties of the first part, for and in consideration of the sum of one hundred and fifty dollars, lawful money of the United States, to be paid by Michael Kenney, of the township of Whitbreast, county of Lucas and state of Iowa, party of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey unto the said party of the second part, his executors, administrators and assigns, all timber and growth of timber on the north fourth of the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 11, Twp. 72, R. 22 West, with privilege at all times to enter upon the above-described lands for the purpose of cutting, hauling timber therefrom. The said Wm. Lyons to make proper openings in his fence for the passage of teams to haul timber therefrom, and the ⁶⁴⁰ said Michael Kenney to keep such gate or other opening so constructed, closed, as to prevent stock from entering or escaping therefrom. To have and to hold the same unto the said party of the second part, his executors, administrators and assigns forever. And I do for myself, my heirs, executors and administrators, covenant and agree to and with the said party of the second part, his executors, administrators and assigns, to warrant and defend the sale of said property, goods and chattels hereby made unto the said party of the second part, his executors, administrators and assigns against all and every person or persons whomsoever."

The plaintiff, as the grantee of Lyons, asks in this action that his title be quieted as to any remaining right which defendant may claim or assert under this instrument, and that it be canceled and defendant directed to execute his quit-claim deed; or, if the court concludes that defendant has not had a reasonable time to remove the timber from said land, and that he is entitled to further time to do so, then the court fix the time within which defendant may remove said timber after which his rights under the instrument shall terminate. In his answer defendant alleges the circumstances under which the instrument was executed as tending to show a purpose on the part of defendant to acquire in perpetuity a right to take timber for fence post, firewood, and other uses from the land described, to be enjoyed by him in connection with the ownership of a farm not far distant, which right was also to be enjoyed by his executors, administrators, and assigns forever. Defendant also pleads a custom and usage of the neighborhood as to the meaning of the words "timber" and "growth of timber," by which the latter term had the meaning of the future growth of any and all timber on the land, and he alleges that there is now on the land a growth consisting of small trees, shrubs and sprouts of no value for immediate removal, but which will mature into usable timber. The answer also contains allegations ⁶⁴¹ as to the rights acquired by defendant under the instrument referred to which constitute conclusions of law and purport to raise issues which might properly have been raised and determined by demurrer to plaintiff's petition. Plaintiff demurred to the answer in substance on the ground that it stated no defense, and the court sustained the demurrer. After defendant had elected to stand upon his answer, the case was submitted to the court on evidence as to whether defendant had had a reasonable time in which to exercise the right of taking timber and growth of timber from the land under the stipulations of the instrument, and the court decreed that defendant should be given two years' further time to remove the timber and growth of timber to which he was entitled, after the expiration of which period all the right, title, and interest of defendant under the instrument should terminate, and plaintiff and his grantees should become entitled to the exclusive possession and use of the land described. The recitals of the findings of the court made in its decree show that the answer of defendant was treated as a demurrer to plaintiff's petition, and that, in sustaining plaintiff's demurrer to his answer, the court in effect overruled defendant's allegations of law which might have been made by way of demurrer, and, so far as the construction of the instrument is to be determined by rules of law, we may properly consider the case as though it had been submitted on

a demurrer by defendant to the allegations of plaintiff's petition and such demurrer had been overruled, and decree for plaintiff entered on such ruling.

In construing the instrument above set out, no consideration need be given to the fact that its title or heading, as appears from the record, was "Bill of Sale," nor that a part of the description in the warranty, was of "goods and chattels," nor that it was in fact recorded in the chattel mortgage records, although that fact does not appear ⁶⁴² from the abstract. It is wholly immaterial what the parties call the instrument or the right described or where the instrument is recorded, save as possibly these circumstances may throw light on the intent. But, as against the plain terms of the recitals of the granting clause and covenant, they are entitled to no weight.

A purchaser of standing timber to be cut and taken from land within a specified time acquires no interest in the land: *Sanders v. Clark*, 22 Iowa, 275. Such license may be established by parol evidence, because it conveys no interest in land, and the right to the timber which the licensee is authorized to remove becomes vested only when the trees are severed and converted into chattel property: *Agne v. Seitsinger*, 85 Iowa, 305, 52 N. W. 228; *Michigan Iron & Land Co. v. Nester*, 147 Mich. 599, 111 N. W. 177; *Melhop v. Meinhart*, 70 Iowa, 685, 28 N. W. 545; 1 *Tiffany on Real Property*, sec. 304. There may be, however, an irrevocable license created in writing or provable by parol evidence on account of performance or payment of consideration under our statute which is an interest in land, and the right acquired under such a license is in effect an easement or right analogous thereto: *Cook v. Chicago etc. Co.*, 40 Iowa, 451.

It is clear that whatever right the defendant acquired in this land was irrevocable, and was an interest in the land itself, and we have to determine from the language of the instrument the nature and extent of that right. It is plainly of the general nature of an easement, but differs from an easement in that it involves the right to appropriate and take away that which is a part of the land itself—the growing timber. Such a right is usually described as "profit à prendre," which term is used to include also such rights in regard to another's land as that of cutting grass or pasturing cattle, of taking coal or mineral from the soil, of taking water that has been artificially accumulated or restrained so as ⁶⁴³ to be a source of power, and of hunting or fishing: 14 *Cyc.* 1142; 23 *Am. & Eng. Ency. of Law*, 2d ed., 186. Rights both of easement and of profit à prendre are usually granted or reserved in deeds or acquired by prescription as appurtenant to other real property than that over which they are to be enjoyed; that is to say, there is usually a dom-

inant estate to the ownership of which the right attaches, and a servient estate as to which it may be exercised, and, when such right is thus created as appurtenant, it cannot be severed from the ownership of the dominant estate so as to exist as an independent right, but passes only as an incident to the ownership of that estate; *Ring v. Walker*, 87 Me. 550, 33 Atl. 174.

But some rights of easement and many rights of profit à prendre are of such character that they may be acquired and exercised in gross, and not merely as appurtenant. While language is to be found in some text-books and opinions of courts to the effect that an easement in gross is a personal privilege not assignable or transmissible by inheritance, it will be found on examination that these expressions of opinion relate to particular kinds of easements which are in the nature of personal privileges only. See, for example, *Boatman v. Lasley*, 23 Ohio St. 614, involving a private right of way which the court held to be a personal privilege, and *Cadwalader v. Bailey*, 17 R. I. 495, 23 Atl. 20, 14 L. R. A. 300, where a restriction on building to obstruct a view of the sea from certain premises was held to be extinguished if severed from the premises for the benefit of which it was made: See, also, Washburn on Easements, 3d ed., 10. In 2 Blackstone's Commentaries, 35, it is said that a right of way granted to a particular person not appurtenant dies with the person. But a right profit à prendre which involves the beneficial use by one person of the land of another to derive profit therefrom may in its very nature exist in gross, and not merely as appurtenant. One example of such a right is ⁶⁴⁴ that of common in gross, which is described by Blackstone (2 Blackstone's Commentaries, 34) as a right not appendant or appurtenant to land, but annexed to a man's person, being granted to him and his heirs by deed, or it may be claimed by a prescriptive right. "This," he says, "is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground." And see notes in Hammond's Edition, on pages 418-420 of volume 2, where it is said there is no question that the law recognizes incorporeal hereditaments in gross—that is, not appurtenant to lands, as rights in rem, quoting from Digby's History of Law of Real Property, 130. Speaking of the reservation of water-power in a deed, Mr. Justice Campbell, in *Hall v. City of Ionia*, 38 Mich. 493, says: "There is no foundation for the claim that a right to the perpetual use of water must be dependent on a particular estate with which it is connected. Some confusion has perhaps been caused by an attempt among writers to create symmetry in the law by putting all rights connected with lands or springing from them into classes, and by speaking of these particular rights

as easements, which very commonly require both a dominant and a servient estate. But every right of property must usually have some peculiar qualities of its own, which must not be destroyed by inappropriate attempts to classify it with different kinds. The old maxim, 'Omnis definitio periculosa,' is especially true when things of essentially different qualities are placed together under one head. The value of water as a distinct inheritance, either for creating power or for other purposes of use or consumption, has been recognized in all periods, and its ownership is well established as not dependent on lands to which it may be appurtenant, but as having a separate and intrinsic importance. There may be an occasional dictum, and possibly some decisions to the contrary; but most cases where any doubt seems raised on this question will be found to rest on peculiar facts which in no way involved the general doctrine. The facts are often such as to confine the use of water, not only to special places, but also to specified purposes. But this limited use is the exception, and not the rule."

⁶⁴⁵ There can be no doubt at this time of the power to create in favor of one person an assignable and inheritable right to use for profit the land of another who grants such right by apt language in a deed or consents to it in a reservation, and such right need not be created or reserved as appurtenant to other property: *Goodrich v. Burbank*, 12 Allen (94 Mass.), 459, 90 Am. Dec. 161; *Huntington v. Asher*, 96 N. Y. 604, 48 Am. Rep. 652; *Taylor v. Millard*, 118 N. Y. 244, 23 N. E. 376, 6 L. R. A. 667; *Leyman v. Abeel*, 16 Johns. (N. Y.) 30; *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597; *Columbia Water P. Co. v. Columbia Elec. etc. Co.*, 43 S. C. 154, 20 S. E. 1002, 172 U. S. 475, 19 Sup. Ct. Rep. 247, 43 L. ed. 521; *Washburn on Easements*, 3d ed., 126, 528. The language of the instrument before us indicates that the parties contemplated the right on the part of defendant and his administrator or assigns to take timber and growth of timber from the described land. There is not only a failure to fix a time limit, but the habendum clause expressly describes the right as one which is to exist forever. It is true in neither the granting clause nor the habendum are the heirs of the grantee mentioned, and at common law the grant would be construed to be for life only. But in this state "the term 'heirs' or other technical words of inheritance are not necessary to create and convey an estate in fee simple": Code, sec. 2913. And the form of warranty deed authorized by statute as conveying a fee simple title does not include such words: Code, sec. 2958. If a grantor desiring to prepare an instrument which should convey to the grantee a fee simple title to the incorporeal hereditament described in the instrument as the right to take timber and growth of timber from

designated land, should attempt to frame a deed for that purpose, he could not, having regard to the laws of this state, do so in apter words than those used in the instrument before us, and we reach ⁶⁴⁶ the conclusion that such was his purpose. The reservation to himself of the fee simple title in the land would not be by any means a barren right. He could still use the land for pasture or for any other purpose not inconsistent with the preservation of the timber and growth of timber thereon. For instance, he could exercise or dispose of the right to remove any coal there might be under the surface, and he could enjoy the benefit and exclusive control of any springs or streams of water thereon; in short, he could make any use of the land whatever, not inconsistent with the continued existence of the incorporeal right of the grantee to enjoy the timber privileges.

The contention for appellee is that the grant shall be construed as relating only to the timber growth on the land at the time of the grant, and, in support of this contention, it is argued that "timber" and "growth of timber" mean the same thing. If the term "timber" alone had been used, it might perhaps have been open to argument, in the absence of any proof of local usage, whether the term was used to designate trees that had been cut down for the purpose of being made into timbers or growing trees yielding wood suitable for constructive uses (see Century Dictionary, s. v. "Timber"; also Webster's Dictionary, where the meaning of the word is given for western United States as "wood or forest, wooded land"), but the addition of the term "growth of timber" not only makes it plain that the intent was to grant all the wooded growth on the land, but also in connection with the designation of the grant as "forever" shows the purpose to have been to transfer the right to take away future growth. The appropriate meaning of the term "growth" as given in Webster's Dictionary is "that which has grown or is growing; anything produced; product," and in the Century Dictionary, "that which is grown; anything produced; a product." "Timber" and "growth" are not synonymous even when the latter is manifestly used to relate ⁶⁴⁷ to timber growth: *Lord v. Meader*, 73 N. H. 185, 60 Atl. 434. "Where, as in this state, the grant of growing trees to remain affixed to the soil or the exception of them from the grant is an interest in land, it is logical to consider the trees and the right in the soil and the growth of them as a unit and inseparable. Their owner is entitled to their increase. The grant of trees or timber or particular kinds of timber trees should be held a grant of the growth standing at the time of the grant. If the grant limit itself by size of tree, age, or adaptability for specific use, then, of course, the particular described tree would pass and none other. But

where there is no limitation of that character, and the grant is of standing timber, to be taken off in the future, the common understanding would be that the grantee might cut timber from the lot until the present growth, suitable for the purpose, shall have been exhausted, or until the right to cut shall have expired by limitation, either express or implied": *Donworth v. Sawyer*, 94 Me. 243, 47 Atl. 521. Cases cited for appellee simply announce the well-recognized rule that, under a contract for the sale of growing trees to be removed within a specified time, the licensee acquires only the right to cut and remove trees during that time, and, if the time is not specified, then within a reasonable time: *Johnson v. Truitt*, 122 Ga. 327, 50 S. E. 135; *Brinson v. Kirkland*, 122 Ga. 486, 50 S. E. 369; *Allison v. Wall*, 121 Ga. 822, 49 S. E. 831; *Hawkins v. Goldsboro Lumber Co.*, 139 N. C. 160, 51 S. E. 582; *Taylor-Brown Timber Co. v. Wolf Creek Coal Co.*, 32 Ky. Law Rep. 1015, 107 S. W. 733; *Bowerman v. Taylor*, 127 Ky. 812, 32 Ky. Law Rep. 671, 106 S. W. 846; *Garden City Stave etc. Co. v. Sims*, 84 Ark. 603, 106 S. W. 959; *Liston v. Chapman etc. Land Co.*, 77 Ark. 116, 91 S. W. 27; *Kidder v. Flanders*, 73 N. H. 354, 61 Atl. 675; *Wallace v. Kelley*, 148 Mich. 336, 118 Am. St. Rep. 580, 111 N. W. 1049. But these cases are not in any way inconsistent ⁶⁴⁸ with the exercise by the owner of the land of the power to create a fee simple title in an incorporeal right in the nature of profit à prendre which thus created is inheritable and assignable. We reach the conclusion that the language of the instrument before us unequivocally establishes the grant of such a right in the defendant.

The decree of the trial court by which the right of defendant under this instrument is declared to be in effect only a personal privilege which must be exercised within a reasonable time fixed by the decree as two years from the date of its rendition is reversed, and the case is remanded to the lower court, with direction that plaintiff's petition be dismissed, or the defendant at his election may have a decree to the same effect entered in this court. Reversed.

The Sale of Standing Timber is considered in *Fairbanks v. Stowe*, 83 Vt. 155, 138 Am. St. Rep. 1074, and the cases cited in the cross-reference note thereto; note to *Wilson v. Alderman*, 128 Am. St. Rep. 868.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

LOUISVILLE RAILWAY COMPANY v. HIBBITT.

[139 Ky. 43, 129 S. W. 319.]

NEGLIGENCE.—The Plea of Contributory Negligence is an affirmative defense. It is a charge, in substance, that the cause of the injury complained of was plaintiff's own negligence, but for which negligence the injury would not have happened. (p. 465.)

NEGLIGENCE—Plea of Contributory Negligence.—Agreeably to the Kentucky code, which, for the purposes of the action, attaches truth to every material allegation in a pleading not specifically traversed, the plea of contributory negligence must, unless denied, stand as true. (p. 465.)

TRIAL—Motion for Verdict Overruled—Resumption of Trial.—A defendant who, after presentation of the plaintiff's case, without producing his evidence moves for a peremptory instruction to the jury to find for him, waives no rights by proceeding to produce his evidence after his motion is denied. (p. 466.)

NEGLIGENCE—Plea of Contributory Negligence.—Failure to Reply to the plea of contributory negligence is not cured by defendant going to trial and producing testimony in support of the plea and having the court charge the jury to find for him in case they believe such testimony, if before producing this testimony and also after all the testimony was in he asked the court to direct a verdict in his favor. (p. 466.)

FELLOW-SERVANTS—Association Theory.—In applying the fellow-servant rule the Kentucky courts adopt the "association theory," by which the master is excused in cases only where the servants were so engaged and situated at the time of the injury that each by carefulness and attention to the performance of his duties might have protected himself from the effects of other's negligence. (p. 466.)

FELLOW-SERVANTS.—A Servant Assumes the Risk of being injured by a fellow-servant only when the two labor together in a common employment, each being so situated that he can observe the acts and conduct of the other. (p. 468.)

FELLOW-SERVANTS—Unreasonableness of Doctrine.—Nearly all of the courts seem to recognize that the fellow-servant doctrine is a harsh and unreasonable rule, and yet one that is so firmly fixed

in the jurisprudence of the country that it cannot well be gotten rid of except by legislation. (p. 469.)

FELLOW-SERVANTS.—The Motormen of Two Trolley Cars, one of which collides with the other, are not fellow-servants so as to exempt from liability the master in an action by one of the motormen for injuries caused by the collision. (pp. 467, 470.)

Fairleigh, Straus & Fairleigh, for the appellant.

O'Doherty & Yonts, for the appellee.

44 CARROLL, J. Appellee Hibbitt, a motorman on a street-car running on Fifth street, was injured in a collision between the car he was operating and another of the appellant company's cars at the corner of Fifth and Market streets. The petition charged that the collision was due to the negligence of the motorman in charge of the Market street car. The answer was a traverse and plea of contributory negligence, and to this plea there was no reply. At the conclusion of the testimony offered for Hibbitt, counsel for the company moved the court to peremptorily instruct the jury to find for it; but this motion was overruled. Again, at the conclusion of all the testimony a similar motion was made, which was also overruled. Thereupon the case was submitted to a jury and a verdict returned in favor of Hibbitt. Afterward, in due time, the company by counsel moved for a judgment notwithstanding the verdict, and this motion was overruled. A reversal of the judgment in favor of appellee is asked upon two grounds: First, on account of the failure of the court to sustain the motion for a peremptory instruction; and, second, upon the ground that the motorman in charge of the Market street car was a fellow-servant of Hibbitt.

The plea of contributory negligence is an affirmative defense. It is a charge in substance that the injury of which the plaintiff complains was caused by his own negligence and except for which it would not have happened. The code provides, in section 126, that "every material allegation of a pleading must, for the purposes of the action, be taken as true unless specifically traversed." And so we have held in a ⁴⁵ number of cases that unless the plea of contributory negligence is denied, it must be taken as true. And taking it as true, there cannot, of course, be a recovery, as it stands admitted that the injuries complained of were caused by the negligence of the complaining party: Louisville & N. R. Co. v. Paynter's Admr., 26 Ky. Law Rep. 761, 82 S. W. 412; Brooks v. Louisville & N. R. Co., 24 Ky. Law Rep. 1318, 71 S. W. 507; Louisville & N. R. Co. v. Mayfield, 18 Ky. Law Rep. 224, 35 S. W. 924; Mast v. Lehman, 100 Ky. 464, 18 Ky. Law Rep. 949, 38 S. W. 1056.

It is insisted, however, that as the company introduced evidence conducing to show that Hibbitt was guilty of contributory negligence, and the jury was instructed that they could not find a verdict in favor of Hibbitt if they believed his injuries were caused by his contributory negligence, the omission in failing to reply to the plea was cured. And, further, that counsel for the company waived the right to complain after verdict of the failure to file a reply by introducing evidence upon the subject of Hibbitt's contributory neglect and asking an instruction based upon this evidence. But counsel for the company saved in the proper manner all its rights by requesting the court to direct a verdict for it upon the conclusion of the evidence for Hibbitt, and also at the conclusion of all the testimony. The motion for a peremptory instruction should have been sustained, and certainly the company ought not to suffer because of the error of the court committed over its objection and after it had done everything it could do to save its rights. This precise question was before us in *Mast v. Lehman*, 100 Ky. 464, 18 Ky. Law Rep. 949, 38 S. W. 1056, in which the petition was so fatally defective as not to entitle the plaintiff to a verdict. The court said: "At the conclusion of the trial the defendant ⁴⁶ moved the court to peremptorily instruct the jury to find for the defendant. This motion of defendant should have been sustained by the court, and would have been sustained if the court had been aware of the true condition of the pleadings. It is true the plaintiffs objected to the instruction; but in our opinion such objection did not relieve the court of its obligation to properly instruct the jury as to the law of the case based upon the pleadings and the proof. If the court had sustained this motion, as it was clearly his duty to do, it would necessarily have brought to the attention of the plaintiffs the defense which had been so carefully concealed from the very beginning of the case. And before the submission of the case to the jury he would have had an opportunity to have offered an amendment curing the defects in his petition, which, in furtherance of justice, it would have been the duty of the court to have allowed to be filed." For this error the judgment must be reversed; but as there may be a new trial, at which the plaintiff will be permitted to file a reply, we will consider the question raised by counsel that these motormen were fellow-servants. If they were fellow-servants, then Hibbitt cannot recover.

The fellow-servant rule is invoked in many cases but applied in few. This court is fully committed to the doctrine of what is known as the "association theory," or, in other words, that the master will not be excused for negligence resulting in injury to one servant which is inflicted by a fellow-servant unless the servants are so engaged and situated as

that each by carefulness and attention in the performance of his duties may protect himself from injury caused by the negligence of the person with whom he is working.

⁴⁷ In *Louisville & N. R. Co. v. Brown*, 127 Ky. 732, 106 S. W. 795, 13 L. R. A., N. S., 1135, the court, following a long line of cases therein cited, said that: "When the servant is injured by employees of the same master, who are not directly associated with him, and with whom he is not immediately employed, and whose qualifications for the place they occupy he has no means of knowing, and in whose selection he has no voice, and over whose conduct and actions he has no control, and against whose negligence and carelessness he cannot protect himself, he may recover damages from the master for injuries received through their negligence, whether it be ordinary or gross, and without any reference to the position or place the servant causing the injury holds." And this rule, to which we adhere, makes it plain that these motormen operating on different cars were not fellow-servants. True it is they were fellow-servants in the sense that they were employees of the street railway company; but in the performance of their duties they had no association with or control over each other. Each acting for himself had charge of the operation of the car upon which he was running. Neither could control the actions of the other, or protect himself from the negligence of the other. If the motorman on the Market street car negligently or carelessly ran his car into the car upon which Hibbitt was motorman, he should not be held responsible for his negligence or be denied a recovery against the master on account of it. A few courts hold in effect that when the master has furnished the servant a safe place in which to work and safe appliances to work with, and has exercised reasonable care in the employment of the servants, that his full duty is discharged, and that if ⁴⁸ one of the servants is injured by the negligence of another, there can be no recovery; the theory being that accidents of this kind are one of the risks assumed by the servant in accepting the employment. But this doctrine has never obtained a foothold in this state. We are unable to perceive upon what sound reason the servant should be held to assume the risk or injury from other employees not immediately associated with him. Why should this risk be put upon the servant and not the master?

When the servant accepts employment, the master should be held accountable for injuries inflicted upon him by the negligence of other employees over whose movements the injured servant has no control. The imposition of this duty upon the master will not render servants more indifferent to danger or lead them into conduct they would avoid if compelled to suffer the consequences of their own acts. On

the other hand, it will have a tendency to make the master more careful in the selection of his servants. Let us take this case as an illustration. The motorman on the Market street car was selected and employed by the street railway company. It had opportunity before engaging his service to ascertain his competency and afterward to observe his capacity to safely operate a car, and had the right to discharge him at any time he failed to perform in a satisfactory manner his duties. But it is safe to say that Hibbitt did not have the right to exercise any of these privileges and was not consulted as to the fitness of the other motorman to perform the service he was engaged in. And yet we are told that as between the street-car company and Hibbitt, Hibbitt must bear the burden of the other man's incompetency or negligence. There does not seem to be good reason for thus shifting responsibility ⁴⁹ to a dependent employee or for relieving the master from an obligation that as between the two should be borne by the one clothed with power and authority. If, however, the master employs servants to labor together in a common employment, and each is so situated that he may observe the acts and conduct of the other, there is more reason why the master should be exonerated, and the injured servant has little right to complain when by attention to his associates and the manner in which they conduct themselves he can save himself from their inadvertent or negligent acts. It may well be said that the servant assumes the risk of being injured by a fellow-servant when he is so situated that he may by exercising care for himself and at the same time by keeping an eye on his colaborer avoid the injury. But if the fellow-servant doctrine is extended beyond this, there is no reasonable place at which it can stop short of the complete exoneration of the master for the negligent acts of all servants who are not superior one to the other. If the servant whose employment gives him no direct association with or opportunity to protect himself from the negligence of another servant is made to suffer for the acts of that servant merely because they happen to be working in the same building or room or place or on the same train, why should not the rule be extended to embrace all other servants of the same master without reference to where they work, or whether they are engaged in the same character of work or not? The injured servant has no more opportunity to protect himself from one class than he has from the other. It is therefore illogical to say that persons who are doing identically the same kind of work for the same master, although neither has any direct association with the other, and ⁵⁰ is not so employed as that he can protect himself from the negligence of the other fellow-servants, but that the servants who do not happen to be engaged in precisely the same field of labor

are not fellow-servants. The reasons that would bring them within the fellow-servant rule are as cogent in the one case as in the other, and if the doctrine is to be extended beyond the limits we have fixed, it should take in the whole field of fellow-servants and be applied to all employees of a common master wherever or in whatever engaged, except as to those who occupy some place or position that give them the right to superintend or control others.

In *Shearman & Redfield on Negligence*, section 180 et seq., *Thompson on Negligence*, section 4846 et seq., *Bailey on Master and Servant*, volume 2, section 1795 et seq., *McKinney on Fellow-servants*, *Labatt on Master and Servant*, volume 2, section 471 et seq., and in the notes to *Murray v. South Carolina R. R. Co.*, 36 Am. Dec. 268, and *Fox v. Sanford*, 67 Am. Dec. 587, numerous cases will be found illustrating the decisions of the various courts upon this subject. But there is so much confusion and conflict in the cases that it would be a difficult as well as unprofitable task to undertake to state the positions of the different courts. It would not however, be far out of the way to say that in the various phases of the fellow-servant doctrine each court of last resort has adopted a measure or standard of liability for itself. Nearly all of them seem to recognize that it is a harsh and unreasonable rule, and yet one that is so firmly fixed in the jurisprudence of the country that it cannot well be gotten rid of except by legislation. In one case the doctrine will be applied if the servants are engaged in the same field of employment of the same department of service,⁵¹ as, for instance, persons connected with the operation of trains on a railroad. In another, this group of employees will be again divided, and engineers and firemen placed in one class, and conductors and brakemen in another. And so it is that these attempts to apply the doctrine often result in drawing the line of nonliability at absurd places. Thus, how can it be said with propriety that a brakeman should be made to suffer for the negligence of an engineer under the fellow-servant doctrine when the brakeman has no more to do with the movements and conduct of the engineer than he has with the movements and conduct of the general freight agent? Upon what reasonable ground can it be said that a conductor of a freight train is a fellow-servant of the track repairer, and so cannot recover if the latter is faithless in the performance of his duties and in consequence the train is wrecked? These and many other like instances that can be found in the cases, as well as text-books cited, illustrate that the courts have tried to make arbitrary distinctions that, when applied to actual conditions, are entirely unreasonable as well as illogical. And it would seem that the courts holding to what is known as the "department theory" are endeavoring to break

away from the principle first declared in *Farwell v. Boston & W. R. Corp.*, 4 Met. (Mass.) 49, 38 Am. Dec. 339, which is the leading American case on the subject, that all employees of the same master, when neither occupied the position of vice-principal or representative of the master, were fellow-servants in the sense we are considering, but are not prepared to abandon it altogether. We appreciate the fact that in some instances it will be difficult to apply with reasonable certainty and fairness the "association theory" that we have adopted. It ⁵² may be perplexing in many cases for the trial court to draw with accuracy the line that separates servants so associated as to exempt the master from liability for any injury to one caused by the neglect of another from those servants who do not assume the risk of injury by a fellow-servant. But, at last, it is a question of fact to be settled, as are other questions of fact, by the court if the facts are admitted, and by a jury if they are in doubt. And, however troublesome its application may appear, we have no doubt that the justice and common sense of the courts will find a way to apply it to the facts of each case that will not make it less adaptable than many other rules of law that must be adjusted to conditions as they arise and be met and solved as the right and justice of the case seems to demand. We are also aware that this rule has not been approved by many courts; but we are nevertheless of the opinion that the theory upon which it rests will not suffer by comparison with the distinctions made in the "department theory" doctrine followed by many courts.

For the error indicated, the judgment is reversed.

Contributory Negligence as a Defense must be Affirmatively Proved: *Little Rock etc. Ry. Co. v. Leverett*, 48 Ark. 333, 3 Am. St. Rep. 230; *Little Rock etc. Ry. Co. v. Eubanks*, 48 Ark. 460, 3 Am. St. Rep. 245. To take advantage thereof, it must be pleaded: *Buechner v. New Orleans*, 112 La. 599, 104 Am. St. Rep. 455. The burden of proving it is upon the defendant, and the plaintiff is not required to show that he was free from negligence: *Gentzkow v. Portland Ry. Co.*, 54 Or. 114, 135 Am. St. Rep. 821.

As to Who are and Who are not Fellow-servants, see the note to *Fisk v. Central Pacific R. R. Co.*, 1 Am. St. Rep. 31, 32; *Chicago City Ry. Co. v. Leach*, 208 Ill. 198, 100 Am. St. Rep. 216; *Enright v. Oliver*, 69 N. J. L. 357, 101 Am. St. Rep. 710; *Aldrich v. Illinois Cent. R. R. Co.*, 241 Ill. 402, 132 Am. St. Rep. 220, and cases cited in the cross-reference note thereto. According to some authorities, the fact that employees are engaged in different departments of the business does not preclude their being fellow-servants: See *Aldrich v. Illinois Cent. R. R. Co.*, 132 Am. St. Rep. 225, and cases cited in the cross-reference note thereto. The department rule, however, does not obtain in the law of fellow-servants in California: *Leishman v. Union Iron Works*, 148 Cal. 274, 113 Am. St. Rep. 243.

As to Whether Employees on One Railway Train are Fellow-servants with employees on another train operated by the same company, see *Aldrich v. Illinois Cent. R. R. Co.*, 241 Ill. 402, 132 Am. St. Rep. 220,

and cases cited in the cross-reference note thereto: *Williams v. W. R. Pickering Lumber Co.*, 125 La. 1087, 136 Am. St. Rep. 365, holding that the employees on one train are not fellow-servants with a brakeman on another train operated by the same company. It has also been held that the motorman and conductor of one car of a street railway are fellow-servants of the conductor and motorman of another car, when they are engaged in the same common employment, meeting and passing each other frequently, and associating together every day, and there is such coassociation and co-operation in the same line of employment that each necessarily knows the habits and capacity of the other, and has an opportunity to exercise a mutual influence upon the other: *Berg v. Seattle etc. Ry. Co.*, 44 Wash. 14, 120 Am. St. Rep. 968. But employees of one train of a cable street railway are held to be fellow-servants with the employees on the train next preceding: *Chicago City Ry. Co. v. Leach*, 208 Ill. 198, 100 Am. St. Rep. 216. In *Meyers v. San Pedro etc. R. R. Co.*, 36 Utah, 307, 104 Pac. 736, it was decided that the members of train crews of separate railroad trains are not fellow-servants within the meaning of a statute which defines fellow-servants to be those "working together at the same time and place and to a common purpose."

The Later Current of Judicial Decision, as Well as Legislative Action, indicates a marked departure from the general rule that all servants employed by the same master, and working under the same control and in a common employment, are fellow-servants, and a disposition is manifested to so limit and restrict the rule as shall make the master answerable for his just share of responsibility to his servant for injuries sustained in his employment: *Anderson v. Bennett*, 16 Or. 515, 8 Am. St. Rep. 311. For further comments on the fellow-servant rule, see the note to *Mast v. Kern*, 75 Am. St. Rep. 584.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. STREET.

[139 Ky. 186, 129 S. W. 570.]

RAILROADS—Horses and Vehicles Near Track.—The law recognizes railroads, prudently operated, as being as necessary as horses and vehicles, but when these come into proximity one with the other, imposes upon the more dangerous agency the greater degree of care to avoid impeding the other and putting it in peril needlessly. (p. 474.)

RAILROADS.—While Operators of Trains must Recognize the rights of the public in and to the streets adjacent to the railroads and be vigilant accordingly, the public is charged with knowledge of the usual and ordinary conditions on the tracks and, moreover, of extraordinary and unexpected conditions likely to arise there. (p. 475.)

RAILROADS—Frightened Horse.—The Law Does not Require railway operatives to be on the lookout lest some horse on a neighboring highway become frightened, or to stop their train in case such an event seems imminent. (p. 475.)

RAILROADS—Frightened Horse.—The Utmost Required of a Trainman, mindful of a horse near by frightened by the train, is that he operate the latter without unusual and unnecessary noise, and, if possible, with less noise than was being made before his becoming thus mindful. (p. 475.)

Charles H. Moorman, James J. Donahue and Benjamin D. Warfield, for the appellant.

Greene, Van Winkle & Schoolfield, B. F. Proctor, G. H. Herdman and J. H. Hazelrigg, for the appellee.

¹⁸⁷ O'REAR, J. Appellee's intestate, Henry J. Street, and W. D. Wooten were driving in a buggy along a road parallel with a railroad track of appellant, in the village of Upton, on the afternoon of June 13, 1907. As they approached the point where the road forks—one road leading over the track of appellant and the other leading west away from its track—they discovered a train on the crossing. Street, who was driving, stopped his horse at the fork and at a point about forty feet distant from appellant's nearest track on the road crossing. The head of the horse was turned toward the road leading away from the crossing. As soon as the horse stopped, Wooten stepped from the buggy, and immediately thereafter the horse became frightened and ran away. Street was thrown from the buggy, or he jumped from it, and was fatally injured, dying a few hours later.

Appellee, as administratrix of the estate of Street, filed suit in the Hardin circuit court against appellant for thirty thousand dollars damages for his death. The negligence is stated in the petition, as follows: "She says that the Louisville and Nashville Railroad Company is a corporation and common carrier created by an act of the legislature of Kentucky, with power to sue and be sued under said corporate name, and that its chief lines of roads run through the said town of Upton, and that at the time and place aforesaid defendant's agents and servants did, with gross negligence, frighten a horse attached to a buggy in which said decedent was sitting, and did by such ¹⁸⁸ negligence cause said horse to run and throw said decedent from said buggy with such force as to cause his injury and death as the direct and natural result of such gross negligence, whereby his power to earn money was destroyed and lost to his estate and this plaintiff, and they were damaged thereby in the sum of thirty thousand dollars, which sum this plaintiff should recover of defendant."

During vacation and before defendant's motion to make the petition more specific was ruled on, the plaintiff filed an amended petition, by which she undertook to specify the acts of negligence complained of. This amended petition alleges: "This plaintiff, in order to make more specific the allegations of her petition, as defendant asks, says that at the time that

the horse of her husband and intestate was frightened and ran, as alleged in her original petition, her said intestate was sitting in his buggy in a public street, which was also a public road and passway in the town of Upton, and said town lies on both sides of said track, and was very near the place where said street and road crossed the track of defendant on level or grade crossing; that her said intestate was compelled to cross said track to reach his place of business, and also to reach the stable and owner of buggy and horse, and when he got to the place where his horse was frightened the said track and track crossing were blocked by several of defendant's trains which prevented his passing over the track; that said town had a population of three hundred people, all of whom were accustomed to use the track at and near the crossing, as defendant and its agents and servants well knew at the time, and that defendant and its agents did illegally permit said crossings to be obstructed as aforesaid by its trains for forty minutes, an ¹⁸⁹unreasonable and unnecessary time, and detained her said intestate and thereby kept him from crossing said track, and while her said intestate was so detained by said obstruction, defendant and its agents and servants did, with gross negligence, cause and permit a loud and unusual and unnecessary noise to be made by escaping air, gas, and steam near him, and did by such gross negligence raise a cloud of dust from the roadbed, and knew, or by ordinary care could have known, of the presence of her said intestate, and the danger to him of such negligence, and the horse was frightened, and her said intestate was killed and his power to earn money was destroyed and lost to his estate as the direct result of such gross negligence, and without fault on his part."

Appellant's motion to strike out so much of the pleading as alluded to the obstruction of the crossing for an unnecessary length of time was overruled. As the pleadings did not then disclose but that the obstruction contributed in some part to the injury to the intestate, the motion was properly overruled. However, on the trial it developed that decedent had but driven up to the point in the road whence his horse began running but a moment before the incident—in fact, just long enough for Mr. Wooten to alight from the buggy. Perhaps it was decedent's purpose to have then crossed the railroad track had it been clear, but so far as he was concerned it does not appear to be material how long the train had been standing there, as the length of time it had consumed in that position contributed nothing to his injury, did not cause his horse to become frightened, and therefore had no place in the evidence. The fact that the train at that time so obstructed the crossing as to prevent decedent's ¹⁹⁰passing over it was a relevant fact. But the evidence that it had been there longer than was necessary, or for an

unlawful length of time, if shown, could have only operated to prejudice the defendant's cause in the eyes of the jury. The evidence on that point should have been excluded. There was evidence to the effect that the horse driven by decedent was a wild, unruly animal in the presence of railroad trains. There was also evidence that he was gentle. Whether it was known to the decedent what his tendency was in this respect is not shown. But there was evidence that he gave signs of fright on coming into view of the train.

There were five trains at Upton on this occasion. The one that was charged to have occasioned the injury was No. 32, a local freight-train with twenty-five or more cars. It occupied the north end of the passing track. Immediately behind it, within fifty feet or less, was another train called No. 12. The caboose of No. 32 was then within a few yards of the engine of No. 12. The two trains completely occupied that track, and in addition some part of the switch ahead of No. 32. In order to make room for another train on the main track to pass that switch, No. 32 had to change its position. Those in charge of it claim that in attempting that movement it was endeavoring to couple up a cut of three cars at its rear belonging to it, and which had been cut off to open the crossing. In executing the order for coupling the first effort was a failure. Another moved the cars back, so it is claimed, so that the rear of No. 32 would be forced upon the locomotive of No. 12 if not immediately stopped. In order to avert that the conductor of No. 32, who was standing near and directing the coupling, applied the emergency air-brake, the effect of which was to force ¹⁹¹ out all the air in the air cylinders, causing the brakes to be set immediately. It was the expulsion of this air with suddenness that caused the noise and raised the dust as it hit the ground, which, it is said, frightened the decedent's horse and caused it to run away. Such is the defendant's theory of the facts. On the other hand, the plaintiff's evidence tended to show that the train was not attempting a coupling at all; that unnecessarily the emergency brake was applied, making an unusual and unnecessary noise. This issue of fact was for the decision of the jury under proper instructions.

Railroads and their prudent operation are as necessary as the use of horses and vehicles, and where the use of these two means of travel and carrying occur in immediate proximity, as they do in great numbers of cases, the rule of conduct imposed by law is that course dictated by such considerations as allow the business to go on, but require it to be so done by the more dangerous of the two agencies, as not to unnecessarily endanger or impede the other. And those who are using it, when the highway and railway are parallel, or cross, or are in the same immediate vicinity, each

vehicle has the legal right to use its own road—the train upon the railroad, the horse and buggy on the highway. While the operators of trains must know that people have the right to use, and may in fact at that moment be using, the adjacent highway, the latter are also charged with the knowledge of expected conditions on the railroad tracks, which is to say the usual and ordinary conditions, as well as those extraordinary conditions which may arise out of ordinary use, and which are extraordinary in the sense that they do not happen frequently—nevertheless are likely to happen. Therefore it is, where ¹⁹² travelers upon the highway approach a railroad track, and particularly when they see it in use by trains, they should govern their actions with the knowledge of such movements and noises made by the railroad trains as may be necessary in their operation. It is well known that these noises excite horses, some more than others, and some uncontrollably. The drivers alone have control of their horses, and are generally alone in position to know the temperament of the animals. Those operating trains in villages, as well as cities and towns, know, too, that horses are driven upon the public roads and streets in the vicinity of the trains, and sometimes they become frightened at them and become uncontrollable. But they also know that their drivers are better aware of their habits in this particular and presumably govern themselves accordingly. The result is in practice that train operatives go ahead handling their trains as if the horses were not present, unless the animals by their actions in sight of the trainmen give evidence of fright and danger to the driver. In that event those controlling the train's movements are under the necessity of not doing anything unnecessarily to add to the dangers of the situation of the driver. It is not customary, nor is it reasonable, to require the train operatives to keep a lookout upon the adjacent highway to see if a horse thereon is frightened, or likely to be, and thereupon to stop their train. Nor is it the law that they must do so. No case to which we have been cited so holds. The utmost requirement is the trainman must operate his own vehicle without unusual or unnecessary noise, and, perhaps, if he actually becomes aware of the fright of the horse, to be even more cautious in the making of noises in operating his train. But if he were also required to use ¹⁹³ care to discover horses and their state of trepidation out on the highway some rods away from his track, it would so distract his attention from his necessary duties as probably to imperil more lives and property, including his own life, and more than offset any advantage to the public by requiring him to keep such lookout. It is for that reason, and not from indifference toward the driver of the horse, that the law has never exacted such a degree of care from

the trainmen. This much has been said that the instructions given to the jury may be tested.

The first instruction told the jury, among other things, that if those in charge of defendant's train knew, or by the exercise of ordinary care could have known, of the presence of deceased and the danger to him of the noises they were making (if such noises were unusual and unnecessary), the verdict should be for the plaintiff. The instructions should have been confined to a knowledge by the trainmen of the presence of the deceased with his frightened horse, in such proximity to the train as that its noises, not excessive or unnecessary, may have put him in peril. But, upon the plaintiff's theory as to the facts, the first instruction was in substantially proper form.

The jury should have been instructed also that the defendant, its agents and servants had the right to make all usual and necessary noises incident to the prudent and careful operation and movement of the trains, and if they believed from the evidence that the noise made by the escaping air, and which frightened Street's horse, was a usual and necessary noise made in the prudent and careful operation of the train, or if they believed that it was necessary, or believed by the conductor or servant applying the emergency brake, in the exercise of a reasonable judgment, ¹⁹⁴ in the necessary and prudent operation of the train, that the air-brake should then be applied as it was done, for the purpose of preventing a collision, or loss of life or property, then in either of such events the verdict should be for the defendant. They should have been told that usual and necessary noises were such as were usually or necessarily made in the prudent operation of such trains in such emergencies as the one claimed by the defendant to then have existed, if the jury believed that it did then exist. For emergencies do arise even in the prudent operation of railroad trains, that require extraordinary means to be employed. That is why air-brakes and particularly emergency air-brakes are provided. If, when the occasion for their use arises, the operator must stop, and look about to see if there are any scary horses in sight, and if there are, or any that appear to be, refrain from applying the emergency air-brake because it necessarily makes a noise not usually heard, it would be almost useless to provide the emergency brakes. Besides, even if the horse was seen, it might or might not have done some danger to itself or driver; the usual experience is they do not. But if the train was not stopped, it appeared more certain that it would do much more property damage by the impending collision, and most likely imperil more lives also. The duty and natural instinct of the trainman would have been, under such circumstances, to have taken the chance of doing the

least amount of damage. The conductor's duty was to act somehow. If he failed to do anything, and damage was done as a result, he and his master would be liable. He must act on the appearances, and in the exercise of a reasonable judgment. If he does so, it cannot be negligence, although if he did not act at all it might be. ¹⁹⁵ Therefore, it is the law that he act—act as promptly as the emergency seems to require—and act in the manner which a reasonable judgment then and there suggests. When he does that he has “exercised ordinary care,” which is the care that an ordinarily prudent man would have exercised under the same or similar circumstances. This instruction gives the legal effect of the act, and appraises the jury of it in language not calculated to mislead them, or leave them in doubt. This decision is not to indicate a conviction on the part of this court that the defendant sustained its defense by its evidence, but to direct the trial court to submit the defendant's side of the case to the jury along with the plaintiff's.

The verdict and judgment in this case were for the plaintiff under instructions, and evidence, which, as discussed above, we believe were prejudicially erroneous. The judgment is therefore reversed and cause remanded, with directions to award the appellant a new trial under the proceedings not inconsistent herewith.

The Liability of a Railroad Company for Injuries Due to the Frightening of Animals by the emission of steam is the subject of a note to *Weller v. Lehigh Valley R. R. Co.*, 133 Am. St. Rep. 862. In *Kentucky etc. Bridge Co. v. Montgomery*, 139 Ky. 574, 67 S. W. 1008, 68 S. W. 1097, it is affirmed that greater care is exacted of a corporation which uses its bridge for the operation of trains as well as a toll highway for passengers, than is exacted of a corporation operating trains parallel with an ordinary public highway; and that the bridge company is required to keep a lookout to discover whether teams have become so frightened as to be unmanageable, and in such a case not to cause any more noise than is necessary under the circumstances.

RANDALL v. WESTERN UNION TELEGRAPH COMPANY.

[139 Ky. 373, 107 S. W. 235.]

TELEGRAM—Mental Anguish—Absence from Funeral.—In assessing damages, in an action against a telegraph company for failing to deliver a message, mental anguish is not to be attributed to the plaintiff, prevented by such failure from attending a funeral, unless the deceased was a near relative. (p. 479.)

TELEGRAM—Mental Anguish—Funeral of Fiancee.—A marriage engagement does not render the parties such near relatives as

that a telegraph company is answerable in damages for the mental anguish of one of them, the failure of the company to deliver a telegram having caused his absence from the funeral of the other. (p. 481.)

Morrow & Morrow, for the appellant.

Richards & Ronald and George H. Fearons, for the appellee.

374 CLAY, C. Appellant, William Randall, instituted this action against appellee, the Western Union Telegraph Company, to recover damages for a failure on the part of the latter to deliver to him a telegram announcing the death of Mrs. Terry, to whom he was engaged to be married. The petition, after setting forth the residence of appellant in Somerset, Kentucky, and the incorporation of appellee, alleged that on the twenty-eighth day of January, 1906, Arthur Terry delivered to appellee in Cincinnati, Ohio, the following message: "Dated Cincinnati, Ohio, 28th. To Mr. William Randall, Somerset, Kentucky. Come to Cincinnati as soon as you get this, as mother is dead. Arthur Terry"; that said message was prepaid, and appellee accepted it for transmission, and received and accepted pay therefor; that said message was received at Somerset, Kentucky, at 9:35 A. M., January 28, 1906; that appellant lived within the corporate limits of the city of Somerset, and within the delivery district of appellee, where he was well known and was at the time said message was received, and that thereafter during the 28th, 29th and 30th of January, 1906, he was in said city; that appellee carelessly and negligently failed to deliver said message to him on the twenty-eighth day of January, or on the twenty-ninth day of January, and that he did not receive said message until the thirtieth day of January, 1906; that if said message had been delivered to him promptly and within a reasonable time, he could and would have left Somerset at noon on the twenty-eighth day of January, and could and would have arrived in Cincinnati in time to have seen the corpse and have attended the funeral ³⁷⁵ and burial of Mrs. Terry, which service occurred on January 29, 1906; that said message was sent for the purpose of informing him of the death of Mrs. Terry, who, at the time of her death, was engaged to be married to appellant; that said marriage was to have taken place in the month of February, 1906, and that at the time said message was sent the contract and agreement of marriage was in full force and effect, and would have been consummated had it not been for the death of Mrs. Terry; that by reason of appellee's carelessness and negligence in failing to deliver said message, appellant was caused to and did suffer great physical and mental anguish by reason of having been unable to attend the funeral and

see for the last time the corpse of his affianced wife. Appellant then asked damages in the sum of eighteen hundred dollars. A demurrer was filed to the petition and sustained. Appellant having declined to plead further, judgment was entered dismissing his petition. From that order this appeal is prosecuted.

The question in this case is, whether a telegraph company is answerable in damages for mental suffering caused by its failure to deliver a social message, by reason of which the sendee is prevented from attending the funeral services of one to whom he was engaged, but who was not of the slightest degree of relationship to him.

In the case of *Western Union Tel. Co. v. Steenbergen*, 107 Ky. 469, 54 S. W. 829, this court said:

"It is insisted for the company that, even in the courts of those states where mental anguish can be made the basis of recovery, the rule has never been extended beyond nearest degrees of blood relationship.

³⁷⁶ "This contention seems to be supported by the authorities.

"Certainly no legal presumption of such affection arises as will warrant a recovery for mental anguish, except in cases of such relationship.

"Thus in *Western Union Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896, a recovery was denied to a brother in law; in *Western Union Tel. Co. v. McMillan* (Tex. Civ. App.), 30 S. W. 298, to a sister in law; in *Western Union Tel. Co. v. Garrett* (Tex. Civ. App.), 34 S. W. 649, to a stepson; and in *Western Union Tel. Co. v. Gibson* (Tex. Civ. App.), 39 S. W. 198, to a son in law."

In the case of *Robinson v. Western Union Tel. Co.*, 24 Ky. Law Rep. 452, 68 S. W. 656, 57 L. R. A. 611, this court also said: "This court is committed to the doctrine that a telegraph company is answerable in damages for mental suffering caused by its failure to deliver a social message, by reason of which the sender or person addressed is prevented from attending at the bedside, at the death or at the funeral of a near relative: *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 13 S. W. 880, and subsequent cases. We have not applied the doctrine, however, further than to the class of cases referred to, and then the liability has been restricted to those of the first degree of relationship."

In *Denham v. Western Union Tel. Co.*, 27 Ky. Law Rep. 999, 87 S. W. 788, this court again said: "Since the *Chapman* case (90 Ky. 265, 13 S. W. 880), this court has been committed to the doctrine that an action will lie against telegraph companies in damages for mental suffering, caused by its failure to deliver special messages by reason of which the sender or person addressed is prevented from attend-

ing the bedside, at the death of, or at the funeral of, a near relative. The court has only allowed recoveries to ³⁷⁷ those of the first degree of relationship: *Robinson v. Western Union Tel. Co.*, 24 Ky. Law Rep. 452, 68 S. W. 656, 57 L. R. A. 611; *Western Union Tel. Co. v. Steenberg*, 21 Ky. Law Rep. 1289, 54 S. W. 829; *Western Union Tel. Co. v. Wilson*, 97 Tex. 22, 75 S. W. 482. This is not an action to recover damages because the sender of the message was not permitted to be at the bedside of a sick relative, or to attend the funeral of a near relative, but is to recover damages because she was required to keep the body of a relative for two days and nights. Even if such an action could have been maintained for mental anguish by a near degree relative on the averments of the petition, still the appellant is not entitled to recover, because she did not sustain that relationship. There are many breaches of contracts which occasion mental suffering, but no action will lie therefor."

Counsel for appellant argue with great earnestness and much force that in this state husband and wife, father and son, brother and sister, have been permitted to recover for their mental suffering occasioned by being unable through delay in the delivery of telegrams to be present and see their loved ones before burial, or at their bedside before death; that the relationship of a plighted man and woman is, next to that of husband and wife, the dearest and most sacred relationship on earth; that the difference between betrothed lovers with their marriage day almost in sight and husband and wife consists only in the fact that the man has not proclaimed what two hearts have already before God made certain; that if the appellant had been the husband of Mrs. Terry for one month, he could have recovered for the mental anguish caused by the negligence of appellee; that there is no material difference in the two cases ³⁷⁸ so far as mental anguish is concerned; that the suffering of a man about to marry is just as great as that of a man who has married. We confess that, in many instances, the mental anguish in the one case would be as great as in the other; but if the rule should be extended to apply to cases of expected relationship, it should apply whether the wedding was to take place in one month, in six months, or in one year, or even at a date that had never been fixed. The affection of engaged couples frequently changes on one side or the other; many engagements are never consummated by marriage. If the rule, then, were extended to include cases of persons who bore no actual relationship to each other, but merely expected to become husband and wife, damages could be recovered by men or women for mental anguish occasioned by their

inability to attend the funeral of persons to whom, as a matter of fact, they would never be married, and to whom they would never bear the relationship of husband or wife. If the rule should be extended to include engaged couples, there would be no good reason why it should not include friends; for in many instances the relationship between friends is marked by a devotion and love as great, if not greater, than that of those connected by ties of blood relationship. The doctrine being thus extended, it would be easy to prove not only the fact of the engagement, but that every engagement was to be actually consummated. It would also be easy to prove not only the fact of the friendship, but the close intimacy and the genuine attachment existing between the parties. For these reasons, we think the rule heretofore announced by this court should be strictly adhered to, and that the doctrine in cases of this character should not be further extended.

Judgment affirmed.

The Right to Recover Against Telegraph Company for Mental Anguish due to negligent delay in the transmission or delivery of a message is discussed in the note to *Kagy v. Western Union Tel. Co.*, 117 Am. St. Rep. 305. Mental anguish and wounded feelings, alone and unaccompanied by personal injury, which naturally and proximately arise from the breach of a contract to deliver a telegram, furnish ground for the recovery of damages, limited, however, to certain degrees of relationship: See *Western Union Tel. Co. v. Saunders*, 164 Ala. 234, 137 Am. St. Rep. 35, and cases cited in the cross-reference note thereto; *Ogilvie v. Western Union Tel. Co.*, 83 S. C. 8, 137 Am. St. Rep. 790; *Lyles v. Western Union Tel. Co.*, 84 S. C. 1, 137 Am. St. Rep. 829. Where a child is ill and the father telegraphs to his wife's mother of the illness and for her to come, the relation between the sender, the sendee and the child is such as to entitle the sender to damages for mental anguish in case the delivery of the message is negligently delayed: *Western Union Tel. Co. v. Saunders*, 164 Ala. 234, 137 Am. St. Rep. 35. But damages for mental anguish suffered by a father by reason of his failure to reach his sick daughter in law, caused by the delay in the delivery of a telegraphic message, cannot be recovered, it has been held, unless the company had notice of the affectionate relations existing between such father and his daughter in law, and such relations must be alleged in the complaint: *Amos v. Western Union Tel. Co.*, 79 S. C. 259, 128 Am. St. Rep. 845. And there is no presumption of mental anguish arising from delay in a telegram depriving one of an opportunity to attend his cousin's funeral: *Johnson v. Western Union Tel. Co.*, 81 S. C. 235, 128 Am. St. Rep. 905.

BOARD OF EQUALIZATION OF CAMPBELL COUNTY
v. LOUISVILLE AND NASHVILLE RAILROAD
COMPANY.

[139 Ky. 386, 109 S. W. 303.]

TAXATION—Railroads.—At the Time of the Adoption of the present constitution, in 1891, it was the settled policy of the state of Kentucky that local taxation of railroads should be based entirely on the assessment made by the railroad commission. (p. 484.)

TAXATION—Railroads.—The Kentucky Constitution of 1891, now prevailing, declared expressly against any construction of its words to prevent the General Assembly providing for how railroads and railroad property should be assessed. (p. 484.)

TAXATION—Railroad Commission.—By the act of April 19, 1882, which was unrepealed in 1891, when the present constitution was adopted, the power of assessing railroads and railroad property was vested in a railroad commission; and such constitution declared that until otherwise provided the law on the subject then prevailing should remain in force. (p. 484.)

TAXATION—Railroads.—Since the Adoption, in 1891, of the present constitution of Kentucky, the legislature of that state has done nothing to change the system then prevailing as to the assessment of railroads and railroad property. (p. 484.)

TAXATION—Railroads.—A Bridge Owned by a Railway company and used by it in connection with the operation of its road is, in Kentucky, assessable by the railroad commission as railroad property, although there are street-car tracks on it, a wagonway and paths for foot-passengers. (p. 488.)

John W. Heuver and Brent Spence, for the appellant.

H. L. Stone, C. H. Moorman and Benjamin D. Warfield, for the appellee.

387 CLAY, C. The question involved on this appeal is, whether or not the bridge formerly owned by the Newport and Cincinnati Bridge Company, but now the property of appellee by virtue of a conveyance executed by the former to the latter on July 26, 1904, should be assessed for taxation by the railroad commission or by the local authorities in Campbell county.

The property in question was assessed by the board of equalization of Campbell county at one million five hundred thousand dollars. From this action of the board an appeal was taken by the Louisville and Nashville Railroad Company to the county court. There it was adjudged that the assessment was invalid, and that the same be stricken from the assessment-book. From that judgment an appeal was prosecuted to the circuit court of Campbell county. There it was adjudged that, at the time of making the assessment, there was no power in the board of equalization, or in the county assessor, to assess the property in question, and that at said time all such power was in the

railroad commission and not elsewhere. The judgment further directed that the assessment be stricken from the assessor's book, ³⁸⁸ and that the sheriff of Campbell county collect no taxes thereon. From this judgment the board of equalization of Campbell county prosecutes this appeal.

For a number of years prior to the adoption of the present constitution, it was the settled policy of this state that railroad property should be assessed as an entirety. By an act of 1864 the railroads were assessed at twenty thousand dollars per mile, and were required to pay annually the same rate of tax on that assessment as was levied by law on real estate. In the case of *Applegate v. Ernst*, 3 Bush, 648, the court held that fragmentary taxation of railroads would be unjust, injurious, and contrary to public policy, and that, under the above act, they were taxable for state revenue and were not a fit subject for local taxation. By an amended act of March 17, 1876 (1 Acts 1876, p. 78), local taxation of railroads was authorized, and the assessment thereof by local assessors was provided for. Evidently this method of assessment was soon found to be unsatisfactory, for by an act of April 3, 1878 (1 Acts 1878, p. 82), it was provided that the assessment of railroad property, whether for state, county or other purposes, should be made by a board of equalization appointed by the governor for that purpose. By an act of April 19, 1882 (1 Acts 1881-82, p. 66), the power of assessment was vested in a railroad commission.

In the case of *Cincinnati etc. Ry. Co. v. Commonwealth*, 81 Ky. 492, this court gives the reason why railroad property should not be assessed by the local officers of each county, but should be assessed by a central board, and in the opinion it is said: ³⁸⁹ "The principal object of the legislature in having this board of commissioners to assess and supervise the taxing of such corporations was, that no injustice might be done the companies by subjecting their property to fragmentary assessments, subject to the revision of the supervising board of each county through which the road might run. Fragmentary taxation of the same line of road by a dozen or more different assessors would scarcely produce that uniformity in assessment so absolutely essential to produce equality in taxation, and the legislative purpose was to obviate such an objection and have a uniform assessment of this class of property, and no wiser suggestion could have been well made than to place the valuation in the hands of intelligent freeholders, to be selected by the executive of the state, thus removing the question of value from local influences and prejudices that often result in imposing upon such corporations oppressive burdens."

Thus it will be seen that, at the time of the adoption of the present constitution in 1891, it was the settled policy of the state that local taxation of railroads should be based entirely upon the assessment made by the railroad commission.

Section 182 of the constitution adopted in 1891 is as follows: "Nothing in this constitution shall be construed to prevent the General Assembly for providing, by law, how railroads and railroad property shall be assessed and how taxes thereon shall be collected. And, until otherwise provided, the present law on said subject shall remain in force." Thus it will be seen that the framers of the constitution recognized the propriety of providing that railroad property should be assessed in a manner different from the assessment of property generally. Prior to the adoption ³⁹⁰ of the present constitution, it was differently assessed, and by the section above referred to the power was expressly given to the General Assembly to provide, by law, how railroads and railroad property should be assessed; and it was further provided that the law then in force should remain until it should be changed by the legislature. Since that time the legislature, instead of changing the system, has practically continued it in force, and such continuation has been repeatedly recognized and enforced by this court: *Louisville & N. R. Co. v. City of Louisville*, 16 Ky. Law Rep. 796, 29 S. W. 865; *Commonwealth v. Union R. T. Co.*, 26 Ky. Law Rep. 23, 80 S. W. 490.

By the act of March 16, 1906 (Acts of 1906, p. 139), it is provided that "the president or chief officer of each railroad company, or other corporation owning or operating a railroad line, in whole or in part, in this state, and all railroad bridge companies owning or operating the bridge spanning a river constituting the boundary of this state, shall, on or before the 1st of August in each year, return to the auditor of public accounts of the state, under oath, the total length of such railroad, including the length thereof beyond the limits of the state," etc. Counsel for appellant insist that this act does not place the power of the railroad commission to assess for taxation the bridge in question. It is unnecessary to determine whether or not the expression "all railroad bridge companies" includes the bridge of appellee. The record shows that the bridge in question was conveyed to appellee in the year 1904, and is now the property of appellee. By the acts in force prior to the act of 1906, all railroad property was subject to taxation by this state, and the assessment ³⁹¹ thereof was to be fixed by the railroad commission alone. It was not intended that any property belonging to a railroad company should be exempt from taxation. In our opinion,

therefore, the bridge in question, being owned by appellee, was taxable even prior to the act of 1906; and being taxable as railroad property, it was proper that the assessment thereof be made by the railroad commission.

It is contended by counsel for appellant that, under section 181 of the constitution, the legislature cannot vest in the railroad commission power to assess for taxation property not strictly "railroad property," as that section provides that "the General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes"; it being argued that it is clear by this language that the power is constitutionally vested in the local authorities, and cannot be placed elsewhere, the only question being in regard to railroads and railroad property; and it is insisted that "railroad property," within the meaning of this constitutional provision, is only such property as is necessarily incident to the operation of a railroad. In this connection, our attention is called to the fact that the bridge in question is used not only for the purpose of accommodating the trains of appellee, but that it has two tracks upon which street-cars run; also a wagonway and paths for foot-passengers. In the first place, we may say that the construction placed upon section 181 by counsel for appellant is not the one adopted by this court. In the case of *South Covington etc. Ry. Co. v. Town of Bellevue*, 105 Ky. 283, 49 S. W. 23, 57 L. R. A. 50, this court ³⁹² said: "The fallacy of this argument lies in the meaning given to the word 'assess.' In the place used, it means to levy a tax, and does not mean the valuation of property for taxation. That the constitution makers did not intend to forbid the valuation of property for local taxation by the state board is apparent from their continuing in force that method of valuation of railroads for taxation, and which is now in force." Again, the power of the legislature to vest the state board with power to assess tangible property for local taxation by counties, cities, towns, and taxing districts was upheld in *City of Louisville v. Louisville Public Warehouse Co.*, 107 Ky. 184, 53 S. W. 291. In that case, this court held that the city assessor of Louisville had no power to assess distilled spirits in bonded warehouses, but that the assessment of such property must be made by the state board of valuation and assessment, not only for state, but county, city, town and district taxation.

From these authorities it will be seen that the power of the legislature to vest in a state board the authority to assess either tangible or intangible property for local taxa-

tion is no longer an open question. Furthermore, the fact that the bridge in question is used for other than railroad purposes does not make it any the less "railroad property." So long as the railroad is permitted to, and does, own the bridge, it should be taxed as any other railroad property. It is suggested that, under section 192 of the constitution and section 567 of the Kentucky statutes, the appellee has no power to own or operate a structure of this character. It does not appear from the record, however, that by owning and operating the bridge in question the appellee has engaged in a business other than that expressly ³⁹³ authorized by its charter or the law under which it was organized, nor that it holds any real estate except such as is proper for carrying on its legitimate business; nor does it appear that the bridge has been owned by appellee for a longer period than five years; nor is there anything in the record to indicate what appellee's charter rights are with respect to owning or operating a bridge of this character. Furthermore, we could not determine in this proceeding the question whether or not appellee has the right to own and maintain a bridge of the character of the one in question.

Counsel for appellant cite several cases in support of the position that a bridge like the one under discussion is not "railroad property," and should not, therefore, be assessed by the railroad commissioner; among them, the cases of *St. Louis & S. V. Ry. Co. v. Williams*, 53 Ark. 58, 13 S. W. 796; *St. Joseph & G. I. R. Co. v. Devereux*, 41 Fed. 14; *Chicago & A. R. Co. v. People*, 153 Ill. 409, 38 N. E. 1075, 29 L. R. A. 69; *State v. Mississippi River Bridge Co.*, 109 Mo. 253, 19 S. W. 421, and *Cass County v. Chicago B. & Q. R. Co.*, 25 Neb. 348, 41 N. W. 246, 2 L. R. A. 188.

In the case of *St. Louis & S. V. Ry. Co. v. Williams*, 53 Ark. 58, 13 S. W. 796, it was contended that the bridge in question should be assessed for taxation to the appellant railway, on the theory that it was used by said railway. In the opinion the question is thus stated: "The question is, Does the railway own or operate the bridge as a part of its road, or is it owned or operated independently?" In passing upon this point, the court said: "There is nothing to show that the railway company is the substantial owner of the bridge by reason of owning the stock, and the case is therefore unlike that of *State v. St. Paul Union Depot* ³⁹⁴ Co., 42 Minn. 142, 43 N. W. 840, 6 L. R. A. 234, which the appellant relies upon."

In the case of *St. Joseph & G. I. R. Co. v. Devereux*, 41 Fed. 14, it does not appear how the bridge was acquired by the appellant, whether by purchase or by acquisition of all its stock. The court, in holding the bridge subject to

taxation, said: "It is a costly structure, used for purposes of general travel; and the fact that the railroad company has its rails upon it and runs its cars across it does not destroy its character as an independent structure."

In the case of *Chicago & A. R. Co. v. People*, 153 Ill. 409, 38 N. E. 1075, 29 L. R. A. 69, appellant claimed the right to assess as railroad property a bridge. Its claim of ownership of this property was based on a lease. The lease was forever, provided the lessee should keep and perform its terms and conditions, but if it failed, the lessor had the right to re-enter and take possession of the property. The decision turned on the ownership of the property. The court said: "Whether objector had the right to demand that the assessment should be against it as for railroad property, in our view of the case, depends upon the ownership of the property. If the railroad company was the owner, it could not be lawfully assessed under section 1, chapter 120, supra, but only by the state board of equalization as railroad track." And, again, in holding the property subject to local taxation, the court said: "Either from necessity or of its own volition, appellant has never become the absolute owner of the property, but has left the real title to the same in the Mississippi Bridge Company, and it is therefore subject to taxation against the latter by the township assessor of the town in which it is located."

³⁹⁵ In the case of *State v. Mississippi River Bridge Co.*, 109 Mo. 253, 19 S. W. 421, it was held that "a railroad bridge may lawfully be segregated, for the purposes of taxation, from a railway line in connection with which it is used, where its ownership is separate from the railway." It was held that the bridge should be taxed to the bridge company, as the legal title was in that company. In the opinion it is said: "It is clear, from this statement of the substance of the instrument, that, notwithstanding the long term of tenancy may normally endure, the paramount title remains in the bridge company. The lease is subject to a defeasance, in event of any failure on the part of the lessee to meet all its requirements, and its entire scope and effect exclude the notion of any attempt at a transfer of the title outright. This view of it results in the ruling that the property is yet 'owned' by the bridge company, within the meaning of the section for the taxation."

The cases of *Cass County v. Chicago, B. & Q. R. Co.*, 25 Neb. 348, 41 N. W. 246, 2 L. R. A. 188, and *Chicago, B. & Q. R. Co. v. School District No. 1*, 25 Neb. 359, 41 N. W. 249, held that the Nebraska statute does not require the return to the state board of a bridge constructed across the Missouri river; that said river being a navigable stream, the right to bridge

it can be obtained only by law of Congress and not by authority from the state. The opinions hold that such bridges, when constructed, are not parts of the roadbeds or superstructures. It is also held that such bridges are not assessable by the state board of equalization, for the reason that section 40 of the Nebraska statutes specifically declares that said board, in making their assessment and valuation, "shall not assess the value of any machine or repair shop, or general office buildings, ^{and} storehouses, or any real or personal property, situated outside of the right of way or depot grounds of such company." The court held that this exception to the general law excluded the bridge property from assessment by the state board of equalization and assessment.

It will be seen, therefore, that these cases are different from the case under consideration in that the language defining the character of property assessable by the state board, as well as the statutory exceptions thereto, are not similar to ours.

By the decided weight of authority, we think the whole question depends upon the ownership of the bridge in question. If it be railroad property used in connection with the operation of a railroad, it is then assessable by the railroad commission. The fact that a portion of the bridge may be used for other than railroad purposes does not, we think, give the right to the local officers of the county to assess the same.

For the foregoing reasons the judgment is affirmed.

A Bridge is not Exempt from Taxation, where it is owned by a private individual or corporation, though the state has a reversionary interest in it: Note to *Herrick & Stevens v. Sargent & Lahr*, 132 Am. St. Rep. 325.

MERRIWETHER v. BELL.

[139 Ky. 402, 58 S. W. 987.]

JUDGMENT—Enforcement—Equitable Proceedings.—The rule whereby only a liquidated claim of a debtor against a third person may be subjected to the satisfaction of that for which the creditor sues such debtor gives way when, under an appropriate statute, such third person is made codefendant with the debtor in an equitable proceeding after judgment, issue of execution and the return "no property found." (p. 490.)

JUDGMENT—Enforcement—Equitable Proceedings.—Under the Kentucky statute which authorizes a proceeding in equity, on the return "no property found," against the judgment debtor jointly with a debtor of his, a chose in action of the former as against the latter may be subjected to the payment of the debt for which the judgment was recovered. (p. 491.)

WORDS AND PHRASES—Chose in Action.—Where one has taken valuable material out of the soil of property belonging to another, mistaking such property for his own, the claim against him coming thereby to the true owner is a chose in action. (p. 491.)

TRESPASS—Entry on Land by Mistake.—Where one has entered upon and taken sand from the lot of another, mistaking the lot for his own, and the true owner as mistakenly has permitted him to do so, there has been no trespass. (p. 491.)

ASSUMPSIT.—Whenever There is a Legal Liability, the law infers a promise upon which an action of assumpsit will lie. (p. 491.)

DAMAGES—Measure of for Excavating and Taking Sand.—Where one has excavated another's lot, mistaking it for his own, and has taken sand out and sold it, the measure of damages is not the cost of filling up the lot again, but the value of the sand. (p. 492.)

JUDGMENT—Proceedings After Unsatisfied Execution.—The debtor of a judgment debtor, proceeded against jointly with him in equity, under the appropriate statute, after the issue of execution and the return "no property found" thereon, is a defendant to the action and may have the latter transferred to the ordinary docket so as to avail himself of a jury trial. (p. 492.)

Isaac T. Woodson, for the appellant.

H. M. Lane, for the appellee.

403 **HOBSON, J.** On December 19, 1894, appellant recovered judgment against David Yancy individually and as surviving partner of the firm of Stone & Yancy, for six hundred dollars and costs, on which execution was issued, and returned no property found. He then, on August 23, 1895, filed a petition in equity against the judgment defendants and the appellee Thompson Bell, on the return of no property found, in which he sought to subject to his judgment a demand in favor of Stone & Yancy against Bell, which, as he alleged, arose in this way: Stone & Yancy owned a tract of land fronting four hundred and twenty feet on Ormsby avenue, Louisville, Kentucky, and running back three hundred and eighty feet; off this tract they sold and conveyed to the appellee Bell a lot fronting one hundred and sixteen feet on Ormsby avenue and running back three hundred and eighty feet, and undertook to put him in possession of the property so conveyed; Bell entered and dug a sand-pit and hauled away a large quantity of sand. After this it was discovered that the excavation was 404 not on the property conveyed to Bell, but on another lot. The lot conveyed to Bell is described as lying at the intersection of Seventeenth street and Ormsby avenue; but when Bell entered, Seventeenth street had not been extended as far as Ormsby avenue, and the parties in locating the point at which Bell was to dig his sand-pit made a mutual mistake as to the point where Seventeenth street when extended would strike Ormsby avenue. When the mistake was discovered several years afterward, Bell insisted on holding the corner lot which had been conveyed

to him, but did not pay Stone & Yancy for the sand taken from the other lot, or the excavation made in it. Appellant alleged that the sand so taken by Bell was appropriated by him by mutual mistake of the parties; that he took it by the consent of Stone & Yancy, but that their consent was given by mistake; that by reason of the mistake Bell had received the benefit of the sand-pit and had used the sand, which was of value eight hundred dollars, and agreed to pay them therefor. A demurrer having been overruled to the petition, Bell answered, traversing its allegations, and proof having been taken which sustained substantially the allegations, except of the promise to pay for the sand, the court below dismissed the action on the ground that the demand against Bell was an unliquidated claim for damages and not subject to garnishment.

In Drake on Attachments, section 548, the rule is thus stated: "In no case where the claim of the defendant against the garnishee rests in unliquidated damages, can the garnishee be made liable. B. & P., partners, were summoned as garnishees of T., and it appeared that they had signed and delivered to T. a paper in ⁴⁰⁵ the following words: 'This may certify that if Mr. S. T. should wish to purchase of us tinware at our wholesale prices within twelve months from date, and should have O. P.'s note in his possession, we will take the same in payment.' Within twelve months from the date of this instrument, T. presented to B. & P. four notes of O. P., and demanded their amount in tinware at wholesale prices, and B. & P. refused to comply with the demand. It was contended that on this state of facts B. & P. might be held as garnishees of T.; but the court decided that as T.'s claim was not a legal debt, but rested only in unliquidated damages, the garnishment could not be sustained. So, a mere liability of the garnishee to an action on the part of the defendant for negligence, fraud, slander, or assault and battery; or for the wrongful conversion of the defendant's property; or for the recovery from a creditor of usurious interest paid him by the defendant; or for damages caused by a wrongful attachment, cannot be the foundation of a judgment against the garnishee."

The same rule is stated in Shinn on Attachments, section 850, and in Freeman on Executions, section 167, and it is supported by many adjudications. But the rule as laid down by these authors is in reference to ordinary attachments in which the person against whom the unliquidated damages are claimed is only summoned as a garnishee and not made a defendant in the action. This is not that kind of case, but is an action under section 439 of the Code of Practice, and the rights of the parties must be determined under the statute, which is as follows: "After an execution of fieri facias,

directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned ⁴⁰⁶ by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, the plaintiff in the execution may institute an equitable action for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and in such actions, persons indebted to the defendant, or holding money or property in which he has an interest, or holding evidences or securities for the same, may also be made defendants."

In *Farmers' Bank of Kentucky v. Morris*, 79 Ky. 157, it was held that, although a growing crop was exempt from execution before the first day of October under the statute as it then stood, it might be subjected in a proceeding under this section. The court said: "Section 439 of the Civil Code, which authorizes a proceeding in equity on return of no property found, was intended to enable the creditor to subject to the payment of his claim 'any money, choses in action, equitable or legal interest, and all other property to which the debtor is entitled.' It affords a remedy that did not exist at law because of the inability of the law court to reach all the interests and property of the creditor by execution, which is the only means by which that court can enforce its judgments."

The words "chose in action" and "all other property to which the defendant is entitled" seem to us broad enough to cover the demand in contest. The statute is remedial, and should be liberally construed with a view to promote its object, which evidently was to enable the creditor after a return of ⁴⁰⁷ no property found to reach by this kind of proceeding all the property of the judgment defendant. The demand against Bell for the value of the sand which he had converted was a property right of Stone & Yancy which would have passed to their assignee for the benefit of creditors if they had made a voluntary assignment for the benefit of their creditors generally. Bell was not guilty of a trespass, because he entered and took the sand by the consent of Stone & Yancy. His liability to pay for the sand is precisely the same as his liability would have been for rents collected by a similar mistake, or personal property in like manner converted. Whenever there is a legal liability, the law creates a promise upon which an action of assumpsit will lie: *Daniel v. Daniel*, 9 B. Mon. 195.

It is earnestly argued for appellee that when property is converted by mistake, the owner has the right to elect whether he will sue for the taking of the property in tort, or waive the tort and sue in assumpsit for the value, and that he only

can make this election. In support of this contention, we are referred to some decisions in other states, which appear to so hold; but they cannot apply to this case, because both the taking and conversion of the sand was consented to by Stone & Yancy, and they could not sue in tort for that which was done by their consent. The mistake being mutual and Bell having converted and enjoyed by reason of it their property, their only remedy is an action in assumpsit to require him to pay for that which he has received and for which in justice and right he ought to pay: Bishop on Noncontract Law, secs. 49-51.

What other claims for unliquidated damages may be reached and subjected under the statute above ⁴⁰⁸ quoted, we need not determine in this case; but we are satisfied it must at least include all claims on which an action of indebitatus assumpsit lay at common law, if the plain purpose of its enactment is not to be defeated. The debtor is a defendant to the action, and may by section 12 of the code have the action transferred to the ordinary docket for the trial of any issue concerning which he is entitled to a jury trial.

The proof is very conflicting as to the value of the sand taken and the amount. The measure of damages is not the damage to the lot by the excavation, or what it would cost to fill it up, but the value of the sand converted. There was some loam in the sand, and the quantity of it cannot be determined accurately from the size of the excavation. It would seem, also, that the sand varied in quality, and was not sold at a uniform price. On all the evidence we have concluded to fix the quantity of the sand at two thousand loads, and the price at twenty cents a load, making in all four hundred dollars, for which judgment will be entered, with interest from the filing of the petition, and cost.

Judgment reversed and cause remanded for a judgment and further proceedings not inconsistent with this opinion.

Proceedings Supplemental to Execution: See the note to Lathrop v. Clapp, 100 Am. Dec. 500; Flood v. Libby, 38 Wash. 366, 107 Am. St. Rep. 851. As to creditors' bills and proceedings in equity in aid of execution, see the note to Massey v. Gorton, 90 Am. Dec. 288.

The Action of Indebitatus Assumpsit has been greatly enlarged, and now embraces all cases in which the plaintiff has equity and conscience on his side, and the defendant is bound by ties of natural justice and equity to refund the money. In such cases, no express promise need be proved: Lawson's Exr. v. Lawson, 16 Gratt. 230, 80 Am. Dec. 702. Where there is a legal right to demand a sum of money, and there is no other remedy, the law will, for all the purposes of a remedy, imply a promise of payment: Poor v. Guilford, 10 N. Y. 273, 61 Am. Dec. 749.

The Measure of Damages for Property Taken by Mistake is discussed in the note to Tilden v. Johnson, 36 Am. Rep. 770. In a suit to charge the defendant with the value of coal mined by him on the

plaintiff's land, where the trespass is unintentional, the measure of damages is the value of the coal in the bed, with the incidental injury to the land: *Coal Creek Min. & Mfg. Co. v. Moses*, 15 Lea, 300, 54 Am. Rep. 415.

HAYS v. MEYERS.

[139 Ky. 440, 107 S. W. 287.]

FRAUD—Suppression of Knowledge.—Between Parties dealing with each other at arm's-length, one having valuable knowledge pertinent to the subject matter not had by the other may validly proceed with the negotiation without volunteering a disclosure. (p. 496.)

FRAUD—Suppression of Knowledge.—The Right One has to use the knowledge he has, superior to that of the party he deals with, as to the matter in negotiation between them, for his own sole advantage, does not excuse a resort by him to fraud or deceit. (pp. 496, 497.)

VENDOR AND VENDEE—Question—Equivocal Answer—Fraud.—When, after an offer made by a contracting party having sole knowledge of a fact which if known to the other might cause such offer to be rejected, such party gives an equivocal or misleading answer to a question, pertinent to the fact, put to him by the other, such answer amounts to deceit or fraud. (pp. 497, 498.)

PURCHASE OF REMAINDER—Fraud of Vendee in Suppressing Information.—One who makes an offer for a remainder, having at the time knowledge not had by the remainderman, that the life tenant is dying, and, in answer to a question put by the remainderman as to how the life tenant is, says, "I think they are getting along a little smoother than they have been," is subject to have the acceptance, following the offer so made, rescinded later on the ground of fraud. (p. 498.)

Duff & Hutcherson, for the appellant.

Porter & Sandige and Lewis McQuown, for the appellee.

441 **CARROLL, J.** The single question presented by this appeal is whether the concealment of the fatal illness and impending death of a life tenant from the owner of the remainder interest by a purchaser of the remainder is sufficient to authorize a rescission of the contract.

The appellee was the owner of an undivided interest in a tract of land in remainder, subject to the life estate of Mrs. Carnes. The remainderman had no knowledge or information that the life tenant, who lived about twenty miles from him, was dangerously ill, but the appellant W. S. Hays, who lived in the same neighborhood with the life tenant, knew of her dangerous sickness, and went to the home of appellee and purchased the remainder from him for six hundred dollars, which was the price fixed by the remainderman when he knew the life tenant was in good health. Hays spent the night preceding his purchase with appellee, but failed to in-

form him of the serious sickness of the life tenant, who died the day after the contract of sale and purchase was executed. ⁴⁴² The death of the life tenant converted the remainder into a fee worth twelve hundred dollars. No inquiry was made by appellee concerning the health or condition of Mrs. Carnes, nor did appellant Hays volunteer any information concerning it, or in any other manner mislead or deceive appellee in respect to her anticipated death, unless the following question and answer may be construed to be an inquiry and a deceptive answer. Appellant was asked by appellee "how Mr. and Mrs. Carnes were getting along," and he replied, "He thought they were getting along a little smoother than they had been." That, after obtaining knowledge of the critical illness of the life tenant, and in anticipation of her speedy demise, appellant visited the home of appellee for the purpose of purchasing their interest in remainder, is conceded.

The question presented is a very narrow one. On behalf of appellant it is said that he was under no legal obligation to impart to appellee the information in his possession concerning the condition of the life tenant, but only to refrain from saying or doing anything that would affirmatively deceive or mislead them; and that his answer to the query "how they were getting along," did not have this effect.

For appellee, it is insisted that they were ignorant of the material facts in the possession of appellant, and were induced by their ignorance to make the contract; that appellant, with knowledge of their ignorance by his failure to speak, practiced a fraud upon them, or else by the evasive and deceptive answer to the question propounded, misled and deceived them.

A person may with perfect honesty and propriety use for his own advantage the superior knowledge ⁴⁴³ of property he desires to purchase that has been acquired by skill, energy, vigilance and other legitimate means. And in the ordinary business and commercial affairs of the world he is not under any legal obligation to disclose to the person he is trading with the reasons that influenced him to desire the property, or his views as to its value, or the sources of information at his disposal. Nor need he disclose the knowledge that he has concerning the circumstances or condition that may depreciate or enhance its value. If any other rule were adopted, it would have a depressing tendency on trade and commerce by removing the incentive to speculation and profit that lies at the foundation of almost every business venture. Every purchaser of land buys it because he believes he can make a profit on the investment, or because he needs it in his business, or for some purpose of his own, and he is not required to explain the reasons that induce him to

make the purchase, or give to the seller any information concerning the purpose to which he intends to put the property.

The following authorities illustrate the prevailing opinions upon this subject entertained by text-writers and courts of last resort: In Cyc., volume 20, page 65, it is said: "Although a prospective purchaser has special knowledge of facts which enhance the value of the property, and the vendor is ignorant of these facts, the purchaser is ordinarily under no duty to disclose them to the vendor, and is not liable in an action of deceit for failure to do so. But if in such a case he volunteers to convey information which may influence the vendor's conduct in making the sale, he is bound to tell the whole truth; and a ⁴⁴⁴ fraudulent misrepresentation of a material fact will render him liable. . . . Where the parties deal on equal footing, and the facts in question are equally open to the knowledge of the vendor, the general principles requiring reasonable investigation or inquiry are inapplicable."

In 14 American and English Encyclopedia of Law, 66, the editor states the rule as follows: "It is a general rule that the mere failure of a party to a contract to disclose material facts—that is, mere silence without more—does not amount to fraud if no inquiry is made by the other party. Something must be said or done to conceal the truth, or there must be a partial or fragmentary statement, or else the relation of the parties or the nature of the subject matter of the contract must be such as to impose a legal or equitable duty to disclose all material facts."

In Taylor v. Bradshaw, 6 T. B. Mon. 145, 17 Am. Dec. 132, we find this statement: "Fraud may no doubt be, and frequently is, committed by the suppression of truth as well as by the suggestion of falsehood, and it is equally competent for the court to relieve against a fraud whether it be perpetrated in the one way or the other. By suppressing the truth, the deception may often be as base and the injury to others as great as by the suggestion of falsehood. But the failure to disclose to others whatever is known to us cannot with any propriety be at all times a suppression of the truth. From those who have reason to expect information from us, the truth should not be withheld: but such as look not to us for information, and expect no disclosure from us, have no cause to complain of our silence, and to reproach us for not speaking, with having suppressed the truth."

⁴⁴⁵ In Williams v. Beazley, 3 J. J. Marsh. 577, the court in approving the quotation from Taylor v. Bradshaw, 6 T. B. Mon. 145, 17 Am. Dec. 132, further said: "The supreme court of the United States has decided that the purchaser of property does not legally commit fraud by failing to communicate to the seller a knowledge of existing facts of which

the seller is ignorant and the purchaser informed—although such facts if known would operate directly to enhance the value or price of the property. Whatever the moralists may think of these doctrines, the jurist is bound by them."

In *Stewart v. Wyoming Cattle Range Co.*, 128 U. S. 383, 9 Sup. Ct. Rep. 101, 32 L. ed. 439, the court said: "In an action of deceit, it is true that silence as to a material fact is not necessarily, as a matter of law, equivalent to a false representation. But mere silence is quite different from concealment. A suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

In *Akers v. Martin*, 110 Ky. 335, 61 S. W. 465, the court said: "If in addition to a party's silence there is any ⁴⁴⁶ statement, word or act on his part which tends affirmatively to a suppression of the truth, or to cover up or disguising the truth, or to a withdrawal or distraction of a party's attention from the real facts, then the line is overstepped, and the concealment becomes a fraud. In other words, while a party may keep silence and violate no rule of law or equity, yet, if he volunteers to speak or convey information which may influence the conduct of the other party, he is bound to tell the whole truth; and a fraudulent or false misrepresentation of a material fact which would be important for the vendor to know affords ample ground for the interposition of a court of equity to relieve against the consequences of such a fraud."

In *Mills' Heirs v. Lee*, 6 T. B. Mon. 91, 17 Am. Dec. 118, *Bowman v. Bates*, 2 Bibb, 47, 4 Am. Dec. 677, *Smith v. Fisher*, 5 J. J. Marsh. 188, other illustrations involving questions in some respects like the one before us can be found.

From these authorities, the rule may be deduced that when the parties are dealing at arm's-length, and there is no relation of confidence or trust between them, and no representation or statement made that would have a tendency to deceive or mislead, and there are no special circumstances imposing a duty to speak, mere silence or the nondisclosure of facts in the possession of one of the parties will not amount to such fraud as would authorize a rescission of the

contract, or justify a refusal to specifically enforce it. Although in every case the purchaser will not be permitted to rely on his silence as a defense, as there are times and occasions when it is the duty of a person to speak in order that the party he is dealing with may be placed on an equal footing with him as when the knowledge he possesses is not within the ⁴⁴⁷ fair and reasonable reach of the other—or of such a character that by the exercise of diligence it could be discovered, or it is not open alike to both parties; and if any relation of trust or confidence exists between the parties, or any statement or representation is made that does or might create a wrong impression, or there is a failure to impart information that is asked for, and the knowledge of which would affect the value of the property, or the acts or conduct of one of the parties is reasonably calculated to deceive or mislead the other, or the circumstances surrounding the parties and the transaction are such as to make it the duty to disclose information not within the knowledge of the other—equity will afford relief. In some jurisdictions, the courts have gone so far as to hold that each party is bound in every case to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of them, and they be not open and naked or equally within the reach of his observation. An examination of the various decisions will show that a great many of them are on the narrow line that separates fair and legitimate contracts from those that are tainted by fraud, and hence the courts have virtually come to the point of adjudging each case by the facts disclosed by the record. It will readily be perceived that it is difficult to set down any fixed rules that may be followed, especially in cases where strangers are dealing with each other and no active fraud is practiced or affirmative misrepresentation indulged in, and where only a deceptive answer or a studied silence may be seized hold of as evidence of fraud. While the tendency of the courts is to allow the utmost freedom in business and commercial transactions, and not to impose upon traders restrictions ⁴⁴⁸ that would deny speculation, competition and profit, at the same time, where gross injustice has been perpetrated, and valuable property has been acquired at an inadequate price, the slightest evidence of fraud will be seized upon to relieve the injured party, and it is a rare case when courts of equity cannot find some means of redress if the facts authorize it.

In the case before us, the appellees were in total ignorance of the fact that the life tenant was on her death-bed. Appellant, with actual knowledge of her impending death, visited appellees for the purpose of buying their interest at such a price as it would be worth with the life tenant in good health. If no inquiry had been made or question asked

by appellees, concerning the life tenant, and appellant had refrained from any act or word that might have a tendency to mislead or deceive them concerning her health, it would present a question that is not before us in this record. But when appellees inquired of appellant how the life tenant was "getting along," and he replied "he thought they were getting along a little smoother than they had been," his response was not only deceptive, but misleading. The inquiry was broad enough to embrace the condition of the life tenant's health, and ordinarily might fairly be said to include it. So that, when appellee, without giving any intimation that the life tenant was dying or disclosing in any way his knowledge of her condition, replied he thought they were "getting along a little smoother than they had been," his purpose in making this character of reply was manifestly to avoid giving them the information that he must have understood their question called for. It is clear that his object was not only to withhold from them the ⁴⁴⁹ information in his possession, but to affirmatively deceive them by leaving the impression that there had been no immediate change in the life tenant's condition, or if there had been, that it was for the better.

Under the facts in this case, if appellant's contention was sustained, the courts would be used as an agency to enable him to perpetrate a wrong and to accomplish a fraud; when one of the ends of the law as correctly administered is to withhold relief from persons who seek its aid to practice fraud.

The judgment of the lower court must be affirmed.

It is a Case of Manifest Fraud where a party intentionally misrepresents a material fact, or produces a false impression by words or acts, in order to mislead or obtain an undue advantage. Any intentional misrepresentation or concealment of material facts in the making of a contract, in cases in which the parties have not equal access to means of information, will vitiate and avoid the contract, and it is immaterial whether the misrepresentation be made on the sale of real or personal property, or whether it relates to the title to land or some collateral thing attached to it: *Mitchell v. Zimmerman*, 4 Tex. 75, 51 Am. Dec. 717. Fraud vitiates all transactions into which it enters: *Fleming v. Townsend*, 6 Ga. 103, 50 Am. Dec. 318. *Suppressio veri* vitiates a contract equally with *suggestio falsi*: *Beard v. Campbell*, 2 A. K. Marsh. 125, 12 Am. Dec. 362; though the concealment of facts which a party is not bound to disclose is not a fraud: *Mills' Heirs v. Lee*, 6 T. B. Mon. 91, 17 Am. Dec. 118. Thus, a vendee is not bound to disclose the fact that there is a gold mine on the land sold, though, if, on being interrogated as to that, he denies all knowledge, the denial will be a fraud: *Smith v. Beatty*, 2 Ired. Eq. 456, 40 Am. Dec. 435. A purchaser, who has discovered salt water on the land and prevents the agent of the vendor from giving information thereof, and conceals the discovery from the vendor by artifice, is guilty of a fraud, and will not be permitted to retain the purchase: *Bowman v. Bates*, 2 Bibb, 47, 4 Am. Dec. 677. Concerning the right to rescind or to set aside a contract pro-

cured by fraud, see, also, *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 105 Am. St. Rep. 1016; *Hooker v. Midland Steel Co.*, 215 Ill. 444, 106 Am. St. Rep. 170; *Jones v. McElroy*, 134 Ga. 857, 137 Am. St. Rep. 276. As to what is the sole question in an action for deceit: *Bowe v. Gage*, 127 Wis. 245, 115 Am. St. Rep. 1010.

SOUTHERN RAILWAY COMPANY v. GRADDY.

[139 Ky. 465, 109 S. W. 881.]

CARRIER OF LIVESTOCK—Damages for Delay—In Case of Depreciation in the value of livestock, shipped on railway cars, through delay by the carrier in delivering them at their place of destination, their owner may recover of the carrier only the difference between their value when delivered at last and what value would have been theirs had they been transported with ordinary care, reasonable diligence, and within a reasonable time. (p. 501.)

CARRIER OF LIVESTOCK—Damages.—The Pedigree of a Thoroughbred Colt is a material factor in fixing its value, and in an action for deterioration of stock of this sort, caused by a carrier's failing to make a prompt delivery of it when shipped for transportation, it is pertinent to allow witnesses to testify who know the value of the pedigree as well as the value of colts generally. (pp. 502, 503.)

Field McLeod, Chas. M. Harriss and Humphrey & Humphrey, for the appellant.

D. T. Edwards, for the appellee.

⁴⁶⁵ **CARROLL, J.** The appellee on September 5, 1906, shipped from Versailles, Kentucky, to Louisville, Kentucky, over the appellant railway six yearling thoroughbreds. The colts were shipped to be sold at a public sale in Louisville on September 8th. They were loaded at Versailles on the morning of September 5th, and in the usual course of transportation should have reached their destination on the afternoon of the day they were shipped. They were not delivered at ⁴⁶⁶ Louisville until the afternoon of September 6th.

Alleging that the stock were injured, and their marketable value at the sale greatly reduced by reason of the negligence of appellant in failing to transport them within a reasonable time, appellee brought this suit to recover damages for the loss sustained. A jury assessed the damage at one thousand dollars, and from the judgment on the verdict this appeal is prosecuted.

In view of the fact that there must be a retrial of the case, we will only state so much of the evidence as is necessary to an understanding of the errors relied on for reversal.

The proof is conflicting as to the time the stock were received and when they should have been delivered in Louisville, and also as to their condition, and the loss in their marketable value sustained by the delay in their shipment. There was, however, sufficient evidence to warrant a submission of the case to the jury, and to authorize a verdict for appellee.

Serious and just complaint is made of instruction No. 2, which reads as follows: "If the jury believe from the evidence that the defendant company negligently and carelessly failed to transport said six yearlings to the Central Stock Yards in Louisville, Kentucky, within a reasonable time, and without unusual delay, and by reason of the negligence and carelessness of the defendant company, if any proven, the said six yearlings or any of them became sick or ill or feverish or contracted a disease, and were reduced in health or strength, quality or value, they should find in damages for the plaintiff the difference, if any proven, between the fair vendable ⁴⁶⁷ market value of said yearlings or any of them on September 8, 1906, at Douglass Park, Louisville, Kentucky, if the said six head of yearlings were transported to the place of their destination named in the contract of shipment in the ordinary and usual condition had they arrived there within a reasonable time and without unusual delay, and the amount said yearlings sold for in the condition they were in on the eighth day of September, 1906, not exceeding in all five thousand dollars. Unless the jury so believe, they will find for the defendant."

The radical error in this instruction is that it fixed the measure of damage as the difference between the value of the stock if they had been transported within a reasonable time and without unusual delay and the amount they sold for at the public sale. It was competent to prove what the stock sold for at the public sale, as a circumstance tending to show their value, and to show that the fair market value was not realized for them. But what they brought at the sale was not the test of the depreciation in their market value that should have been submitted to the jury. If the stock had been in first-class condition and had been transported within a reasonable time, and with the usual care, they might not have brought at the sale one-half of their real or market value. On the other hand, they might have sold for more than their real or market value. The sale may have been poorly attended, not well advertised, held at an inopportune time or an unfavorable place, the day may not have been suitable, the persons conducting the sale may not have had the confidence of buyers. We merely mention these as a few of the many illustrations that might be given for the purpose of show-

ing that what the colts brought at the sale was not a fair ⁴⁰⁸ test of the depreciation in their market value caused by the delay in shipment. Appellee was entitled to recover the difference, if any, between the fair market value of the stock in the condition they would have been if they had been transported with ordinary care, reasonable diligence and within a reasonable time, and the condition they were in when delivered at Louisville: *Cincinnati etc. Ry. Co. v. Pendleton & Hudson*, 29 Ky. Law Rep. 721, 96 S. W. 434; *Newport News etc. R. Co. v. Mercer*, 16 Ky. Law Rep. 555, 29 S. W. 301; *Hutchinson on Carriers*, sec. 1366.

It may be conceded that this rule by which to measure the loss sustained is not by any means accurate or entirely satisfactory, but it is the best available under the circumstances. In cases like this all that the shipper is entitled to is compensation for his loss resulting from the delay of the carrier in the shipment. It will be readily agreed that the amount lost is in most instances the depreciation in the fair market value of the stock resulting from the delay, but it is often troublesome to ascertain with reasonable certainty the amount of this loss. Generally speaking, what property brings at a public sale is a fair test of its value, and in some instances it may be the only available test. For this reason it is considered competent for persons shipping livestock for sale to introduce as evidence the price they brought on the market, but this is not the only nor is it a conclusive test. It is only one of the means by which the value of the property and the loss may be ascertained. The opinion of witnesses who saw the stock, or who knew its condition, or the injury it received, or the depreciation in its market value, is also competent evidence, but neither is it conclusive. All these facts, and any others that throw light upon the condition ⁴⁰⁹ of the stock, the injury they received, and the depreciation in the market value, the jury have the right to consider in making up their verdict. But it is not proper to single out in an instruction by which the jury must be controlled any particular standard of value or loss other than the depreciation in the market value. The jury should be allowed, after hearing the evidence, to fix for themselves from the evidence the depreciation in the fair market value, and not be confined by the court to what the property sold for or to the opinion of witnesses as to its value.

It is further complained by appellant that the trial court permitted incompetent evidence to go to the jury. The evidence objected to was made by witnesses who had never seen the colts shipped by appellee and who were not present at the sale when they were offered. These wit-

nesses were gentlemen engaged in the purchase, sale and breeding of race-horses, and were familiar with the pedigrees and breeding of appellee's colts. After the colts had been described to them, they were asked in substance to examine the catalogue containing the description and pedigree and state what would be the fair market value of each of them on the eighth day of September, 1906, at Douglass Park, Louisville, Kentucky, if they had been shipped from Versailles on the morning of the 5th and had arrived at Louisville in the usual time and in the usual condition. Their estimate of the value of the colts was based largely on the knowledge of the witnesses touching their pedigree and breeding.

It is argued that this evidence was too speculative to be admissible, and it is said that a witness who has never seen a colt that he is asked to fix a value on would be venturing an opinion not based on sufficient ⁴⁷⁰ knowledge to make it competent. In this opinion we do not concur. The pedigree of a thoroughbred colt is a material factor in fixing its value, and in the estimation of many persons it is more important than the individuality of the animal, its style, bearing and movement, the shape of its body and limbs and general conformation. It is also true that a horse may have a fine pedigree and yet be deficient or defective in some important particulars that could only be discovered by inspection, and that the picture of a horse, whether it be a pen picture, a photograph or a word picture, might convey an inadequate idea of its value and furnish an erroneous impression as to its qualities. But these facts go more to the weight of the evidence than to its competency. There is a wide difference between the weight that a court or jury may and ordinarily will attach to evidence, but if the offered evidence is competent, the question of its probative value is for the jury trying the case. Expert and opinion evidence is allowable in many cases, although the expert may have no personal knowledge of the particular thing he is called on to express an opinion concerning and may never have seen it. We do not deem it appropriate within the proper scope of this opinion to elaborate upon the class or character of cases in which expert and opinion evidence is allowable. It embraces a wide field and covers a variety of subjects concerning which jurors may be unable to come to a correct conclusion without the aid of the testimony of persons who have made the subject a study. But, confining our remarks to the matter particularly in hand, we may say that a trader or dealer in stock, or a person who is qualified by experience, may give evidence as to the value of cattle, hogs and ⁴⁷¹ other animals that have a market value although he

may never have seen them. If these colts had not been thoroughbreds, it would have been admissible to prove their value by persons who had experience in the breeding or purchase and selling of colts; but, as they were thoroughbreds, and their pedigree and breeding alone were material elements in fixing their value, it was especially pertinent to allow witnesses who knew the value of the pedigree as well as the value of colts generally to testify. The breeding and care of thoroughbreds has been made a special study by many persons. It has become a business of wide importance. Registers are kept, books are written, and papers almost daily published devoted to explaining and exploiting the performance of sires and dams, and the value of certain strains of blood. Thoroughbreds have a market value, and it is regulated in a large measure by the pedigree, although the value is not controlled by standards as reliable or accurate as is the market value of cattle or hogs, or sheep or other animals that are daily sold in the open and established markets of the country. A jury composed of persons not acquainted with the value of pedigrees might be disposed to attach little importance to this well-recognized factor in fixing the value of a horse. It was therefore important to plaintiff that he should produce to the jury the evidence of persons acquainted with the value of pedigrees, and who could inform the jury touching this feature of the question they were called upon to determine: *Fleming v. McClaffin*, 1 Ind. App. 537, 27 N. E. 875; *Miller v. Smith*, 112 Mass. 470; *Brown v. Hoburger*, 52 Barb. 15; *Browne v. Moore*, 32 Mich. 254; *Cantling v. Hannibal & St. Joseph R. Co.*, 54 Mo. 385, 14 Am. Rep. 476; *Bowers v. Horen*, 93 Mich. 420, 32 Am. St. Rep. 513, 53 N. W. 535, 17 L. R. A. 773; *St. Louis etc. Ry. v. Edwards*, 78 Fed. 745, 24 C. C. A. 300.

For the error mentioned in the instruction, the judgment must be reversed, with directions for a new trial consistent with this opinion.

As to the Competency of Persons to Testify as to the Value of Property, see the note to *Jones v. Erie etc. R. R. Co.*, 31 Am. St. Rep. 734; *Anderson v. Chicago etc. Ry. Co.*, 84 Neb. 311, 133 Am. St. Rep. 626, and cases cited in the cross-reference note thereto. Persons engaged in buying, selling and handling racehorses who had seen certain racehorses injured while in the hands of a common carrier, frequently upon the race-track and in races before their injury, and knew their speed and quality, are competent to testify to their value immediately before and after the injury: *Chicago etc. Ry. Co. v. Calumet Stock Farm*, 194 Ill. 9, 88 Am. St. Rep. 68. And an expert may be allowed to give his opinion as to the value of a dog lost through a baggageman's negligence: *Canthing v. Hannibal etc. R. R. Co.*, 54 Mo. 385, 14 Am. Rep. 476.

The Liability of a Carrier for Loss or Injury to Livestock is the subject of a note to *Stiles v. Louisville etc. R. R. Co.*, 130 Am. St. Rep. 432.

PENNSYLVANIA IRON WORKS COMPANY v. VOGT
MACHINE COMPANY.

[139 Ky. 497, 96 S. W. 551.]

LIBEL.—A Corporation is Responsible for a Libel, provided the publication can be shown to have been made by one of its servants or agents in the scope of his employment and in the course of the business in which he was employed. (p. 506.)

LIBEL.—The Facts That a Corporation Gave No Authority to its agent to insert libelous statements written by him as such agent, and that such were written without its knowledge and consent, do not relieve it from liability, if the wrong was done in an effort to obtain business for it. (p. 507.)

LIBEL.—Words Written of a Corporation by the Agent of Another Corporation in a letter to a third, to which the first two had submitted competing bids for furnishing an ice machine, which words characterized the company written about as a second-hand dealer, ignorant of how to construct the needed article, foretold failure if it tried to do so, charged it with using inferior material and employing only "scab" labor, and denied its having "a mechanic in their whole establishment," are libelous. (p. 508.)

LIBEL.—Injury to Business.—An Allegation of Special Damage is not necessary in a complaint in libel when the charges complained of have a tendency to injure the plaintiff in his trade or business. Such charges are actionable per se. (p. 508.)

LIBEL.—Malicious Intent Presumed.—Punitive Damages.—When a letter is libelous per se, malicious intent in the publication is presumed, and the jury have a right to find punitive damages, in their discretion. (p. 509.)

LIBEL.—Failure by a Corporation to Repudiate the libelous letter of its agent immediately upon obtaining knowledge of its publication amounts to a ratification. (p. 509.)

Bennett H. Young and M. W. Ripy, for the appellant.

Thum & Clark and Gibson, Marshall & Gibson, for the appellee.

⁴⁹⁸ **CARROLL, C.** The appellant is a Pennsylvania corporation and the appellee a Kentucky corporation, and they are rivals in the manufacture of ice machines.

In 1896 the appellant opened an office in Louisville, Kentucky, and placed it in charge of William Wilson. In 1897 appellant and appellee were competitive bidders for an ice machine desired by the Northern Lake Ice Company of Louisville. Appellee was the successful bidder, and when Wilson learned of this fact he wrote a letter to the Northern Lake Ice Company, the material parts of which are as follows: ". . . The reason we withdrew our proposition is because you telephoned us that the tank was let to the Sulzer-Vogt Machine Co., and another reason is because we could not figure against a second-hand dealer. We do not recognize that company as ice machine builders, and they know absolutely nothing about the compression system. They never

have done any work in connection with the compressed system, and at any time they do they will make a failure. . . . The material ⁴⁹⁹ they put in the work of this class is so far inferior to ours that we could not figure with them; and you will find this when the tank is erected. . . . Our shops and equipments are the largest in existence in our line, and we employ nothing but union labor, whereby the other parties run a scab establishment and have not a mechanic in their whole establishment including the head of the concern. We will not be slow to make this known to the different unions in this and other cities. . . . The above might seem strong, but it is our sentiment. We know the machine will not make its capacity with a tank built by parties who absolutely know nothing of it and will eventually give us a black eye as the other parties are interested in running down the compression system. They cannot make capacity with their own machines and could not try to do it with another make and the whole system will not be put in right. If it is not too late, you had better reconsider the matter and let it to parties who know how to do it."

This letter was written on a letter-head of the Pennsylvania Iron Works Company from Southern Office, 44 Bull Block, Louisville, Kentucky, and was signed "Pennsylvania Iron Works Co., Wm. Wilson, Manager Southern Office."

After this time, the Sulzer-Vogt Machine Company changed its corporate name to the Henry Vogt Machine Company, but before changing its name, the Sulzer-Vogt Machine Company brought this action against appellant, alleging that appellant by the manager of its southern office at Louisville wrote and delivered to the Northern Lake Ice Company the letter mentioned, the purpose of which was to induce the ice company to decline to award the contract to appellee, and that the letter was written falsely, wickedly ⁵⁰⁰ and with the malicious intent to deprive the appellee of said contract, and to injure it in its reputation and business, and asking damages for the libelous matter in the sum of twenty thousand dollars.

The appellant, in its answer, after traversing generally the allegation of the petition, denied that Wilson had any authority from or on behalf of it to write the letter, and that if Wilson did write such letter, it was entirely unauthorized. To this answer a reply was filed, in which it is averred that Wilson at the time he wrote the letter and for a long time prior thereto, with the knowledge and approval of the appellant held himself out as the manager of the southern office, and as such manager, with the knowledge and consent of the appellant, was conducting and carrying on business for it; and further, that appellant after learning said letter had been written by Wilson acting as its agent, failed and refused to disavow or retract the same, but adopted and confirmed the

act of Wilson in writing and delivering said letter, knowing the statements therein to be false and malicious. This completed the pleadings in the case, except an entry of record controverting the affirmative matter contained in the reply.

On a trial, appellee recovered judgment for five thousand dollars, to reverse which this appeal is prosecuted; and it is urged, first, that the principal is not liable in damages for the unauthorized wrongful act of its agent; second, that there was no evidence upon which to submit to the jury the ratification of it; third, that there was no evidence to authorize a finding of punitive damages; and fourth, that the petition does not state a cause of action.

It appears from the evidence that Wilson had been an employee of appellee, and in March, 1896, he solicited ⁵⁰¹ employment from appellant, and appellant wrote to appellee requesting information concerning Wilson. Soon after this date, Wilson became the agent of appellant. Appellant furnished the printed letter-heads used by Wilson in his correspondence, but Wilson had put on the letter-heads the words "From Southern Office 44 Bull Block, Louisville, Ky." These letter-heads Wilson used in his correspondence with appellant, and it knew that he was in the habit of signing its name by him as manager of its southern office, that he was holding himself out as manager of its southern office, and this state of affairs continued until the latter part of December, 1899, when Wilson removed from Louisville. It also appears that appellant advertised extensively in trade journals, and always mentioned in the advertisement the fact that its southern office was at 44 Bull Block, Louisville, Kentucky. Wilson also held himself out to the public generally as the agent of appellant, and testified that in the libelous letter complained of the word "we" refers to the Pennsylvania Iron Works Company.

The letter complained of fell into the hands of Dr. Satterwhite, who, as president of the board of commissioners for the Lakeland Asylum, was negotiating with different parties for the erection of an ice plant at the institution, and was delivered by Satterwhite to the president of appellee. It does not appear that appellant ever repudiated the letter written by Wilson except in its answer, and only there by denying that it wrote or authorized the writing of the letter by Wilson.

A corporation is liable in damages for the publication of a libel as it is for other torts. To establish its liability the publication must be shown to have ⁵⁰² been made by its authority, or to have been ratified by it, or to have been made by one of its servants or agents in the scope of his employment and in the course of the business in which he was employed. And a corporation may sue for libel upon it as dis-

inct from libel upon its individual members: Newell on Slander and Libel, p. 361; Washington Gas Light Co. v. Lansden, 172 U. S. 534, 19 Sup. Ct. Rep. 296, 43 L. ed. 543; Townshend on Libel and Slander, secs. 261-165; Peterson v. Western Union Tel. Co., 75 Minn. 368, 74 Am. St. Rep. 502, 77 N. W. 985, 43 L. R. A. 581.

The evidence shows very clearly that Wilson was the duly authorized agent of appellant and in charge of its southern office at the time he wrote the letter; that it was written in the course of his business for appellant and was within the scope of his employment is made plain by the fact that it was written for the purpose of obtaining for the appellant the contract to build the ice machine for the Northern Lake Ice Company and to take this business away from appellee. This being the sole purpose of the letter, and Wilson being at the time the general agent of appellant, it cannot be doubted that in writing it he was acting within the scope of his employment and therefore appellant is liable for his acts. It may be true that appellant did not authorize Wilson to insert in this letter the libelous statements it contained, and it may be conceded that they were written without its knowledge or consent, but this will not exonerate it from liability for the wrong perpetrated by him in an effort to obtain business for it. If the appellant is not responsible for this conduct of Wilson, it would be difficult to find a case in which a corporation could be held liable for the acts of its agents in the publication of libelous matter. Corporations transact all of their business through agents; and when the agent is ⁵⁰³ acting in the course of his business and within the scope of his employment, the corporation will be held accountable for his acts and doings in the same degree as an individual will be held answerable for torts perpetrated by him in his individual capacity. Where an action will lie against an individual for tort, it will lie against a corporation if the tort was committed by its agent or servant in the scope of his employment.

It is argued that the petition does not state a cause of action, because the words and statements contained in the letter are not per se libelous, and it is said that if they are not per se libelous, they can only be made actionable by an averment of injury to plaintiff's business and special damage occasioned thereby.

"Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office, or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment, are actionable in themselves without proof of special damages": Newell on Slander and Libel, p. 168; 18 Am. & Eng. Ency. of Law, 954.

act of Wilson in writing and delivering said letter, knowing the statements therein to be false and malicious. This completed the pleadings in the case, except an entry of record controverting the affirmative matter contained in the reply.

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A corporation is liable in damages for the publication of a libel as it is for other torts. To establish its liability the publication must be shown to have ⁵⁰² been made by its authority, or to have been ratified by it, or to have been made by one of its servants or agents in the scope of his employment and in the course of the business in which he was employed. And a corporation may sue for libel upon it as dis-

tinct from libel upon its individual members: Newell on Slander and Libel, p. 361; Washington Gas Light Co. v. Lansden, 172 U. S. 534, 19 Sup. Ct. Rep. 296, 43 L. ed. 543; Townshend on Libel and Slander, secs. 261-165; Peterson v. Western Union Tel. Co., 75 Minn. 368, 74 Am. St. Rep. 502, 77 N. W. 985, 43 L. R. A. 581.

The evidence shows very clearly that Wilson was the duly authorized agent of appellant and in charge of its southern office at the time he wrote the letter; that it was written in the course of his business for appellant and was within the scope of his employment is made plain by the fact that it was written for the purpose of obtaining for the appellant the contract to build the ice machine for the Northern Lake Ice Company and to take this business away from appellee. This being the sole purpose of the letter, and Wilson being at the time the general agent of appellant, it cannot be doubted that in writing it he was acting within the scope of his employment and therefore appellant is liable for his acts. It may be true that appellant did not authorize Wilson to insert in this letter the libelous statements it contained, and it may be conceded that they were written without its knowledge or consent, but this will not exonerate it from liability for the wrong perpetrated by him in an effort to obtain business for it. If the appellant is not responsible for this conduct of Wilson, it would be difficult to find a case in which a corporation could be held liable for the acts of its agents in the publication of libelous matter. Corporations transact all of their business through agents; and when the agent is ⁵⁰³ acting in the course of his business and within the scope of his employment, the corporation will be held accountable for his acts and doings in the same degree as an individual will be held answerable for torts perpetrated by him in his individual capacity. Where an action will lie against an individual for tort, it will lie against a corporation if the tort was committed by its agent or servant in the scope of his employment.

It is argued that the petition does not state a cause of action, because the words and statements contained in the letter are not per se libelous, and it is said that if they are not per se libelous, they can only be made actionable by an averment of injury to plaintiff's business and special damage occasioned thereby.

"Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office, or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment, are actionable in themselves without proof of special damages": Newell on Slander and Libel, p. 168; 18 Am. & Eng. Ency. of Law, 954.

"Next to imputations which tend to deprive a man of his life or liberty or to exclude him from the comforts of society may be ranked those which affect him in his office, profession or means of livelihood. To enumerate the different decisions upon this subject would be tedious, and to reconcile them impossible, yet, they seem to yield to a general rule sufficiently simple and unembarrassed, namely, that words are actionable which directly tend to prejudice any one in his office, profession, trade or business. So, if a person carry on any trade recognized by law, or be engaged in any lawful employment, however humble, ⁵⁰⁴ an action lies when any words prejudice him in the way of such trade or employment; but the words must relate to his trade or employment and touch him therein. It is not necessary to prove special damages in any action for libel whenever the words are spoken of the plaintiff in the way of his profession or trade. Such words from their natural and immediate tendency to prejudice and injure, the law judges to be defamatory, although no special loss or damage is or can be proved": Newell on Slander and Libel, p. 656. To the same effect is Townshend on Libel and Slander, sec. 146; *Manire v. Hubbard*, 22 Ky. Law Rep. 1753, 61 S. W. 466.

The statements in this letter that appellee was a second-hand dealer; that it put in a class of inferior work; that it was a scab establishment; that it did not have a mechanic in its establishment, come fully up to the rule announced in these authorities, that an allegation of special damages is not necessary where the charges have a tendency to injure a person in his trade or business, and such charges are actionable per se.

The court instructed the jury that if they believed from the evidence that the letter was written with express malice against the plaintiff, they might, in addition to compensating plaintiff for any damage or injury, find punitive or exemplary damages against the defendant. In *Courier-Journal Co. v. Sallee*, 104 Ky. 335, 47 S. W. 226, it is said: "It must be remembered that the law always presumes that in the publication of an article which is libelous on its face it was published with malicious intent, and this presumption remains throughout the entire case until it is rebutted by proof of the contrary motive. In this state, in all actions for torts, punitive damages are allowed where the injury is a result of a wanton ⁵⁰⁵ or grossly negligent act. The intent or purpose is not a necessary ingredient. This is especially true where the words published are actionable per se."

Newell on Slander and Libel, page 843, is to the same effect.

The letter in this case being libelous per se, the presumption is that it was published with malicious intent, and this question having been submitted to the jury under proper instructions, they had the right in their discretion to find punitive damages against appellant.

The court also instructed the jury that although they might believe that Wilson was not the agent of the company at the time the letter was written, yet the company subsequently ratified or approved the letter and the statements therein contained, they could find for plaintiff. Of this instruction appellant complains. There is no affirmative evidence in the record of the express ratification of this letter by appellant, but Wilson having written it within the scope of his employment, appellant, as we have held, was liable for the consequences of its publication, and, therefore, ratified it by its failure to disapprove or repudiate the letter after obtaining knowledge of its publication, which it did long before the trial took place. Its failure, under the circumstances of this case, to disavow the letter must be taken to be a ratification and approval of its contents.

After a careful examination of this record, we have been unable to find any error that would authorize a reversal, and the judgment is affirmed.

In Burgess & Co. v. Patterson, 139 Ky. 547, 106 S. W. 837, a libelous letter was written in respect to the business of a partnership. It was admittedly written by a member of the firm, and asserted title by the firm as such to the personal property concerning which the letter was written. The letter was signed with the name of the firm by the writer. In an action to recover damages for the alleged libel all of the partners were held answerable therefor.

A Corporation may Sue for a Libel or Slander against it in the way of its business or trade: *St. James Military Academy v. Gaiser*, 125 Mo. 517, 46 Am. St. Rep. 502; and a corporation may become civilly liable for libel or slander: *Note to Hoboken Printing etc. Co. v. Kahn*, 59 Am. St. Rep. 594; *Sawyer v. Norfolk etc. R. R.*, 142 N. C. 1, 115 Am. St. Rep. 716; *Pattison v. Gulf Bag Co., Ltd.*, 116 La. 963, 114 Am. St. Rep. 570; *Singer Mfg. Co. v. Taylor*, 150 Ala. 574, 124 Am. St. Rep. 90; even in punitive damages: *Peterson v. Western Union Tel. Co.*, 75 Minn. 368, 75 Am. St. Rep. 502. A corporation is answerable for a libel, the publication of which is sanctioned by its manager in its interest: *Pattison v. Gulf Bag Co., Ltd.*, 116 La. 963, 114 Am. St. Rep. 570. But a corporation is not liable for libel or slander by its agent without previous authorization or subsequent ratification: *Sawyer v. Norfolk etc. R. R.*, 142 N. C. 1, 115 Am. St. Rep. 716; *Singer Mfg. Co. v. Taylor*, 150 Ala. 574, 124 Am. St. Rep. 90. The liability of corporations for libel and slander is the subject of a note to *Sawyer v. Norfolk etc. R. R.*, 115 Am. St. Rep. 721.

Exemplary Damages may be Awarded for the Publication of a False Charge which is libelous per se, and not a privileged communication: *Childers v. San Jose etc. Publishing Co.*, 105 Cal. 284, 45 Am. St. Rep. 40; *Gambrill v. Schooley*, 93 Md. 48, 86 Am. St. Rep. 414.

When an employer is liable in exemplary damages for libelous publications by his employee or servant is discussed in the note to *Crane v. Bennett*, 101 Am. St. Rep. 752-758. The liability of corporations for exemplary damages in cases of libel is discussed in the notes to *Hoboken Printing etc. Co. v. Kahn*, 59 Am. St. Rep. 594; *Sawyer v. Norfolk etc. R. R.*, 115 Am. St. Rep. 725.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

RADY v. FIRE INSURANCE PATROL OF NEW ORLEANS.

[126 La. 273, 52 South. 491.]

LIMITATIONS—Interruption by Service of Citation.—Prescription is not interrupted by the service of citation on a day of public rest other than Sunday. (p. 513.)

LIMITATIONS—Computation of Time—Action for Death.—An action for damages for the death of a person is prescribed by one year from the day of the death. In the computation of time, the day a quo is excluded, and the day ad quem must have elapsed. Thus, where death occurred on June 25, 1905, citation served on June 25, 1906, before midnight, will interrupt prescription. (p. 513.)

INSURANCE PATROL—Liability for Negligence of Servants. The Fire Insurance Patrol of the City of New Orleans is not a public charitable association, and is responsible in damages for injuries occasioned by the negligence of its servants in driving its wagon into a truck of the city fire department. Conceding that such patrol and the fire department have the same rights of way in the streets, it does not follow that the former is not responsible for injuries inflicted through the negligence of its servants. (p. 514.)

(Syllabi by the court.)

McCloskey & Benedict, for the appellant.

George W. Flynn, for the appellee.

274 LAND, J. Plaintiff sued for damages for the death of her son, James Rady, who died on June 25th from the effects of wounds received on June 23, 1905, in a collision at a street crossing between truck No. 4 of the New Orleans Fire Department and a patrol wagon of the defendant. Rady was the driver of truck No. 4 at the time of the collision.

The petition in this suit was filed on June 23, 1906, and on the same day at 2:45 P. M. copies of the citation and petition were served on the defendant. This service was made on a Saturday, and in the citation the plaintiff was styled "Rody,"

(511).

instead of "Rady." On June 25, 1906, another citation in due form issued and was served at 10:15 A. M. of the same day.

Defendant's plea of the prescription of one year was overruled, and defendant then answered that the collision could not have been avoided by any human foresight, and that every care, circumspection and prudence were used by the respondent at the time.

The case was tried, and there was judgment in favor of the plaintiff for damages in the sum of five thousand dollars. Defendant has appealed, and the plaintiff has, by answer, joined in the appeal and prayed for an increase of the award to ten thousand dollars.

The contention of the defendant is that the service of the citation on the Saturday ²⁷⁵ half holiday was a nullity and did not interrupt prescription.

Article 207 of the Code of Practice of 1870 provides that "no citation can issue" on Sundays, Fourth of July, 1st or 8th of January, 25th of December, 22d of February, or on Good Friday. Section 1114 of the Revised Statutes of 1870 provided that the same days "shall be considered as days of public rest in this state," and for cases where bills of exchange and promissory notes become due and payable on such holidays. By Act No. 9, page 16, of 1880, said section was amended and re-enacted so as to include Mardi Gras, and the 4th of March in New Orleans, among the days of public rest. There was other legislation on the subject matter, which culminated in Act No. 3, page 5, of 1904, amending and re-enacting the same section so as to read: "The following shall be considered as days of public rest and legal holidays and half holidays in this state, and no others, namely: Sundays, Good Friday, twenty-fifth day of December, Thanksgiving Day, and in cities and towns where the population shall exceed fifteen thousand, every Saturday, from twelve o'clock noon, until twelve o'clock midnight, to be known as a half holiday."

By Act No. 6, page 9, of 1904, the same legislature provided for the continuance of trial of any case begun but not concluded at the time of the intervention of any legal holiday or half holiday, Sunday and Christmas Day excepted.

It is very plain that Act No. 3 of 1904 places Saturday half holidays on the same footing as Sunday and other legal holidays and days of public rest, and that Act No. 6 of 1904 treats such half holiday as a dies non juridicus. In fact, neither the Code of Practice nor the statutes of this state make any distinction quoad judicial proceedings between Sunday and other legal holidays, all being days of public rest, except in the matter of the trial of cases already begun.

²⁷⁶ We therefore are of opinion that the service of the citation on the half holiday, being prohibited by law, produced no legal effect.

But the service on June 25, 1906, was good. It is true that this service was made more than one year after the date of the accident; but it was within one year from the date of the death; that is to say, the last day of the year had not elapsed when the citation was served: Civ. Code, art. 3467. The day a quo is excluded in the computation: See *De Armas v. De Armas*, 3 La. Ann. 527, citing a number of French commentators. In *Chestnut v. Hughes*, 22 La. Ann. 615, the court said: "Prescription had not accrued when the citation was served on the 4th of April, 1868, the injury having occurred on the 4th of April, 1867. The year must be computed from the day on which the injury was caused; the day a quo is not included: Civ. Code, art. 3467 (3430); *De Armas v. De Armas*, 3 La. Ann. 527."

The damages on account of the death were not sustained until June 25, 1905, and prescription quoad such damages commenced to run from the date of the death: *Jones v. Texas etc. Ry. Co.*, 125 La. 542, 136 Am. St. Rep. 339, 51 South. 582.

This case is on all-fours with that of *Coleman v. Fire Ins. Patrol*, 122 La. 626, 48 South. 130, 21 L. R. A., N. S., 810, 16 Ann. Cas. 778. Coleman was on the same truck and was injured in the same collision. The district court awarded damages in favor of Coleman, and the judgment was affirmed on appeal. Both courts found that the collision was occasioned by the negligence of the servants of the defendant. In the case at bar, another district judge, after considering the same state of facts, says: "The evidence as a whole convinces me that the negligence of the defendant's employees was the direct cause of the collision in which the plaintiff's son lost his life. . . . In this position the slightest attention would have made manifest the near approach of the fire department ²⁷⁷ truck, for its gong was sounding, and its horses going at a moderate gallop. . . . I find the facts of this case in substance as they are found by the supreme court, in the (*Coleman*) case referred to, hereinbefore."

After a reconsideration of the evidence, we see no good reasons for changing our opinion on the question of negligence.

This conclusion renders it unnecessary to discuss at any great length the questions of law that were considered in the *Coleman* case. We adhere to the view that the defendant is not a public charitable corporation, and is liable for the negligence of its servants. We are impressed with the very able argument of counsel for defendant as to the proper construction of the provisions of the statute giving to the men, teams and apparatus of the fire insurance patrol the same

right of way, whilst going to a fire, as the fire department of the city. Section 16, Act No. 83, page 111, of 1894, provides that the officers and men of the fire department, with their apparatus of all kinds, when on duty, shall have the right of way to any fire and in any highway, street, or avenue over any and all vehicles of any kind except those carrying the United States mail, and also a penalty against persons owning or driving vehicles and refusing right of way, etc. The act of 1902 (Acts 1902, No. 115) gives to the defendant the same right of way, and it is argued, therefore, equal rights of way. Conceding the premises, the defendant's servants are not dispensed from the use of ordinary care in the exercise of such right of way. The greater the danger, the greater should be the care to avoid collisions with the heavier and more unwieldy apparatus of the fire department.

We are not prepared to say that the quantum of damages awarded for the death of the son is manifestly insufficient.

Judgment affirmed.

Provosty, J., concurs.

Liability of Fire Insurance Patrol for Negligence.—In the case of *Coleman v. Fire Ins. Patrol of New Orleans*, 122 La. 628, 48 South. 130, 21 L. R. A., N. S., 810, referred to and relied upon in the principal case, it is held that a fire insurance patrol, supported by assessments levied upon all persons engaged in the fire insurance business in a certain city, and maintaining a force and equipment for the saving of life and property from destruction and damage by fire, is neither a public corporation nor a public charity, its main purpose being to minimize the losses and care for the interests of the insurers, thus rendering it liable for the consequences of its negligence. This rule is in accord with *Newcomb v. Boston Protective Dept.*, 151 Mass. 215, 24 N. E. 39, 6 L. R. A. 778, and *Bates v. Worcester Protective Dept.*, 177 Mass. 130, 58 N. E. 274, while, on the other hand, such a corporation was held to be a public charity, and therefore not liable for the negligence of its servants in *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 6 Am. St. Rep. 745.

STATE v. TREADAWAY.

[126 La. 300, 52 South. 500.]

STATUTES—Construction—Popular Meaning of Words.—The words of a statute are not to be understood in their technical, but in their popular, sense. The dictionaries are the exponents of the popular meaning of the words of the language, and they may be referred to to ascertain and determine such meaning. (p. 516.)

WORDS AND PHRASES—Popular Meaning—How Determined. Apart from the dictionaries, the only source from which can be derived information as to the meaning of words is the literature of the language, including in that literature the evanescent newspaper writings of the day. (pp. 516, 518.)

WORDS AND PHRASES—"Negro."—In the Absence of a definition of the term contained in the statute itself, the use of the term "negro" in a statute means a black man, especially one of a race of black or very dark persons who inhabit the greater part of tropical Africa and are distinguished by certain physical characteristics, and the descendants of such men. It is used in the popular sense; the sense given it by the recognized dictionaries of the language, and does not include octoroons, mulattoes and persons of mixed blood. (pp. 516, 518, 532.)

WORDS AND PHRASES.—The Word "Colored," when used to designate the race of a person, is unmistakable, at least in the United States. It means a person of negro blood, pure or mixed; and the term applies no matter what may be the proportions of the admixture, so long as the negro blood is traceable. (p. 519.)

WORDS AND PHRASES—"Negroes" and "Colored" Persons. When it has become necessary to use a word comprehending within its meaning both negroes, properly so called, and persons of mixed negro blood, in the constitution and laws of the state, the term "colored" has invariably been used, and the same is true in other states, except where a definition of the word "negro" has been given once for all in the code or general statutes; and in the judicial literature of the country is found the same approximate uniformity in the use of the word "colored" whenever the idea is to refer to persons in general having negro blood; and the use of the word "negro" unqualified only when the reference is to the negro, properly so called, or blacks. (pp. 519-521, 524.)

WORDS AND PHRASES—"Colored Person."—A Negro is necessarily a person of color, but a person of color is not necessarily a negro. The term "colored" as applied to race was given the meaning of the word "negro" for the very purpose of having a term including within its meaning both negroes and descendants of negroes; but the converse is not true. The term "negro" was never adopted for the purpose of designating persons of mixed blood. (p. 531.)

WORDS AND PHRASES.—"Griff" Indicates the Issue of a negro and a mulatto; a person too black to be a mulatto and too light in color to be a negro. (pp. 531, 532.)

WORDS AND PHRASES—"Mulatto."—A Person Too Dark to be a white and too light to be a griff is a mulatto. (p. 532.)

WORDS AND PHRASES.—"Quadroon" Indicates a person distinctly whiter than a mulatto. (p. 532.)

WORDS AND PHRASES.—"Colored," When Applied to Race, has the definite and well-known meaning of a person having negro blood in his veins. (p. 532.)

WORDS AND PHRASES.—"Negro," of Itself, Unqualified, does not necessarily include within its meaning persons possessed of only an admixture of negro blood. (p. 532.)

MISCEGENATION.—The Words "a Person of the Negro or black race," as used in section 1 of Act No. 87 of 1908, making concubinage between such person and a person of the Caucasian race a felony, mean a negro, properly so called, and do not include an octoroon. (p. 532.)

St. Clair Adams, district attorney, Warren Doyle, assistant district attorney, and James Wilkinson, for the state.

Loys Charbonnet, for the appellees.

³⁰¹ PROVOSTY, J. The indictment in this case charges that one of the defendants is a person of Caucasian or white race, and the other "a person of the negro or black race, to wit, an octoroon," and that they "did cohabit together and live in concubinage," in violation of section 1 of Act No. 87 of 1908, which reads as follows: "Section 1. Be it enacted by the General Assembly of the state of Louisiana, that concubinage between a person of the Caucasian or white race and a person of the negro or black race is hereby made a felony, and whoever shall be convicted thereof in any court of competent jurisdiction shall for each offense be sentenced to imprisonment at the discretion of the court for a term of not less than one month nor more than one year with or without hard labor."

The sole question is whether an octoroon is "a person of the negro or black race" within the meaning of this statute.

Scientifically, or ethnologically, a person is Caucasian or negro in the same proportion in which the two strains of blood are mixed in his veins; and therefore scientifically, or ethnologically, a person with seven-eighths white blood in his veins and one-eighth negro blood is seven-eighths white and one-eighth ³⁰² negro. But the words of a statute are not to be understood in their technical, but in their popular, sense, and the prosecution contends that the popular meaning of the word "negro" includes an octoroon.

The dictionaries are the exponents of the popular meaning of the words of the language. If we consult them, we find that the word "negro" does not include an octoroon within its meaning.

Webster's International Dictionary, definition of word "negro": "Negro. A black man, especially, one of a race of black or very dark persons who inhabit the greater part of tropical Africa, and are distinguished by crisped or curly hair, flat noses, and thick protruding lips; also, any black person of unmixed African blood, wherever found."

Id., definition of word "colored": "Colored. (Ethnologically) Of some other color than white; specifically applied to negroes or persons having negro blood; as, a 'colored man'; the 'colored' people."

Century Dictionary, page 3960, definition of word "negro": "A black man; specifically, one of a race of men characterized by a black skin and hair of a woolly or crisp nature. Negroes are distinguished from the other races by various other peculiarities—such as the projection of the visage of the forehead; the prolongation of the upper and lower jaws; the small facial angle; the flatness of the forehead and of the hinder part of the head; the short, broad, and flat nose; and the thick projecting lips. The negro race is generally regarded as comprehending the native inhabitants of Sudan, Sene-

gambia, and the region southward to the vicinity of the equator and the great lakes, and their descendants in America and elsewhere; in a wider sense it is used to comprise also many other tribes farther south, as the Zulus and Kafirs. The word 'negro' is often loosely applied to other dark or black-skinned races, and to mixed breeds."

Id., definition of the word "colored," page 1111: "Having a dark or black color of the skin; black or mulatto; specifically, in the United States, belonging wholly or partly to the African race; having or partaking of the color of the negro."

29 Cyc., page 661, definition of word "negro": "A black man descended from the black race of South Africa."

³⁰³ Id., definition of word "colored": "Not a phrase of art, but often applied to black people, Africans, or their descendants, mixed or unmixed; persons of African descent or negro blood; persons of the negro race; persons who have any perceptible admixture of African blood."

American and English Encyclopedia of Law, page 213, definition of "colored people": "'Colored' or black people, African or their descendants, mixed or unmixed."

In Zell's Encyclopedia, "negro" is defined as follows: "A name properly applied to a race or variety of the human species, inhabiting the central portion of Africa, principally between the latitudes ten degrees north and twenty degrees south, on account of some of their striking characteristics—their black color. They do not include Egyptians, Nubians, Abyssinians, etc., of the North, or Hottentots of the South African. Their characteristics are: Skin black, hair woolly, lips thick, nose depressed, jaws protruding, forehead retiring, proportions of the extremities abnormal."

7 Encyclopedia Britannica, page 316, and also 7 Americanized Encyclopedia Britannica, page 4416, defines the word "negro" as follows: "Distinctly dark, as opposed to the fair, yellow, and brown varieties of mankind. The negro dominion originally comprised all Africa south of the Sahara; negro, members of the dark race whose original home is in the inter-tropical and subtropical regions of the Eastern hemisphere."

Webster's Dictionary (Thompson & Thompson ed. 1907), page 747, describes "negro" as follows: "A native or descendant of the black race of men in Africa. The name is never employed to the tawny or olive-colored natives of the northern coast of Africa, but to the most southern race of man, who is quite black."

Standard Dictionary, definition of word "colored": "Of a dark-skinned or non-Caucasian race; specifically, in the United States, of African descent, wholly or in part. Originally the epithet was applied only to those of mixed blood, making three classes of inhabitants—white, black, and colored."

³⁰⁴ Id., definition of word "negro": "One belonging to the Ulotrichi or woolly-haired type of mankind; a black man, especially of African blood, and particularly one belonging to the stock of Senegambia, Upper Guinea, and the Sudan. In North Carolina a person who has in his veins one-sixteenth or more of African blood."

For what it here says is the case in North Carolina the Standard gives as its authority the decision of the supreme court of that state in the case of *State v. Chavers*, 50 N. C. 11; but a perusal of that decision reveals that in it the court has not undertaken to declare what was the popular meaning of the word "negro" in that state, but has simply applied or enforced the following statute: "All free persons descended from negro ancestors to the fourth generation inclusive, though one ancestor in each generation may have been a white person, shall be deemed free negroes and persons of mixed blood."

This was not to hold that in North Carolina the word "negro," as popularly understood, includes within its meaning a person having fifteen-sixteenths of white blood and only one-sixteenth of negro blood in his veins, but that such a person was a negro according to said statute. Of course, where a statute has defined the meaning of a word, the definition is authoritative. If the statute we are dealing with, or any other statute of this state, had defined the word "negro" as including a person of mixed blood, there would be an end of all question. But the contention of the prosecution is that the word does not need to be defined in a statute; that popularly it has a definite, well-known meaning; and that in this popular acceptance it includes all persons having in their veins a perceptible admixture of negro blood. In support of that contention, opposed as it is to the dictionaries of the language, universally accepted as the reliable exponents of the meaning of the words of the language, there is adduced absolutely nothing. The learned district attorney appeals to some knowledge of ³⁰⁵ the popular meaning of the word "negro" which the judges of this court are supposed to be possessed of, derived outside of the dictionaries of the language. Apart from the dictionaries, the only source from which can be derived information as to the meaning of words is the literature of the language, including in that literature the evanescent newspaper writings of the day. Now, no literature, whether of the permanent or evanescent kind, has been called to the attention of the court in which the word "negro" or the term "a person of the negro race" has been given a meaning which would include an octoroon; and, still less, a person of fifteen-sixteenths white and one-sixteenth negro blood, or thirty-one thirty-seconds white and one thirty-second negro blood. If this court were to declare that the popular

meaning of the word "negro" embraces octoroons, the decision would furnish the one solitary instance in legal or any other literature where the word had been given that meaning. The judges of this court do not know that the word has that meaning. The learned trial judge did not think it had; and we are informed that his colleague on the criminal district court bench, Judge Baker, than whom no man in this state, we dare say, has had a wider experience in the trial of criminal cases, was of the same opinion.

There is a word in the English language which does express the meaning of a person of mixed negro and other blood, which has been coined for the very purpose of expressing that meaning, and because the word "negro" was known not to express it, and the need of a word to express it made itself imperatively felt. That word is the word "colored." The word "colored," when used to designate the race of a person, is unmistakable, at least in the United States. It means a person of negro blood, pure or mixed; and the term applies no matter what may be the proportions of admixture, so long as the negro blood is traceable: *Lee* ³⁰⁶ v. *New Orleans Great Northern Ry. Co.*, 125 La. 236, 51 South. 182. In our constitution and laws, when it has become necessary to use a word comprehending within its meaning both negroes, properly so called, and persons of mixed negro blood, the term "colored" has invariably been used. Thus the Civil Code of 1838 (articles 95 and 2261) made null all marriages between whites and "free people of color." The same language was used in Act No. 308 of 1855. In article 284 of our present constitution, the expression is: "There shall be free public schools for the white and colored races." And so in our numerous public school statutes. The "Jim Crow" railroad law (Act No. 111 of 1890, p. 152) requires the railroads to provide equal but separate accommodations for the "white and colored races." The "Jim Crow" street railways law (Act No. 64 of 1902, p. 89) requires that the street railways shall provide equal but separate accommodations "for the white and colored races." The miscegenation law (Act No. 54 of 1894, p. 63) provides that "marriage between white persons and persons of color is prohibited." The act of June 7, 1806 (1 *Lislet's Digest*, p. 498), entitled, "An act to prevent the introduction of free persons of color," etc., uses the expression "persons of color" throughout. The act of April 14, 1807 (1 *Lislet's Digest*, p. 499), entitled "An act to prevent the immigration of free negroes and mulattoes," etc., uses the expressions "negroes and mulattoes" and "free persons of color" throughout. The act of March 31, 1808 (1 *Lislet's Digest*, p. 499), requires notaries passing acts in which "free persons of color may be concerned" to add "after the name and surname of such free persons of color" these words:

"Free man or free woman of color." The act of March 16, 1830 (Laws 1830, p. 90), entitled "An act to prevent free persons of color from entering the state," etc., uses the expression "negroes, mulattoes or other free persons of ³⁰⁷ color" throughout, repeating that expression several times in twelve of its seventeen sections. The act of March 25, 1831 (Laws 1831, p. 78), uses the same expression "free negroes, mulattoes or other persons of color." The title of Bullard & Curry's Digest, relating to negroes, griffs, mulattoes, etc., is not "of negroes," but is "of colored persons." Act June 7, 1806 (1 Martin's Digest, p. 608), relating to slaves, is entitled "An act prescribing the rules," etc., with respect to "negroes and other slaves." (N. B. Other slaves here could only mean descendants of negroes, because there was no other kind of slaves.) In its section 40 this act uses the expression "free persons of color." The act of same date relative to the crime of slaves, "free negro, mulatto or mustee" (Act March 20, 1809 [1 Martin's Digest, p. 664]) uses expression "negroes and other slaves." So likewise the act supplementary thereto of March 23, 1810 (1 Martin's Digest, p. 668). Act of this latter date "concerning the introduction of certain slaves," etc., uses the expression "that a slave, whether negro, mulatto or person of color." The act of March 19, 1816 (1 Martin's Digest, p. 686), is relative to "negroes and other slaves," and speaks of the capture of runaway negroes or slaves, and of any free person of color. The act of February 16, 1818 (Laws 1818, p. 18), uses the expression "negroes and other slaves." Act March 16, 1830 (Laws 1830, p. 90), uses the expression "free persons of color." The Revised Statutes of 1852 (pages 284-290) contains the title "free persons of color." It embodies the entire existing legislation at that time in force relative to said title. Some of the acts already hereinabove referred to are reproduced, and, in addition, Acts 1825, page 132, Acts 1830, page 90, Acts 1831, page 98, Acts 1842, page 308, Acts 1843, page 45, Acts 1846, page 163, and Acts 1850, page 179. A perusal will show that throughout, both in the text and in the marginal notes, the expressions used are "persons ³⁰⁸ of color" or "negroes, mulattoes, or other free persons of color." See same book, title "Slaves" (pages 522-559), where the term "person of color" is constantly used to designate persons of mixed negro blood, and never the unqualified word "negro." What is here said of the Revised Statutes of 1852 is equally true of the Revised Statutes of 1856. Therefore, if the word "negro" as used in the act now in question and in the Gay-Shattuck act, so called (Act No. 176, p. 236, 1908), of the same legislature of 1908, was intended to have a meaning synonymous with "colored," this use of the word must be

looked upon as a clean and clear departure from the customary mode of designating persons of mixed negro blood.

And, if we refer to the legislation of our sister states, we find the same uniformity in the use of the word "colored," and not "negro," where the intention is to designate not exclusively the negro, or black man, but also the mulatto and others of mixed negro blood. And we find that, except in those states where a definition of the word "negro" is given once for all in the code or General Statutes (as, for instance, Ala. Pol. Code 1907, sec. 2; Fla. Gen. Stats. 1906, p. 165, sec. 1), the word is not used as convertible with "colored," unless there is added at once some word enlarging its ordinary meaning. Thus, in Maryland, the word "colored" is used throughout in Code Pub. Gen. Laws 1904, book 1, pages 892, 893, on subject of railroads; page 939, on the subject of house of reformation; book 2, pages 1745-1749, on the subject of schools; and the word "negro" is used, but with a definition added, in book 1, page 877, on the subject of marriage. See, also, 1 Pub. Gen. Laws Md., p. 200, where the expression "negro or of negro descent" is used.

In South Carolina, the constitution of 1895 (article 3, section 33) reads: "The marriage of a white person with a negro, or mulatto, or person who shall have one-eighth or more negro blood," etc.

³⁰⁰ And 1 Civil Code, article 5, sections 1293-1299 (Agricultural Schools), uses the word "colored" throughout, and section 2664, volume 1, on the subject of marriage, uses the words "negro or mulatto." And the public school acts use the words "colored" or "colored races."

In Tennessee, the Code of 1884, on the subject of schools (section 1208, article 9), hospitals (section 2071, article 6), deaf and dumb institutes (section 2098, article 6), railroads (section 2364), uses the word "colored" throughout—and on the subject of marriages (section 3291) uses the words "negroes, mulattoes, or persons of mixed blood, descended," etc. Same in the constitution of 1870.

In Florida, General Statutes of 1906, sections 3529-3533, on the subject of miscegenation, uses the words "negro or mulatto." Section 1, page 165, declares that "The term 'negro' shall include every person having one-eighth or more of negro blood." The constitution on the subject of schools (article 12, section 12) uses the word "colored." On the subject of marriage (article 16, section 24) it uses the expression "negro or negro descent."

In Georgia, 2 Civil Code of 1895, article 3, section 1820, provides that: "All negroes, mulattoes and their descendants having one-eighth negro or African blood in their veins shall be known in this state as persons of color."

Constitution, article 8, section 5906, on the subject of schools, uses the term "colored."

In Mississippi, Code of 1906, section 3244, on the subject of marriage, uses the expression "negro or mulatto, or persons who shall have one-eighth or more negro blood." Sections 4059, 4060, on the subject of railroads, uses the term "colored" throughout; and so does the constitution of 1890 on the subject of schools (section 207).

In West Virginia, the Code of 1906 uses the word "colored" throughout. Thus, section 1763 et seq., on the subject of colored institutes; section 1589 et seq., on the subject of ³¹⁰ schools; sections 4359, 4360, on the subject of miscegenation. And so does constitution, article 12, section 8 (Code 1906, page 83), on the subject of schools; sections 2889 and 2909, on the subject of marriage.

In Alabama, the constitution, forbidding marriages, uses the expression "negro or descendant of a negro": Const. 1901, sec. 102. The Political Code, as already stated, defines the word "negro." In the legislation of the state generally the word "colored" is used thus. Constitution, section 256, on the subject of schools; Code, section 5487, on the subject of railroads, etc.

In North Carolina, the Code (section 1084, page 437) provides that "all marriages between a white person and a person of negro descent to the third generation are void." The legislation of the state in other connections uses the word "colored."

In Virginia, the word "colored" is used throughout, except that, in prohibiting marriages, Code of 1873 (Code 1887 not in library), page 1208, chapter 192, section 8, uses the word "negro." There is a statute in Virginia providing that "every person having one-fourth or more of negro blood shall be deemed a colored person." In *McPherson v. Commonwealth*, 28 Gratt. 939, the supreme court of Virginia held that a person having less than one-fourth of negro blood was not a negro. To the same effect, *Jones v. Commonwealth*, 80 Va. 538. The court was interpreting the first of the above-quoted statutes in connection with the second, and assumed that the word "negro" was convertible with "colored." We are not prepared to say that the second of the said statutes does not have the effect of making the two terms completely synonymous in Virginia.

In Kentucky, the statute with reference to marriage (Rev. Stats. 1894, secs. 2097, 2098) uses the expression "negro or mulatto," and adds that: "Those shall be deemed negroes and mulattoes who are of pure negro blood, and those descended from a negro to the third generation inclusive": ³¹¹ See Laws of Kentucky, 1865-66, chapter 556, section 3. Constitution of 1891, section 187, on the subject of schools, and Revised Stat-

utes, on same subject, pages 1448-1452, use the word "colored" throughout.

In Missouri, Laws of 1864, page 67, there is a statute defining the terms "negro" and "mulatto."

Also in Arkansas, Kirby's Digest of 1904, section 6632, page 1378, provides a statutory definition.

The laws of Oklahoma are not in the state library.

Nothing is to be found on the subject in the laws of Kansas or the District of Columbia.

In Texas, the word "colored" is used generally, except in the law forbidding marriages, where the expression "African and persons of African descent" is used. And the word is defined by statute: Rev. Stats. 1895, art. 3908. And in the separate car law the word "negro" is used.

Passing to the other states, we find that in New York the words "colored" and "of African descent" are used: 1 Rev. Stats., Birdseye 2d ed., tit. "Schools," p. 572, art. 11; 2 Rev. Stats. (Insurance), p. 1692, sec. 319, par. 4.

So in Massachusetts: Rev. Laws (Schools), p. 478, (Kidnaping), p. 1746; "negro, mulatto, or other persons of color."

In Indiana, Burns' Annotated Statutes of 1908, section 2641, marriage is prohibited between "white persons and persons having one-eighth or more negro blood." Elsewhere, the expressions are "negro or mulatto" (Const., art. 1, sec. 82; 2 Burns' Annotated Statutes of 1908, p. 237) and "colored" (2 Burns' Annotated Statutes of 1908, pp. 361, 1175).

In Ohio, the terms used are "colored," "wholly or partially of African descent," "persons of color": 2 Rev. Stats., secs. 3631-1, 3631-2.

In Arizona, Revised Statutes, page 809, article 3092, forbids marriage between white and "negro or descendant of negro."

In Nebraska, Cobby's Annotated Statutes of 1907, section 4275, forbids marriage between white and persons "possessed of one-fourth or more of negro blood."

In Nevada, Compiled Laws, section 4853, subsection 3, ³¹² page 944, forbids illicit cohabitation between white and "any black person, mulatto, Indian or Chinese."

In Illinois, the word "colored" is used throughout: Const., art. 8 (Schools); Act March 24, 1874 (Rev. Stats. 1874, c. 122, sec. 100).

In Montana, Laws of 1909, chapter 49, page 57, prohibiting marriages, uses the expression "negroes and persons of negro blood."

In Michigan, Howell's Annotated Statutes of 1882, paragraph 6214, page 1619, on subject of marriages, uses expression "wholly or in part of African descent." The constitution (Schools) uses word "colored."

The foregoing review of the laws of the other states is, we realize, very imperfect and superficial; but it suffices to show that the word "negro," very far from having been generally recognized and accepted as including within its meaning persons of mixed negro blood, has, on the contrary, never been so used, unless coupled with defining words, or with a definition statutorily elsewhere adopted, except perhaps in Virginia. We say "perhaps," because there is in Virginia a statute which may be said to impart that meaning to the word.

If we pass from statutory literature and come to judicial literature, we find the same approximate uniformity in the use of the word "colored" whenever the idea is to refer to persons in general having negro blood; and the use of the word "negro" unqualified only when the reference is to the negro, properly so called, or blacks. Thus in the first of our volume of reports (1 Mart., O. S., 183, the case of *Adelle v. Beauregard*), the syllabus reads: "Persons of color are presumed free—negroes otherwise."

A sharp distinction is here drawn between persons of color and negroes proper or blacks. In the following cases the word "colored" is used throughout to designate negroes proper and persons of mixed negro blood: *Ex parte* ³¹³ Plessy, 45 La. Ann. 80, 11 South. 948, 18 L. R. A. 639 (a railroad case); *Decuir v. Benson*, 27 La. Ann. 1 (a steamboat case); same case on appeal to supreme court of United States (*Hall v. De Cuir*). 95 U. S. 485, 24 L. ed. 547; *State v. Judge*, 44 La. Ann. 770, 11 South. 74 (a railroad case); *State v. Pearson*, 110 La. 387, 34 South. 575 (a street-car case); *Lange v. Richoux*, 6 La. 560; *Robinett v. Verdun's Vendees*, 14 La. 542; *Compton v. Prescott*, 12 Rob. 56; *Badillo v. Tio*, 6 La. Ann. 129; *Succession of Hebert*, 33 La. Ann. 1099; *Succession of Vance*, 110 La. 760, 34 South. 767; *Cazanave v. Bingaman*, 21 La. Ann. 435; *Succession of Colwell*, 34 La. Ann. 265; *Jung v. Dorio-court*, 4 La. 175; *Holmes v. Holmes*, 6 La. 470, 26 Am. Dec. 482; *Succession of Pearce*, 30 La. Ann. 1168; *The Sue*, 22 Fed. 843; *Louisville etc. R. Co. v. Mississippi*, 66 Miss. 662, 14 Am. St. Rep. 599, 6 South. 203, 5 L. R. A. 132; *Logwood v. Memphis etc. Co.*, 23 Fed. 318; *Murphy v. Western etc. R. R.*, 23 Fed. 637; *State v. McCann*, 21 Ohio St. 198; *People v. Gallagher*, 93 N. Y. 438, 45 Am. Rep. 232; *Roberts v. City of Boston*, 5 Cush. (Mass.) 198.

In *Chesapeake etc. R. R. Co. v. Wells*, 85 Tenn. 613, 4 S. W. 5, a railroad passenger case, the plaintiff was a mulatto, and the court used the word "mulatto" throughout, except when referring to the "colored" porter.

In *Lee v. Hill*, 83 Ky. 49, the word "negro" was used; but whether for the purpose of designating the negro proper, or also the person of mixed negro blood, cannot be ascertained from the decision.

In *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738, the term "negro" was used, but the plaintiff and his children were negroes of the full blood; hence the word "negro" was the appropriate term to use in the case. Where, however, the schools act is referred to and the school children, the word "colored" is used.

In *State v. Duffy*, 7 ³¹⁴ Nev. 342, 8 Am. Rep. 713, the word "negro" occurs both in the syllabus and in the decision; but the court was dealing with a statute which read: "Negroes, Mongolians and Indians shall not be admitted into the public schools."

In *West Chester etc. R. R. v. Miles*, 55 Pa. 209, 93 Am. Dec. 744, the court seems to have used the words "negroes" and "black" convertibly with "colored." The case, however, in no way involved the meaning of these terms; but dealt exclusively with the right to provide separate accommodation for the races on the cars of the plaintiff company.

In *Ward v. Flood*, 48 Cal. 36, 17 Am. Rep. 405, the words of the statute were "of African descent" and "colored." Nowhere "negro" unqualified.

The cases in the following long list involved slaves, rights to slaves, rights claimed by slaves, suits for freedom, incapacity to inherit resulting from the impossibility of whites and persons of color to marry, etc. In not one of these cases is the word "negro" used as including mulattoes, and still less quadroons, etc. Where the word "negro" is used it is with the meaning of a black person. Not necessarily a pure-blooded African; but a black person. The word "colored" is used with the same freedom as if its meaning, as expressing a person having negro blood in his veins, were no more uncertain than is the meaning of the word "horse" or "man": *Merry v. Chexnaider*, 8 Mart., N. S., 699; *Gomez v. Bonneval*, 6 Mart., O. S., 656; *Cuffy v. Castillon*, 5 Mart., O. S., 494; *Metayer v. Metayer*, 6 Mart., O. S., 16; *Metayer v. Noret*, 5 Mart., O. S., 566; *Forsyth v. Nash*, 4 Mart., O. S., 385; *Brown v. Compton*, 10 Mart., O. S., 425; *Simmins v. Parker*, 4 Mart., N. S., 200; *Hawkins v. Vanwinckle*, 6 Mart., N. S., 418; *Girod v. Lewis*, 6 Mart., O. S., 559; *Livaudais Heirs v. Fon*, 8 Mart., O. S., 161; *Allain v. Young*, 9 Mart., O. S., 221; *Delery v. Mornet*, 11 Mart., O. S., 4; ³¹⁵ *Morgan's Syndics v. Fiveash*, 8 Mart., N. S., 588; *Labranche v. Watkins*, 4 Mart., O. S., 391; *Palfrey v. Rivas*, 7 Mart., O. S., 371; *Morgan v. Mitchell*, 3 Mart., N. S., 576; *Catin v. D'Orgensy's Heirs*, 8 Mart., O. S., 218; *Moosa v. Allain*, 4 Mart., N. S., 99; *Louis v. Cabarrus*, 7 La. 170; *Prudence v. Bermodi*, 1 La. 234; *Poulard v. Delamare*, 12 La. 267; *Smith v. Smith*, 13 La. 444; *Poydras v. Taylor*, 18 La. 12; *Mary v. Morris*, 7 La. 139; *Marie Louise v. Marot*, 8 La. 475; *Phillis v. Gentin*, 9 La. 208; *Grounux v. Abat's Exrs.*, 7 La. 17; *Poydras v. Mourain*,

9 La. 492; Markham v. Close, 2 La. 584; Moffat v. Vion, 5 La. 356; Hart v. St. Romes, 7 La. 586; Guerrier v. Lembeth, 9 La. 339; Hurst v. Wallace, 5 La. 98; Strawbridge v. Turner, 9 La. 213; Rice v. Cade, 10 La. 288; Goldenbow v. Wright, 13 La. 374; Buel v. New York Steamer, 17 La. 541; Valsain v. Cloutier, 3 La. 170, 22 Am. Dec. 179; Phillis v. Gentin, 9 La. 208; State v. Moore, 8 Rob. 518; McCargo v. New Orleans Ins. Co., 10 Rob. 202, 43 Am. Dec. 180; Maria v. Edwards, 1 Rob. 359; Nolé v. De St. Romes, 3 Rob. 484; Mathews v. Boland, 5 Rob. 200; Fanchonette v. Grange, 5 Rob. 510; Verdun v. Splane, 6 Rob. 530; Jackson v. Bridges' Heirs, 1 Rob. 172; Francois v. Lobrano, 10 Rob. 450; Winston v. Foster, 5 Rob. 113; Feltus v. Anders, 5 Rob. 7; Cotton v. Brien, 6 Rob. 115; Frierson v. Irwin, 5 La. Ann. 525; Baldree v. Davenport, 7 La. Ann. 589; State v. Dick, 4 La. Ann. 182; Conant v. Guesnard, 5 La. Ann. 696; Eulalie v. Long, 9 La. Ann. 9; Liza v. Puissant, 7 La. Ann. 80; Haynes v. Forno, 8 La. Ann. 35; Brown v. Smith, 8 La. Ann. 59; Barclay v. Sewell, 12 La. Ann. 262; Pauline v. Hubert, 14 La. Ann. 161; Gaudet v. Gourdain, 3 La. Ann. 136; Angelina v. Whitehead, 3 La. Ann. 556; Mary v. Brown, 5 La. Ann. 269; Trahan's Heirs v. Trahan, 8 La. Ann. 455; Virginia v. Himel, 10 La. Ann. 185; Price v. Ray, 14 La. Ann. 697; Hardesty v. Wormley, 10 La. Ann. 239; ³¹⁶ Delphine v. Guillet, 11 La. Ann. 424; Henriette v. Barnes' Heirs, 11 La. Ann. 453; Jamison v. Bridge, 14 La. Ann. 31; Jones v. State, 13 La. Ann. 406; Thompson v. Touriac, 13 La. Ann. 605; Deshotels v. Soileau, 14 La. Ann. 745; George v. Demouy, 14 La. Ann. 145; Carmouche v. Carmouche, 12 La. Ann. 721; Engenie v. Preval, 2 La. Ann. 180; Arsene v. Pigneguy, 2 La. Ann. 620; Sophie v. Duplessis, 2 La. Ann. 724; Matilda v. Autrey, 10 La. Ann. 555; Maranthe v. Hunter, 11 La. Ann. 734; Vail v. Bird, 6 La. Ann. 223; Baker v. Tabor, 7 La. Ann. 556; McDowell v. Couch, 6 La. Ann. 365; State v. Whetstone, 13 La. Ann. 376; Collingsworth v. Covington, 2 La. Ann. 406; Hynson v. Meuillon, 2 La. Ann. 798; Arnoult v. Deschappelles, 4 La. Ann. 41; Bibb v. Hebert, 3 La. Ann. 132; Blanchard v. Dixon, 4 La. Ann. 57; McCutcheon v. Angelo, 14 La. Ann. 34; Arnandez v. Lawes, 5 La. Ann. 127; Carmouche v. Bouis, 6 La. Ann. 96, 54 Am. Dec. 558; Benjamin v. Davis, 6 La. Ann. 472; Kemp v. Hutchinson, 10 La. Ann. 494; Griffing v. Routh, 11 La. Ann. 135; Gardiner v. Thibodeau, 14 La. Ann. 732; Williamson v. Norton, 7 La. Ann. 393; Spalding v. Taylor, 1 La. Ann. 195; Botts v. Cochrane, 4 La. Ann. 35; Dowty v. Templeton, 9 La. Ann. 549; Farwell v. Harris, 12 La. Ann. 50; Barry v. Kimball, 12 La. Ann. 372; Daret v. Gray, 12 La. Ann. 394; Buddy v. The Vanleer, 6 La. Ann. 34; Marciacq v. Wright, 13 La. Ann. 27; Vinot v. Bertrand, 6 La. Ann. 474; Oates v. Caffin, 3 La. Ann. 339;

Leigh v. Meurice, 6 La. Ann. 476; Landry v. Klopman, 13 La. Ann. 345; Gaudet v. Gourdain, 3 La. Ann. 136; Carmelite v. Lecaze, 7 La. Ann. 629; Henderson's Heirs v. Rost, 11 La. Ann. 541; Marshall v. Watrigant, 13 La. Ann. 619; State v. Solomon, 15 La. Ann. 463; Bateman v. Frisby, 15 La. Ann. 58; Rost v. Doyal's Heirs, 15 La. Ann. 265; Foster v. Mish, 15 La. Ann. 199; Howes v. The Red Chief, 15 La. Ann. 321; Maille v. Blas, 15 La. Ann. ³¹⁷ 100; Beverley v. Str. Empire, 15 La. Ann. 432; Pelham v. The Messenger, 16 La. Ann. 99.

The foregoing is not given as being an exhaustive review of the decisions wherein the courts of this country might have had occasion to make use of a term to designate persons of the mixed negro blood; but merely as a review of a certain number of cases taken at random, without choice, except that we have sought to include all those of our own reports.

The precise question of whether the word "negro" in its ordinary acceptance includes within its meaning mulattoes, quadroons, etc., has never been considered by the courts, so far as we have been able to ascertain. The decisions coming nearest to it are the following:

In *People v. Hall*, 4 Cal. 399, the court, interpreting the following statute: "No black or mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man"; held, that the statute disqualified all races other than Caucasian, and that, therefore, a Chinaman could not testify. In the course of the opinion the court said: "The word 'black' may include all negroes, but the term 'negroes' does not include all black persons." It will be observed, also, that the legislature of California did not consider that the words "black person" included "mulattoes," for it deemed it necessary to add "or mulattoes" in order to make the statute include mulattoes, meaning, no doubt, by "mulattoes" all persons of mixed negro blood.

In *Thurman v. State*, 18 Ala. 276, the court, interpreting clause 5 of section 2 of the Code of Alabama, which contains a provision defining the term "negro" and "mulatto," and makes the latter to mean "a person of mixed blood, descended on the part of the father or mother from negro ancestors to the third generation inclusive, though one ancestor of each generation may have been white," said: ³¹⁸ "The contention of appellant that she could not be convicted of the felonious grade of the offense charged if it appeared that her paramour was a mulatto, the indictment charging cohabitation with a negro, proceeded, doubtless, on the meaning of those terms, unaffected by the statute to which we have referred; that is, that a negro, generically considered, is a descendant of the whole blood from the black, woolly-headed race of Southern Africa, and that a

mulatto is of the half blood, a person who is the offspring of a negress by a white man, or of a white woman by a negro."

In *Felix v. State*, 18 Ala. 720, on an allegation that a person was a negro, and proof that he was a mulatto, and the question being as to whether the proof sustained the allegation, the court said: "The word 'negro,' meaning a black man descended from the black race of Southern Africa, is not understood in common parlance to mean a mulatto, and our statutes seem to make the distinction between them." See, also, *Linton v. State*, 88 Ala. 216, 7 South. 261.

This, so far as we know, is the only extant judicial expression of opinion (barring that of the two judges of the criminal district court for the parish of Orleans in the instant case) regarding the popular meaning of the word "negro" when used without any qualification, and in the absence of any statute enlarging the ordinary meaning of the word.

In *State v. Davis*, and *State v. Hanna*, 2 Bail. (S. C.) 558, the court interpreting a statute which disqualified negroes and mulattoes as witnesses, held that: Every person of "a distinct and visible admixture of negro blood is to be denominated a mulatto, or person of color. . . . The distinctions which have obtained in the French and Spanish American colonies, and in our sister state of Louisiana, in relation to persons of mixed European and negro blood, have not been admitted in this state. There the descendant of a mulatto—that is, a person of an equal mixture of European and negro blood and a white—is called a 'quadroon.' This term has not been adopted in our state, and I have no doubt that according to the popular acceptance of the term among us such a person would be called a mulatto, or person of color."

Let it be noted, first, that the court does not say that the descendant of a mulatto and ³¹⁹ a white would be known in Louisiana as a "negro," but as a "quadroon"; and that "according to popular acceptance such a person would be called [in South Carolina, not a negro, but] a mulatto, or person of color."

In *State v. Chavers*, 50 N. C. 11, the court interpreted the following statutory provision: "That all freed persons descended from negro ancestors to the fourth generation, inclusive, though one ancestor of each generation may have been a white person, shall be deemed free negroes and persons of mixed blood"—and held that: "A person must have in his veins less than one-sixteenth part of negro blood, before he will cease to be a free negro, no matter how far back you had to go to find a pure negro ancestor."

Here the court was simply interpreting a statute and using the language of the statute.

In Ohio a person is white or colored accordingly as the white or the colored blood predominates: *Monroe v. Collins*, 17 Ohio St. 665; *Williams v. School Dist.*, *Wright (Ohio)*, 579; *Lane v. Baker*, 12 Ohio, 237; *Gray v. State*, 4 Ohio, 353; *Anderson v. Millikin*, 9 Ohio St. 568.

In Michigan a person of less than one-fourth negro blood has been held to be a white person within the meaning of the constitutional provision limiting the elective franchise to "white male citizens": *People v. Dean*, 14 Mich. 406.

In *Frasher v. State*, 3 Tex. App. 263, 30 Am. Rep. 131, under a statute forbidding marriage between "a white person and a negro or a person of mixed blood descended from negro ancestry to the third generation"—an indictment charged that the defendant, a white man, married a negro woman—it was held that it was insufficient to show that the woman was of the mixed blood.

The decision of this court in the case of *Lee v. New Orleans etc. R. R. Co.*, 125 La. 236, 51 South. 182, is extensively quoted ³²⁰ from in the brief of the prosecution, as conclusive of the question now at issue; but we do not see that it has any bearing. The question there was not, as here, whether the word "negro," unqualified, embraces within its meaning persons of mixed negro blood, but as to what proportion of negro blood a person must be possessed of in order to be a colored person within the meaning of the separate railroad coach statute. The court was in no way, shape or form, directly or indirectly, called upon in that case to interpret the word "negro" as including or not within its meaning, when unqualified and in absence of a defining statute, persons of mixed negro blood.

The other cases cited in the same connection in the brief filed in behalf of the prosecution are *Clark v. Board of School Directors*, 24 Iowa, 266; *Johnson v. Town of Norwich*, 29 Conn. 407; *Pierce v. School Trustees*, 46 N. J. L. 79; *Van Camp v. Board of Education of Logan*, 9 Ohio St. 406.

In *Clark v. Board of School Directors*, 24 Iowa, 266, the question was whether, under the constitution and the statutes, which made no distinction between the white and the colored youths of the state, the school board could maintain separate schools for the white and the colored. There was absolutely no question in the case about the meaning of the word "negro." In fact, that word does not occur in the decision. While arguing that, if the school board could exclude African children from the schools, they could exclude Irish, French, German, English, etc., the court said: "The term 'colored race' is but another designation, and in this country but a synonym, for 'African.'"

This is the nearest the court came to mentioning the word "negro."

In *Johnson v. Town of Norwich*, 29 Conn. 407, the question was whether a person having ³²¹ "one-fourth African negro blood" was "a person of color." The court said: "According to the common, general, and, indeed, universal, acceptation of the phrase, 'persons of color' in this community, it embraces not only all persons descended wholly from African ancestors, and therefore of pure and unmixed African blood, but those who have descended in part only from such ancestors, and have a distinct, visible admixture of African blood."

There was no question in the case of the meaning of the word "negro," nor is there anything in the case that can in the most distant manner throw any light upon the meaning of that term.

In *Pierce v. School Trustees*, 46 N. J. L. 79, the statute forbade the exclusion of a child from any school "on account of his or her religion, nationality or color." The excluded child was admittedly a mulatto. There was no pretense to its being white. The court said: "Counsel further urges that since, under the rule of the trustees, an Italian (for example) as dark as the relator's children would have been admitted, the exclusion was therefore owing, not to 'color,' but to race, which the statute does not prohibit. But I think the term 'color,' as applied to persons in this country, has had too distinct a history to leave possible such an interpretation of the law. Both in the statute and in the regulations of the respondents persons of color are persons of the negro race."

Here the court was dealing with the meaning of the term "persons of color," not with the meaning of the word "negro race," as including or not persons of mixed blood.

In *Van Camp v. Board of Education of Logan*, 9 Ohio St. 406, the court said: "The only question presented is whether children of five-eighths white and three-eighths African blood, who are distinctly colored and generally treated and regarded as colored children by the community where they reside, are of right entitled to admission in white schools."

The contention, as shown by the dissenting opinion, was as to whether the term "colored children," made use of in different parts of the statute, had the same meaning as the term "black or mulatto," as used in other ³²² parts of the statute. The court held that the object of the statute was to divide the school children of the state into two categories—the "white" and the "colored"—and proceeded, as follows: "To which of these classes do the children of the plaintiff in error belong—'white' or 'colored'? They are in the ordinary, if they are not in the legal, sense, white. The demurrer admits that they are, in

fact, if not in law, 'colored' children. Our standard philologist, Webster, defines 'colored people' to be 'black people,' 'Africans, or their descendants, mixed or unmixed.' Such is the common understanding of the term. A person who has any perceptible admixture of African blood is generally called a 'colored' person."

There was no denial that the children were colored persons, and there was no contention that they were "blacks or mulattoes." The whole case turned upon whether the term "colored persons" made use of in the statute was intended to be restricted to "blacks or mulattoes," or was intended to be extended to "colored persons" generally. The court was not called upon to interpret the term "negro." It never occurred to the learned counsel in the case or to the court that the words "blacks or mulattoes" could be intended to include persons of five-eighths white blood. In the instant case, the argument is that the term "negro race" includes persons of seven-eighths white blood.

These decisions are authority that a negro is necessarily a person of color; but not that a person of color is necessarily a negro. There are no negroes who are not persons of color; but there are persons of color who are not negroes. The term "colored," as applied to race, was given the meaning of the word "negro" for the very purpose of having in the language a term including within its meaning both negroes and descendants of negroes; but the converse is not true. The word "negro" was never adopted into the language for the purpose of designating persons of mixed blood. On the contrary, it was for the purpose, and the sole purpose, of ³²³ expressing the meaning of persons of the negro race proper; and it can have now a different, or more enlarged, meaning only by enlarging its original meaning, as was done with the word "colored," and imparting to it a meaning different from that which it originally bore in the language. The legislature might do this but the statute by which it did it would have authority only in Louisiana, and the word "negro" would still continue to mean, the world over, outside of Louisiana, except where its meaning had been in like manner statutorily enlarged, a person of the African race, or possessing the black color and other characteristics of the African.

We do not think there could be any serious denial of the fact that in Louisiana the words "mulatto," "quadroon," and "octoroon" are of as definite meaning as the word "man" or "child," and that, among educated people at least, they are as well and widely known. There is also the less widely known word "griff," which, in this state, has a definite meaning, indicating the issue of a negro and a mulatto. The person too black to be a mulatto

and too pale in color to be a negro is a griff. The person too dark to be a white, and too bright to be a griff, is a mulatto. The quadroon is distinctly whiter than the mulatto. Between these different shades, we do not believe there is much, if any, difficulty in distinguishing. Nor can there be, we think, any serious denial of the fact that in Louisiana, and, indeed, throughout the United States (except on the Pacific slope), the word "colored," when applied to race, has the definite and well-known meaning of a person having negro blood in his veins. We think, also, that any candid mind must admit that the word "negro" of itself, unqualified, does not necessarily include within its meaning persons possessed of only an admixture of negro blood; notably those whose admixture is so slight that in their case even ³²⁴ an expert cannot be positive. That much has to be admitted, else why should the legislatures of all the southern states (to say nothing of the northern), save and except, perhaps, in the one case of the Virginia statute hereinabove referred to and commented on, have uniformly abstained from using the word without qualifying it and have deemed it necessary to enlarge the ordinary, or dictionary, meaning of the word by a special statutory definition whenever they have desired to use it as including persons of mere mixed negro blood; else, why should the word "colored" have received such universal adoption as meaning persons of negro blood pure or mixed, if there was already in the language a word expressing that meaning, and no special word was needed to express it? Well, then, if there are well-known words in the language by which persons of negro blood, whether pure or mixed, may be unmistakably referred to or designated, and, in fact, since that meaning could be unmistakably conveyed by the use of a phrase instead of by a single word, and since the word "negro" of itself and unqualified has to be admitted to be, to say the least, of equivocal meaning as including persons not having the appearance of negroes, though having in their veins some admixture of negro blood, can anyone say why the legislature should have said "negro," plain "negro," or "negro race," unqualified, if its intention was to include these persons of such slight admixture of blood? The legislature must be supposed to know the words of the language and to use them according to their ordinary signification. When, therefore, it used the word "negro," plain "negro," or "negro race," and not these other words or forms of speech including within their meaning persons who, though apparently white, yet had in their veins a perceptible admixture of negro blood, the inevitable inference is that it did so because it meant negro, plain negro, or persons ³²⁵ black as negroes and having the

characteristics of the negro, and not these other persons not coming within that description.

It might be different if there were something in the context to enlarge the ordinary meaning of the word; but there is nothing. The word stands isolated, and has to speak for itself.

A consideration of the object sought to be attained by a statute oftentimes throws light upon its meaning, and the argument is made that such is the case in the present instance, that the purpose was to prevent a mixing of bloods, and that that object would not be accomplished if only the blacks and not also the mulattoes and quadroons and octoroons and others of lesser mixture were included within the prohibition; that, in fact, the statute would then be practically a dead letter, since concubinage of the whites with the blacks is practically unknown.

That argument would have great weight if it did not, in the first place, lead to a disregard of the plain meaning of words in advocacy of an attempt to reach the supposed spirit of the statute; and if it did not, in the second place, lose sight of facts of no less importance than the history of the negro race in Louisiana, and the whole past legislation of the state on the subject of the sexual relations of the two races. That history teaches that from birth of the state up to the last session of the legislature concubinage with even the pure-blooded negro was not forbidden, and that to this day cohabitation with even the pure-blooded negro is not forbidden except in concubinage; and that from 1870 up to 1894 marriage with the pure-blooded negro was not only not forbidden, but was legal. And the abstention from legislating on the subject cannot be ascribed to a difference in conditions or to lack of interest in the subject; for, during all this time, conditions have been the same, and of all fit subjects for legislation this one of the relations ³²⁶ of the two races has been one of the most prominent in public thought, demanding the closest and highest attention of the statesmen of the day. It is the growth and progress of ideas that has induced this legislation. Up to the session of 1894 the legislature had evidently not deemed the time ripe for prohibiting marriage. Up to the session of 1908, it had not deemed the time ripe for prohibiting concubinage even with the pure-blooded negro. It has not deemed the time ripe for prohibiting cohabitation even with the pure-blooded negro, except in concubinage. Whether it deemed the time ripe in 1908 for prohibiting concubinage with the person of slight admixture of negro blood, no matter how slight the admixture, and has done so by this statute, is the question. If it has done so, it has certainly chosen to do it in most

questionable form, when it could just as easily have done it in a form free from ambiguity by using the terms made familiar by the constitution and by our other past legislation on the subject of the races. That our legislature, which in the whole history of the state has not deemed it expedient to impose the slightest inhibition or penalty upon concubinage even with the pure-blooded negro, and which continues to deem it inexpedient to impose the slightest restriction upon free illicit cohabitation with the pure-blooded negro except in concubinage, should all of a sudden (conditions being unchanged) have awakened to the necessity of making concubinage even with persons barely exhibiting a trace of negro blood not only an offense and a crime, but a felony, is not a conclusion necessarily to be adopted. Legislation upon important and prominent subjects does not usually go by fits and starts, but by gradual progression. At all events, if the intention was thus to go at one clean sweep from one extreme to the other, terms expressive of that intention should have been used, and not terms which, in the light of the ordinary meaning of words, and in the light of ³²⁷ the past legislation of the state, and of the legislation of the other states, and of the judicial literature of the country, are not expressive of that intention, or, at best, express it ambiguously.

The connection also in which a word is used often operates as a limitation, or as an enlargement, of its meaning. Thus, this same word "negro," if used in connection with the social relations of the whites and negroes and persons of mixed negro blood, would certainly convey the precise and exact meaning of the word "colored" when used in the same connection, because it is known that socially persons of mixed colored blood are known to be classed with negroes. A notice posted at the entrance of a ballroom that negroes are not admitted would certainly mean that colored persons—i. e., persons of mixed negro blood as well as negroes proper—were not admitted; and a similar notice at the entrance of a hotel or theater would approximately with the same certainty have the same meaning. In all states where separate car laws have been in operation for some time a like notice at the entrance of a railroad coach or street-car would have the same meaning, though with diminishing certainty. But, while this is true of the word "negro" when used in connection with the social relations, it is not equally true of the word when used generally. For instance, a notice that all negroes were to be driven out of New Orleans would no doubt set everybody inquiring at what point the color line was to be drawn. Few in all likelihood would understand that the many people who have the appearance, education and

culture of whites were intended to be included in such an order. The contention of the prosecution is that the word "negro" is synonymous with "colored"—no matter in what connection it is used. This is not so. Had it been so, the law forbidding marriages would have used the word "negro," and not the word "colored"; ³²⁸ for "negro" would then have been the natural and obvious word to use.

It was suggested at the bar that the legislature would hardly permit whites and octoroons to live in concubinage when forbidding them to ride together in railroad coaches and street-cars. But the best answer to that suggestion is that—to use a homely illustration—"the proof of the pudding is in the eating thereof"; that the legislature has, as a matter of fact, done that very thing; that from the time of the passage of the separate car bills, years ago, until this last session of the legislature, not only octoroons, but jet black negroes, were allowed to live in concubinage with whites, although forbidden to ride in the same railroad coaches and street-cars with them. The question which the court has to deal with in this case is not what the legislature should have done, but what it has done. The only thing the courts can do (if they wish to keep within the legitimate scope of their functions) is to enforce the laws as they are written, interpreting them in accordance with the recognized and accepted canons of construction.

If conjectures are admissible, however, as to what considerations may have prompted the legislature to enact separate car statutes, while leaving the concubinage and illicit commerce of the races untrammelled, one consideration which readily suggests itself is that without separate statutes the whites would be brought in contact with the colored, no matter how objectionable the proximity might be to them, whilst their concubinage or illicit commerce with them could only be voluntary. The laws on the subject have heretofore been for the protection of the individual; whereas now the time has ripened for the protection of the race. To what length has the legislature gone in the latter direction is the question.

A consideration which fortifies the conclusion to which we have arrived is that penal ³²⁹ statutes are construed strictly. They are not "enlarged, or extended to cases not obviously within their words and purport": *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 25 Sup. Ct. Rep. 158, 49 L. ed. 363. They are construed in *favorem libertatis*. Cases not clearly embraced within them cannot be brought in by a doubtful construction. Nothing is a crime which the legislature does not clearly and unmistakably make a crime. This is strikingly illustrated by the cases of *State v. Smith*, 30 La. Ann. 846, and *State v. Depass*, 31 La.

Ann. 487, where incest went scot free because the statute making it a crime did not define what constitutes incest; and this, although incest is defined in every dictionary in the language.

For whatever it may be worth we will mention that, as framed by its author and presented to the legislature, the act we are dealing with contained the following clause:

"That a person who is as much as one thirty-second part negro shall be, for the purpose of this act, a person of the negro race."

Thus we find that the author of the act had not considered that the word "negro" of itself and unqualified, or in its ordinary acceptation, would include within its meaning mulattoes, quadroons, etc. Following the example of all those who had had occasion to frame similar laws in the past, where the word "negro" was used instead of the term "persons of color," he added a clause enlarging the ordinary, dictionary meaning of the word "negro." As he drafted and presented it, the act would most unquestionably have applied to all persons of color, and the question arises: Why did the legislature strike out the clause which unquestionably gave this act that application? If the act was intended to have that application, certainly the clause could do no harm. The negro blood is barely traceable beyond the one-sixteenth, and certainly not beyond the one thirty-second. The reason for striking out this clause could not, then, have ³³⁰ been for the purpose of extending its application to persons having less than one thirty-second part of negro blood. And, if the object of striking out that clause was not to extend to the application of the act, what could it have been, if not to restrict its application? The suggestion that the clause was stricken out because the word "negro" of itself and unqualified includes mulattoes, quadroons, octoroons, etc., and no additional clause was therefore necessary to give it that meaning, cannot explain the action of the legislature in striking out this clause. If the act was intended to apply to mulattoes, quadroons, etc., the clause could do no harm, and there was absolutely no reason to strike it out. It could only tend to make the act more definite. The author of the act, who doubtless had drafted it only after having read the legislation of the other states on the same or kindred subjects, deemed such a definition necessary. Those who had occasion to frame the kindred legislation in other states deemed it necessary to add such a definition of the word.

To say that the definition was wholly useless would be to lose sight of the fact that until the decision of this court in the case of *Iee v. New Orleans etc. R. R. Co.*, 125 La. 236, 51 South. 182, no one in this state—not the governor, not any judge of any of the courts of the state—could have under-

taken to say with any degree of authoritativeness what proportion of blood a person had to have in his veins in order to be classed as a person of color. The question had to come to this court, and a definition was adopted by this court only after study of the general jurisprudence upon the subject, and even then the definition first adopted was changed in consultation. To say, under these circumstances, that the reason why the definition which for the purpose of enlarging the ordinary dictionary meaning of the word "negro" the author of this bill had added to it was stricken out was that the definition ³³¹ was useless, mere surplusage, dead matter in the bill, is, in our opinion, to go dead against the plain truth of the matter. Had the definition not been stricken out, but remained in the bill, it would have saved this court much labor in the case of *Lee v. New Orleans etc. R. Co.*, 125 La. 236, 51 South. 182. We can now come to no other conclusion than that the legislature struck the definition out because the statute with the definition in it included mulattoes, quadroons, etc., whereas, shorn of the definition, it did not include them.

Judgment affirmed.

The chief justice concurs.

Justices Land and Nicholls dissent.

The Questions Involved in the Principal Case do not seem to have been directly passed upon in any other decision in this series of reports.

TAYLOR v. NEW ORLEANS TERMINAL COMPANY.

[126 La. 420, 52 South. 562.]

EMINENT DOMAIN—Failure to Object to Appropriation.—

If an owner of land fails to object in due time to an appropriation of part of it by a railroad, he is concluded from reclaiming the land free of the servitude imposed thereon and is relegated to the right of claiming damages: *St. Julien v. Morgan's R. R. Co.*, 35 La. Ann. 924. (p. 539.)

EMINENT DOMAIN—Right to Damages is Personal.—The right to claim these damages is personal to the owner of the land and does not pass to successive owners, unless they have been specially subrogated to it, for it does not pass with the title: *McCutchen v. Railroad*, 118 La. 438, 43 South. 42. (p. 539.)

RAILROAD—Duty to Fence and Drain—Grantees of Land.—

Where a railroad acquires land with the obligation to fence and drain it and construct crossings thereon, this right is a servitude in favor of the land, and the right to enforce it passes with the title. (p. 541.)

(Syllabi by the court.)

Saunders, Dufour & Dufour, for the appellant.

James J. McLaughlin and Frederick A. Middleton, for the appellee.

⁴²⁰ BREAUX, C. J. Plaintiff sued the defendant for the sum of \$3,750, with legal interest from judicial demand.

⁴²¹ He describes in his petition the land he owns; refers to his plat of survey and to the origin of his title.

He charges in his petition that defendant appropriated a strip of his land and constructed a switch track thereon, occupying about five acres of his land; that this alleged appropriation cuts off access from his said tract of land to a larger triangular shaped tract he owns, forming part of the south-east area of his property used by him as a pasture.

He fixed the value of the appropriated land at the sum of \$1,000, and the damages growing out of the appropriation at \$500, and avers that there is continuing damage committed which he alleges he "reserves the right to claim."

Plaintiff avers that defendant is bound, under the title which it holds, to construct wire fences, maintain ditches, and build gates and crossings, which it has failed to do.

Plaintiff charges that defendant entered upon his land with workmen and ran a preliminary line for a switch track; they cut down trees and damaged the property in the sum of \$250.

Plaintiff, in addition to the foregoing amount, claims \$1,000 damages caused by a preliminary survey.

The answer is: (a) That the land used for the switch was taken by defendant many years ago, but with the tacit consent of the then owner, and defendant has ever since been in the open, continuous and peaceable possession of the land so taken; except that plaintiff did recently attempt to interfere with defendant's possession, and thereupon plaintiff was promptly enjoined, at the instance of defendant, from further disturbing defendant.

That defendant had been in the possession and enjoyment of said switch track for many years before plaintiff bought the land through which the said track runs, and when ⁴²² he bought plaintiff bought the land as it then stood, and has no right now to claim damages or compensation for the land which defendant had previously taken and was then occupying with its switch track.

(b) That access to part of plaintiff's land is not prevented by the switch above mentioned, and, if access is in some degree impeded, the damages which plaintiff claims in his petition as being caused thereby are grossly exaggerated.

(c) That plaintiff is a stranger to and without any rights under the contract for right of way made with a former owner of the land, and his suit on this contract must therefore be rejected.

(d) That defendant had the legal right to make a preliminary survey for its contemplated new switch, and that it did make such a survey without damage to plaintiff's property, but has never actually built the contemplated new switch; and plaintiff's claim for damages is fictitious and wholly unfounded.

There can be no right to punitive damages. The judge *quo* gave judgment in favor of plaintiff:

First, for the value of three acres of land, which he found had been taken for, and were being occupied by, the switch, at \$300 an acre; in all, \$900.

Second, for \$100, amount of damages done by the preliminary survey.

Third, ordering the defendant to build the fences, ditches, etc., within a year; and, if it should not build them in that time, to pay the plaintiff \$500 with which to build them, and the defendant to maintain them thereafter.

The other demands of plaintiff were rejected.

The defendant appealed, and the plaintiff has answered praying for the amendment of the lower court's judgment.

By defendant's appropriation with the tacit ⁴²³ consent of the owner at the time, the right to the strip of land passed from the owner to the appropriator—the right became segregated from the property, and the owner became a creditor for the value of the property taken. The right was personal. The owner at the time had a claim personally for the amount.

The purchaser by the act of purchase does not become invested with a right to the value of the property taken unless the right is transferred with the property.

In a leading case (*St. Julien v. Morgan's R. R. Co.*, 35 La. Ann. 924) it was decided that the owner is concluded from reclaiming his property free of servitude imposed thereon if he failed to object to the appropriation in due time. He is allowed compensation for value instead of the property taken. The right inures to him personally and not to successive owners. This right to recover compensation is not connected with the title.

In the cited case, the plaintiff sought to return into possession of the property and to have himself recognized as the owner with all the rights which the word "owner" implies.

The railroad track, instead of being the track of a quasi-public corporation, would have become, had his demand been granted, to the extent that plaintiff claimed, the private property of the plaintiff.

The court in the cited case solved the difficulty by which it was confronted by relegating the plaintiff in that case to a compensation for value.

In another case, the court holds that plaintiffs "should have denied defendant's access and have prevented it by using legal

process"; that defendants thereby became creditors for value: *Boudier v. Morgan's L. & T. R. R. Co.*, 35 La. Ann. 947.

The company was not a trespasser, but had acquired, by absolute silence, an absolute ⁴²⁴ right: *Day v. New Orleans P. R. R. Co.*, 36 La. Ann. 244.

Again, his acquiescence did not prejudice his claim to damages: *Lawrence v. Morgan's etc. R. R.*, 39 La. Ann. 427, 4 Am. St. Rep. 265, 2 South. 69.

The owner has a right to damages; he cannot, however, treat the entry as a trespass for which the company is liable at the place of the asserted injury: *St. Julien v. Morgan's etc. R. R. Co.*, 39 La. Ann. 1063, 3 South. 280.

Again, this court said: "The claim is in the nature of a personal action for value of the land": *Mitchell v. New Orleans & N. E. R. R. Co.*, 41 La. Ann. 363, 6 South. 522.

There are other decisions to the same effect and not one to the contrary.

The question is settled by repeated decisions. If it were *res nova*, it would, perhaps, be different.

This brings us to a consideration of the question whether the plaintiff owns the right and has the authority to sue the defendant for the value.

Under prior decisions, he does not have the right to sue for value or damages, as it was not sold to his vendor, and his vendor did not sell it to him.

The taking of the right of way was done many years prior to plaintiff's becoming the owner of the land.

In order that a vendee may have the right of his vendor in this respect, as it is a personal right, there must be a special subrogation to him by his vendor.

That point was conclusively decided in the following cases: *Matthews v. Alsworth*, 45 La. Ann. 465, 12 South. 518; *Bradford v. Damare*, 46 La. Ann. 1530, 16 South. 487; and in the case recently decided of *McCutchen v. Texas & P. R. R. Co.*, 118 La. 436, 43 South. 42.

The damages done by the preliminary survey gives rise to the next question for decision.

The defendant unlawfully acted in the matter of this survey, in that it took possession of plaintiff's property, cut down his ⁴²⁵ trees (about fifty-two in number), and made an opening through his woods. They were small trees, it is true, of no great value. Yet this was an infringement upon plaintiff's right of property for which defendant should be made to pay. The amount allowed for this item, viz., \$100, is not too large; it cannot be less in view of defendant's invasion of plaintiff's right of property. No one prompted by right feeling will trespass upon the land of another and cut down his trees without at least seeking his permission.

We come to a consideration of plaintiff's claim for the failure of defendant to make ditches, put up fences, and construct crossings along the right of way.

This was never done, although in the Lochte deed to plaintiff's author the defendant had bound itself to make these improvements. Subsequently, the plaintiff bought the property.

The right followed the property and was not personal to the owner.

The original owner acquired the right as a servitude for the benefit of the estate and not for his own benefit.

Without the stipulation in the first deed, plaintiff had a right to these improvements; the railroad track was laid across plaintiff's land; the defendant had no reason to expect that it could take the land and escape making these improvements to drain the land and afford a crossing to the owner. It is in itself a right to servitude which plaintiff's author had acquired and which passed to the subsequent owner.

The defendant cannot keep the right of way and deny to the owner the improvements always made by railroad companies in the interest of the owner.

The court a quo condemned the defendant to make these improvements for which it had by agreement made itself liable, and for ⁴²⁶ which it was liable under every principle of right and justice. It should make them.

To the end of protecting the land, it became a part of plaintiff's right to a servitude. It became a part of the place, a part of the right bought.

The other items claimed by plaintiff are not allowed, as they are not sufficiently sustained by the evidence. It follows that the motion to amend before referred to is overruled.

For reasons assigned, the judgment appealed from is amended by striking therefrom \$900, amount allowed for the value of the land.

As amended, the judgment is affirmed, at appellant's costs.

Provosty, J., takes no part, not having heard the argument.

ON APPLICATION FOR REHEARING.

PER CURIAM. Our decree herein is amended by condemning the plaintiff and appellee, instead of the appellant, to pay the costs of appeal, and, as thus amended, is reaffirmed, and the applications for a rehearing are refused in all other respects.

The Legal Title to Property Appropriated to the Use of a Railroad or Telegraph Company with the acquiescence of its owner cannot thereafter be asserted against the company by the owner: Babcock v. Chicago & Northwestern Ry. Co., 81 Am. St. Rep. 845; Charleston etc. Ry. Co. v. Hughes, 105 Ga. 1, 70 Am. St. Rep. 17; but he does not, however, lose his right to recover compensation for the property

taken: *Oliver v. Pittsburgh R. R. Co.*, 131 Pa. 408, 17 Am. St. Rep. 814; *Thornton v. Sheffield etc. R. R. Co.*, 84 Ala. 109, 5 Am. St. Rep. 337.

An Equitable Action for Compensation may be Maintained by the owner of land appropriated by a railroad or telegraph company. He is not restricted to the right to recover such in a condemnation proceeding where the company does not make him a party to such a proceeding: *Phillips v. Postal Telegraph Cable Co.*, 130 N. C. 513, 89 Am. St. Rep. 868; *Babcock v. Chicago & Northwestern Ry. Co.*, 107 Wis. 280, 81 Am. St. Rep. 845; *Florida Southern R. R. Co. v. Hill*, 40 Fla. 1, 74 Am. St. Rep. 124; *Cohen v. St. Louis etc. R. Co.*, 34 Kan. 158, 55 Am. Rep. 242.

Abandonment of the Use of the Property by a corporation after its appropriation does not defeat the owner's right to compensation: *Babcock v. Chicago & Northwestern Ry. Co.*, 107 Wis. 280, 81 Am. St. Rep. 845; *Penn Mutual Life Ins. Co. v. Heirs*, 141 Ill. 35, 33 Am. St. Rep. 273; and see note to *Matter of Water Commrs.*, 86 Am. Dec. 202.

An Equitable Lien, in the Nature of a Vendor's Lien, may be asserted by an owner of property appropriated by a railroad company who elects to regard the appropriation as made under the right of eminent domain, which lien may be enforced as a charge upon the company's interest in the land and the improvements thereon: *Florida Southern R. R. Co. v. Hill*, 40 Fla. 1, 74 Am. St. Rep. 124.

The Right to Recover Compensation for the construction of a railroad is personal to the owner of the land and does not pass by a conveyance of the land: *McFadden v. Johnson*, 72 Pa. 335, 13 Am. Rep. 681.

A Railroad Company Which Entered upon Land with the consent of the owner or mortgagor, and without objection from anyone constructed and maintained its road for fifteen years, without acquiring title or paying damages, cannot be considered as a trespasser: *St. Johnsbury etc. R. Co. v. Williard*, 61 Vt. 134, 15 Am. St. Rep. 837; *Lafferty v. Schuykill etc. R. Co.*, 124 Pa. 297, 10 Am. St. Rep. 587.

WILLIAMS v. UNION FERRY COMPANY.

[126 La. 502, 52 South. 678.]

FERRY—Negligence of Passenger Boarding Boat.—The plaintiffs' mother, in attempting to board a ferry-boat, fell into the Mississippi river and was drowned. They sue the ferry company for damages as having caused her death by leaving open a gate at the end of a gangway leading to the boat, thereby misleading her into the belief that she (the boat) was safely moored to the wharf, and impliedly inviting plaintiffs' mother to go on, when in fact the ferry had swung out into the stream. The jury before which the case came rendered a verdict in favor of defendant, and plaintiffs have appealed. The judgment appealed from is affirmed. The death of the woman was due to her own rashness and negligence. (p. 547.)

FERRY—Boarding Boat After Starting.—One who attempts to board a ferry-boat after it has commenced to leave its dock and who, in attempting to jump upon it, falls into the water and is drowned, must be held to have assumed the risk of so doing and

to have been killed by her own negligence. (By the editor.) (p. 548.)

FERRY—Negligence.—The Leaving Open of a Gate at the end of a gangway down which passengers have to pass to enter a boat, where the attendant circumstances are such as to lull the approaching passengers into false security and mislead them by the reasonable belief that the boat is still tied to her usual landing place, constitutes negligence on the part of the ferry company operating the boat. (By the editor.) (p. 548.)

(Syllabi by the court except when stated to be by the editor.)

Geo. W. Flynn and M. D. Dimitry, for the appellants.

Frank E. Rainold, for the appellee.

503 NICHOLLS, J. Plaintiffs are the heirs of Marie Williams, and seek to recover from the defendant company thirty thousand dollars and interest as damages for her death, which they claim was the result of its fault. They alleged that the Union Ferry Company, a corporation duly organized, having a domicile and doing business in the city of New Orleans, is justly and truly indebted unto petitioners in the full sum of thirty thousand dollars for this, to wit:

That the said Union Ferry Company owns, conducts and operates what is known as the "Third District Ferry" of the city of New Orleans, and that said defendant company did own and conduct and operate on the night of February 4, 1909, the said ferry-boats, landing, and the approaches used in connection therewith, and particularly the ferry-boat "Hattie," and the landing pontoon bridge and the approaches at the head of Oliver street, in the fifth district of the city of New Orleans, or what is commonly known as Algiers, receiving passengers at that point, accepting ferriage, and agreeing to transport and deliver them without injury to the head of Barracks street in the third district of ⁵⁰⁴ this city; that on the night above set forth petitioners' mother, the late widow, Marie Williams, while returning home in the third district of this city after having attended church in Algiers, was drowned; that her death was due to the gross carelessness, negligence and want of skill of the defendant company and its employees; that after having paid her fare in the ferry-house of the Algiers landing she descended the walk or approach to a floating pontoon or landing, which landing is enclosed in a fence constructed and maintained by the defendant company for the purpose of protecting its patrons, in which said fence is placed a gate, and when said gate is open it indicates that it is safe for passengers to embark on the ferry from the pontoon or landing; the open gate further shows that the ferry is properly landed, and that it is without danger for passengers to board same; that on the night above set forth, when petitioners' mother had reached the afore-

described pontoon, finding the ferry at the landing and the gate on the pontoon opened, inviting her to embark on the ferry "Hattie," giving her assurance of her safety to do so, and indicating that it was without danger; that on the evening of the accident it was very inclement, and the rain was pouring down in torrents, requiring of the defendant company an exercise of unusual care and caution in the handling and conduct of its ferry and landing, all of which it failed to do, not even carrying out its own regulations for the safety of its patrons as it was customary to do, but with utter disregard of its duty, and through gross and criminal negligence of its servants and employees in charge of the ferry and landing, the said defendant allowed the forepart of the bow of the ferry to swing out, thereby opening a space between the landing and the ferry itself, and when petitioners' mother attempted to board she was precipitated into the river; that acting under the invitation of the ⁵⁰⁵ opened gate, giving her assurance of her safety to board the ferry, she attempted to step on the said ferry-boat, when she walked into the intervening space, and was as already stated precipitated into the river; that the bow of the said ferry continued to swing out farther, and after a short interval the signal was given to go ahead, the rear line was unloosed, and the ferry proceeded on its trip across the river regardless of the fact that petitioners' mother was floating on the top of the water, her skirt acting as a float, and that she remained in that position for a period of some ten minutes; that the drowning woman called and begged for assistance at the top of her voice, and although the defendant's employee stood directly on the edge of the ferry, and within hearing distance of the drowning woman, he made no effort to render any assistance of any kind whatsoever, not even throwing to her the rope that he had in his hand at the time; that certain passengers, Paul Vidivovich and L. Christinsen by name, seeing the terrible position of the woman, jumped back from the ferry to the landing or pontoon, and made every effort to rescue her from her perilous position, and would have probably succeeded in doing so had it not been for the fact that after petitioners' mother had fallen overboard the ferry was signaled to go ahead, and did go ahead, creating an eddy or current, which carried her out in the river and beyond the reach of the passengers, who jumped back on the landing, and who were making every effort to rescue her; that the company's employee was within a few feet of the engine-room, and could have easily called to or signaled the engineer to stop the boat, but due to his unskillfulness, gross and criminal negligence, and want of care, he made no effort either to stop the ferry or to aid and assist the passengers that were attempting to rescue her, although the passengers who had jumped from the ferry to the pontoon

⁵⁰⁶ were begging and insisting on the company's employees and servants to throw out a rope or float of some kind to aid and assist the drowning woman; that the death of petitioners' mother was due entirely to the gross negligence, carelessness and want of skill of the defendant company and its servants in allowing the gate to remain open after the ferry had partly left the landing, and also to the fact that the employee whose duty it was to close the gate was absent from his post and failed to perform his duties; that the said employee, Leon le Opeo by name, stated shortly after the accident to the passengers and police that he had forgotten to close the gate, and admitted his gross and criminal negligence, want of care, and disregard of the safety of human life; that petitioners' mother's death was also due to gross negligence, want of care and caution, on the part of the defendant in allowing a simple-minded youth, whose name is presently unknown to petitioners, too young and inexperienced to operate its ferry in the absence of its regular employee who failed to perform his duties; that petitioners' mother's death was not only due to the fact that defendant's servants failed to close the gate on the pontoon, the same being open, and inviting her to board the ferry, but also in allowing incompetent, unskilled, unreliable, and too youthful employees to perform the duties of those regularly assigned for this work; that the defendant company could have prevented the injury and death of petitioners' mother by closing the gate, and subsequently thereto, by an average care and diligence, when she had fallen in the river, and which it is its duty so to do. Petitioners claim five thousand dollars for the suffering of their mother, and twenty-five thousand dollars for petitioners' loss of her comfort, society, and motherly affection; that previous to the negligent drowning of petitioners' mother she was in good health, and had the usual life expectancy. Your further named ⁵⁰⁷ petitioner, Eloise Williams, wife of Optilus Sanders, asks that she be authorized to file this suit, and to stand in judgment herein.

In view of the premises, petitioners pray that the said Union Ferry Company, through its proper officer, be cited to appear and answer this petition, and, after due proceedings had, be condemned to pay petitioners the full sum of thirty thousand dollars, with interest from date of judgment, and for costs and for all general relief. Your fourthly named petitioner prays that she be authorized to file this suit and to stand in judgment herein.

Defendant answered. After pleading a general denial, it averred that if plaintiffs' mother met her death as alleged, she did so through no fault of respondent, its servants, agents, or employees, but that she met her death by drowning through her own fault, carelessness and negligence in attempting to board the ferry-boat, which was then under way and moving,

at a time and place and in the manner and under circumstances when it was imprudent for her to do so.

Further answering, respondent averred that if it be shown that respondent was in any way negligent, and that the drowned woman was plaintiffs' mother, her actions contributed to the cause of her death and bar any recovery against respondent. In view of the premises, respondent prays to be hence dismissed, with costs.

The case was tried before a jury, which returned a verdict in favor of the defendant. Judgment was rendered accordingly, and plaintiffs have appealed.

The plaintiffs invoke in this case the application of the rule announced in 19 Cyc. 511, and *Dougherty v. N. Y. Cent. Ry. Co.* (Sup.), 86 N. Y. Supp. 746, that, where a company operating a ferry-boat moors its boat and keeps open the gate, it thereby invites a passenger ⁵⁰⁸ and gives assurance that it is safe to do so.

They also urge that a passenger is justified in assuming that, when the guard-rails are taken down or the place opened for passengers to pass off, the boat will remain securely fastened; he may also assume that the landing place is in a safe condition, and need not examine particularly to see if there is a vacant place between the bridge and the boat: 19 Cyc. 508; *Spiro v. Long Island Co.*, 21 Misc. Rep. 683, 47 N. Y. Supp. 1093; *St. John v. MacDonald*, 14 Can. Sup. Ct. 1; *Palmer v. New Jersey R. Co.*, 33 N. J. L. 90.

They maintain that, reduced to its simplest form, the rule may be stated to be that the carrier is bound to exercise the strictest diligence in receiving a passenger, conveying him to his destination, and setting him down safely, as the means of conveyance and the circumstances of the cases will permit: *Le Blanc v. Sweet*, 107 La. 355, 90 Am. St. Rep. 303, 31 South. 766; 5 Am. & Eng. Ency. of Law, 2d ed., p. 538; *Lehman v. Louisiana R. R. Co.*, 37 La. Ann. 705; *Turner v. Vicksburg etc. R. R. Co.*, 37 La. Ann. 648, 53 Am. Rep. 514.

They refer the court to *Patton v. Pickles*, 50 La. Ann. 857. 24 South. 290; *Julien v. The Wade Hampton*, 27 La. Ann. 377; *Philadelphia etc. R. R. Co. v. Anderson*, 94 Pa. 351, 39 Am. Rep. 787; *Ency. of Pl. & Pr.* 399; *Aiken v. Southern Pac. Co.*, 104 La. 157, 29 South. 1.

The evidence shows that on February 14, 1909, at 8 o'clock in the evening, the steam ferry-boat "Hattie," belonging to and operated by the defendant company, was at her landing in Algiers, moored fore and aft, receiving passengers for the last trip which she was to make for the day, to the foot of Barracks street in the city proper.

The evening was dark, and the rain was falling. The usual hour for leaving having been reached, the boat gave its customary signals to warn all would-be passengers. The steam

whistle had been blown, and the boat's ⁵⁰⁰ bell rung. The boat was lying as usual at the pontoon wharf with her head downstream, because of the strong eddy existing at that point. The customary signals of departure had also been given to the boat's employees. The front line was thrown off from the caril by a deck-hand. The boat got under way. The bow was swung into the stream away from the pontoon until the boat was at an angle from the pontoon of about seventy degrees with the pontoon landing and the bank of the river, the bow being about seventy feet out in the stream.

The boat had backed up with her engines, and the stern line had been somewhat slackened to aid in making the swing. The stern end of the boat was about three feet from the pontoon.

It was usual after the signals for departure had been given for the clerk of the boat, before leaving, to shut a gate, separating the gangway down which passengers had to pass from the ferry-house to the pontoon below, and, having done so, to immediately throw a bar across the opening in the boat's rails, by means of which entrance to it was effected.

On this particular evening the gate having been injured in some manner, it was not shut, but the entrance on the boat was closed as usual by a bar. The departure of the boat on this particular evening conformed in every respect to the usual method of departure, with the simple exception that the gate at the end of the gangway was left open.

While things were in this situation, the plaintiffs' mother, returning from church in Algiers to the main city, entered the ferry-house, paid her fare, and passed down the gangway. She ran down the gangway through the open gate onto the pontoon bridge. She did not attempt to reach the boat by moving forward on the pontoon directly opposite. Instead of doing this she turned to the left when she had passed the gate, and ran toward the stern of the boat, the latter being ⁵¹⁰ still a few feet from the pontoon. When she entered the ferry-house she realized that she was late, and hoped by hurrying forward to be able to get on board the boat. When she reached the gate she saw that it was impossible to do so at the usual place for entering upon it, as the boat at that point was far off in the stream. The lamps along the gangway and the electric lights upon the boat disclosed the exact situation.

She assumed the risk of jumping onto the boat at its stern end, where the intervening space between it and the pontoon was shorter, and in the attempt fell into the river and was drowned.

Accidents of this kind to passengers when reaching ferries after the boat has left its moorings are not unusual, but it cannot be reasonably claimed that the ferry company should be held responsible for the results of the public's own recklessness or want of ordinary prudence.

We can readily conceive of a case where it should be responsible for leaving open a gate at the end of a gangway down which passengers have to pass to enter a boat. It should be, where the attendant circumstances are such as to lull the approaching passengers into false security and mislead them by the reasonable belief that the boat was still tied to her usual landing place. The testimony in this case does not show facts of that character; on the contrary, it discloses a state of affairs which would make injuries that a person has received himself from his own rash conduct, to be suffered and paid for not by himself but by another person, who had not in any way brought them about.

The defendant should have closed the gate leading out from the gangway on the pontoon before the boat swung into the stream, but that fact was not the proximate cause of the woman's death. That was due to her want of ordinary caution and prudence in regard to her own safety. For the result of ⁵¹¹ her dangerous attempt to jump upon the boat at an unusual, unwarranted and unauthorized place, her heirs must legally bear the consequences: *Tatum v. Rock Island etc. R. Co.*, 124 La. 921, 50 South. 796; *Taylor v. Palmer & Co.*, 124 La. 531, 50 South. 522; *Baltimore & P. R. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506; *Summers v. Crescent City R. R. Co.*, 34 La. Ann. 139, 44 Am. Rep. 419; *Childs v. New Orleans City R. Co.*, 33 La. Ann. 154; *Wood on Railway Law*, 1155; *Knight v. Pontchartrain R. R. Co.*, 23 La. Ann. 462; *Phillips v. Rensselaer R. R.*, 49 N. Y. 177; *Chicago & N. W. R. R. v. Scates*, 90 Ill. 586.

The judgment appealed from is not erroneous. It is hereby affirmed.

Open Safety Gates at a Crossing, Which Should be Closed in Case of Danger, are an Invitation to Cross; and while this does not relieve one about to cross from his duty to exercise ordinary care, it is a fact for consideration in determining whether or not he did use ordinary care: *Carlin v. Grand Trunk Ry. Co.*, 243 Ill. 64, 134 Am. St. Rep. 354; *Slattery v. New York etc. R. R. Co.*, 203 Mass. 453, 133 Am. St. Rep. 311; *Messinger v. Pennsylvania R. R. Co.*, 215 Pa. 497, 114 Am. St. Rep. 970; *Koch v. Southern California Ry. Co.*, 148 Cal. 677, 113 Am. St. Rep. 332; *Northern Central Ry. Co. v. State*, 100 Md. 404, 108 Am. St. Rep. 439.

The Public have a Right to Rely upon a Flagman Stationed at a Crossing Doing His Duty, and the carrier placing him there is liable for injury caused by his neglect of duty: *Mitchell v. Illinois Central R. R. Co.*, 110 La. 630, 98 Am. St. Rep. 472; *Pennsylvania Co. v. Sloan*, 125 Ill. 72, 8 Am. St. Rep. 337.

A Carrier must Keep Its Depots, Stations, and the Approaches Thereto in a Reasonably Safe Condition for its passengers, otherwise it will be guilty of negligence, and liable for injuries suffered therefrom: *Louisville etc. R. R. Co. v. Miller*, 134 Ky. 716, 135 Am. St. Rep. 433; *Bates v. Chicago etc. Ry. Co.*, 140 Wis. 235, 133 Am. St. Rep. 1069; *Mangum v. North Carolina R. R. Co.*, 145 N. C. 152, 122 Am. St.

Rep. 437; Abbot v. Oregon R. R. Co., 46 Or. 549, 114 Am. St. Rep. 885; Pineus v. Atlantic etc. R. R. Co., 140 N. C. 450, 111 Am. St. Rep. 856; Jackson v. Natchez etc. Ry. Co., 114 La. 981, 108 Am. St. Rep. 366; Barker v. Ohio River R. R. Co., 51 W. Va. 423, 90 Am. St. Rep. 808; Jordan v. New York etc. R. R. Co., 165 Mass. 346, 52 Am. St. Rep. 522; Fullerton v. Fordyce, 121 Mo. 1, 42 Am. St. Rep. 516; Pennsylvania Co. v. Marion, 123 Ind. 415, 18 Am. St. Rep. 330; Lucas v. Pennsylvania Co., 120 Ind. 205; Alabama Great Southern R. R. Co. v. Arnold, 84 Ala. 159; Moses v. Louisville etc. R. R. Co., 39 La. 649, 4 Am. St. Rep. 649.

MCCORMACK v. ROBIN.

[126 La. 594, 52 South. 779.]

PUBLIC STREETS—Duty to Keep Unobstructed.—The charter of the city of New Orleans requires it to keep "open and free from obstruction all streets," and the right of a citizen to recover damages for injury sustained by reason of a failure in the discharge of the mandatory duty thus imposed is beyond question. (p. 551.)

PUBLIC STREETS—Right to Assume Safe Condition.—Streets and sidewalks are intended for free and constant use, and those who use them have the right to assume that they are safe, and are not expected to exercise the care that would be required in traversing a jungle. (p. 551.)

PUBLIC STREETS—Block of Stone as Obstruction.—A lady who starts from her home on one of the principal streets of New Orleans, after nightfall, to go to the theater, and, whilst putting on her gloves and contemplating the catching of an approaching street-car, fails to see, and falls over, a block of stone, which had been placed on the banquette by a paving contractor, employed by the city, is not guilty of such negligence as will preclude her from recovering damages for the injury thereby sustained. (p. 552.)

PUBLIC STREET—Stepping-stone as Nuisance.—An obstruction, like dirt upon a boy's face, is matter out of place, and that which may be a stepping-stone, when in a position where it is needed and can be used as such, becomes an obstruction when occupying a place intended for other use, and where it is not needed and cannot be so used. And so, though a block of stone which spans a gutter may serve a useful purpose, as a stepping-stone, where a pavement has been laid, the asphaltum surface of which runs smoothly down to the curb, which, there being no gutter, may serve as a stepping-stone, and, incidentally to the paving, the block has been removed from its position and placed within the curb, on the banquette, it ceases to be a stepping-stone and becomes a nuisance. (p. 553.)

PUBLIC STREET—Stepping-stone—Who Liable for.—Where a paving contractor, employed and directed by the city, as an incident to his work, removes a stepping-stone, which spans a gutter, and places it on the banquette, where it becomes a nuisance, the city and the contractor, and not the owner of the property in front of which the paving is done, are the parties who are liable for the resulting damage to a citizen who falls over the stone. (p. 553.)

(Syllabi by the court.)

I. D. Moore, city attorney, and John F. C. Waldo, assistant city attorney, for the appellant City of New Orleans.

B. R. Forman and Rufus J. Paddock, for the appellant McCormack.

W. S. Parkerson, for the appellees Robin.

⁵⁹⁵ MONROE, J. This is an action in damages for personal injuries sustained by plaintiff in falling over a stone block that was lying on the banquette in front of the house ⁵⁹⁶ owned by the defendant Mrs. Robin, and rented to Mrs. White. Plaintiff sues Mrs. Robin and her husband, also the city of New Orleans; and defendants, in effect, plead the general denial and contributory negligence, the city calling Mrs. Robin in warranty. The facts are as follows: Plaintiff is rather an elderly lady, who occupied a house on the river side of St. Charles street, the front door of which is, say, one hundred and twenty-five feet below the corner of St. Joseph street. She had moved in there in October, 1904, and had not had occasion to pay much attention to the banquette between her house and St. Joseph street up to the time of the accident, which occurred between 7 and 8 o'clock on the evening of December 27, 1904, and she does not appear to have been aware that, immediately in front of the Robin house, which is between the house occupied by her and the corner, there was lying, on the banquette, inside of the curbstone, and in a cater-cornered position, a block of stone about three feet square and, probably, eight or ten inches thick. It had formerly occupied a position extending from the curbstone across the gutter and served as a stepping-stone. A year, or perhaps two years, before the accident, however, St. Charles street had been paved by the city, or under its direction, with asphaltum, and the stone had been moved, no doubt by the paving contractor, to the position in which the plaintiff unfortunately found, and fell over, it. On the evening mentioned, she, Mr. Laine (who died before the trial in the district court), Mr. Marigny and his sister, Mrs. Coleman, left plaintiff's house with the intention of going to the theater. Mr. Laine went somewhat in advance in order to stop the street-car, which was just turning into St. Charles street, at Lee Circle, a block above, the two ladies followed, plaintiff being on the right, nearer the curb, and being engaged in putting on her gloves, and Mr. Marigny being in the rear. Plaintiff testifies that the light ⁵⁹⁷ was bad; in fact, that it was rather dark. On the other hand, defendants' witnesses say that, diagonally across the street, at a distance of, perhaps, one hundred feet or more, there were two electric lights in front of a saloon, and that there was a city light over the intersection of the streets; also, that the hall light in the Robin house threw some rays on the banquette. Upon the whole, however, though very likely plaintiff could

have seen the stone if she had been looking closely, we find no reason to doubt her statement that the light was bad. She says that she was not hurrying, but Mrs. White testifies that plaintiff told her, the next day, that she was hurrying. Whether she was or not, she failed to see the stone, and, stumbling over it, fell, and was knocked senseless, sustaining injuries which laid her up for several weeks, and incapacitated her for some time longer. Mr. Kracke, an active man of forty, testifies that, though he sees fairly well, with his glasses on, he stumbled over the same stone. Mrs. White had been occupying the Robin house as a tenant for about ten years, and she testifies that Dr. Robin, who represents his wife, rarely visited the place, and that, some time after the accident, she asked him to give her the stone over which plaintiff had fallen, for her church, which he readily consented to do, saying that he was not aware that there was such a stone. It is fairly evident that he did not know that, as the result of the paving which the city had done, the stone had been misplaced and had become a dangerous obstruction to the banquettes, the fact being, as we take it, that, after the street was paved with asphalt, there was no place and no use for such a stone. Mrs. White concluded not to take the stone, after it had been given to her, and, some time later, it disappeared, and the record does not inform us what became of it. The trial in the district court resulted in a verdict and judgment in favor of plaintiff and against the city of New ⁵⁹⁸ Orleans for five hundred dollars, the demand against Mrs. Robin being rejected. The city and the plaintiff have appealed.

The charter of the city of New Orleans requires it to "keep open and free from obstruction all streets": Act 45 of 1896, sec. 14. The right of the citizen to recover damages for injuries sustained by reason of the failure of a municipal corporation to discharge the mandatory duty thus imposed on it is beyond question: Dillon on Municipal Corporations, 4th ed., p. 887, sec. 731, p. 1203, sec. 980, p. 1284, sec. 1020; Buswell's Law of Personal Injuries, secs. 53, 167; Lorenz v. City of New Orleans, 114 La. 802, 38 South. 566; Weinhart v. City of New Orleans, 125 La. 351, 51 South. 286; Guéble v. Town of Lafayette, 121 La. 909, 46 South. 917; 5 Thompson on Negligence, p. 497, sec. 6022. No doubt, the person injured may, by his own negligence, so contribute to the injury as to preclude the recovery of damages, but streets and sidewalks are intended for free and constant use, and those who use them have the right to assume that they are safe, and they are not expected to exercise the care which would be required in traversing a jungle. As has been held by this court: "All that is required of a pedestrian upon the street is ordinary care, and this does not necessitate his looking constantly where he is going. . . . He has the right to assume that the road-

way is safe for travel": *Weber v. Union etc. Co.*, 118 La. 77, 42 South. 652, 12 Ann. Cas. 1012 (syllabus).

In another case, in which a man, with poor eyes and a basket on his head, fell into an excavation which was left in the sidewalk, it said: "With his poor eyes and his basket on his head, he was not particularly well situated to discover the hole into which he had walked, but the sidewalk is intended for such as he, as well as for those with good eyes and who carry no baskets, and he had the right to assume, within reasonable limits, that if it had been made unsafe, those who made it so would warn him of the fact or protect him from danger": ⁵⁹⁹ *Rock v. American Const. Co.*, 120 La. 831, 45 South. 741, 14 L. R. A., N. S., 653.

The plaintiff in the present case had lost one of her eyes, many years before the accident, but she testified that she had experienced no difficulty in going about on that account; and we are not prepared to hold that the feminine habit of putting on gloves between the front door and the street-car, whilst en route to the theater in the city of New Orleans, exhibits such reckless disregard of danger to life and limb as to preclude the recovery of damages resulting from the failure of those whose duty it is to keep the route free from obstruction.

The learned counsel for the city of New Orleans says in his able brief: "A carriage block, or stepping-stone, upon a sidewalk, in front of a house, at or beside the curb, which does not interfere with the use of the roadway, nor, to any reasonable extent, with the use of the sidewalk, does not constitute a public nuisance, and is a reasonable and proper use of the sidewalk, and the municipality is not liable in damages for injuries sustained by a person who stumbles over the stone."

And he cites a number of authorities in support of the proposition, in which it is held that water hydrants, trees, hitching-posts, telegraph poles, awning-posts and stepping-stones have been held to be permissible, from custom, based on necessity. Thus, in *Dubois v. City of Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273 (one of the cases cited), it was said: "The courts have gone quite far in holding such corporations [municipal corporations] to a very strict responsibility in reference to accidents caused by a failure to keep the streets and sidewalks in proper and safe condition, but it would be adding to the corporate liability beyond reasonable limits to hold that stepping-stones, which are almost a necessity in providing for the interest, comfort, and convenience of the public, in the maintenance of the walks, avenues, and streets, constitute a nuisance and obstruction, and that corporations are liable for damages by reason of accidents caused thereby."

We concur, in the main, in the doctrine enunciated in the cases thus referred to, and, if the plaintiff in this case had been

injured ⁶⁰⁰ by coming in contact with a hydrant, hitching-post, telegraph pole, awning-post, or stepping-stone which was shown to be a reasonable necessity or convenience, and the maintenance of which was shown to be sanctioned by time and usage, we should find for the defendant. But, though stepping-stones, extending from the curbs across the gutters, have been, and, on some streets, are still, reasonably necessary in New Orleans, the evidence shows that the street, upon the sidewalk of which the stepping-stone here in question was lying, was paved, a year or two before the date of the accident, with asphaltum, and, as an incident to the paving, that the stone was moved from the position which it then occupied and placed inside of the curb, catercornered, on the sidewalk, where, so far as we are informed, it was not only useless, but an unmitigated nuisance. Mrs. White (defendant's witness) says: "It had spanned the gutter until the city removed it and placed it inside the curb, three or four inches, just enough to keep it from being on the curb, but flat on the banquette"—a statement which she afterward corrected by saying that the moving of the stone was done by the paving contractor (who did the work under the direction of the city). An obstruction, like dirt on a boy's face, is merely matter out of place, and that which may be a stepping-stone, when in a position where it is needed and can be used as such, becomes an obstruction when occupying a place intended for other use, and where it is not needed and cannot be so used. If, as we assume is the case, there is, now, no gutter on St. Charles street, and, the asphaltum, extending smoothly down, a vehicle may be driven up to the curb, and the curb rises to the height of an ordinary carriage step, the stone, three feet square and eight or ten inches high, lying catercornered on the banquette, inside the curb, cannot be called a stepping-stone, since it is not needed, and cannot be used for the purpose indicated by the name. It is ⁶⁰¹ merely an obstruction on the banquette, and a nuisance; and, as it became so by reason of the act of the paving contractor, employed by the city, the city, and, perhaps, the contractor, and not the owner of the property in front of which the paving was done, are the parties who should be held liable for the resulting damage.

The judgment is accordingly affirmed.

Provosty, J., takes no part, not having heard the argument.

The Liability of Municipal Corporations to Persons Injured by Reason of Defective or Dangerous Streets is the subject of notes to *Dudley v. City of Flemingsburg*, 103 Am. St. Rep. 257; *Goddard v. Inhabitants of Harpswell*, 30 Am. St. Rep. 384; and *Browning v. City of Springfield*, 63 Am. Dec. 350.

What Municipal Corporations are Answerable for Injuries Due to Defects in Streets and Other Public Places is the subject of a note to *Carson v. City of Genesee*, 108 Am. St. Rep. 136.

A Municipal Corporation must Use Ordinary Care to see that its streets are safe for travelers: Webster v. City of Vansburg, 130 Ky. 320, 132 Am. St. Rep. 392; White v. City of New Bern, 146 N. C. 447, 125 Am. St. Rep. 476; Clifton v. Philadelphia, 217 Pa. 102, 118 Am. St. Rep. 906.

If a City Negligently Allows a Public Street to Remain in a Dangerous Condition, It must Respond in Damages to one who ventures thereon in search of recreation or when called to do so by duty and who is injured by such danger while exercising ordinary care: Evans v. Philadelphia, 205 Pa. 193, 97 Am. St. Rep. 732.

It is the Duty of a City to Keep Its Streets Free from Nuisances, Defects and Obstructions caused by itself, or by third persons if it has actual or constructive notice in time to abate the nuisance or remove the defect or obstruction: Benton v. City of St. Louis, 217 Mo. 687, 129 Am. St. Rep. 561; White v. City of New Bern, 146 N. C. 447, 125 Am. St. Rep. 476; and it is not relieved from liability because the sidewalks were built by the abutting owners: Benton v. City of St. Louis, 217 Mo. 687, 129 Am. St. Rep. 561. The obligation is only to keep the streets safe for the ordinary requirements of streets. A city is under no obligation to keep its sidewalks safe for roller-skating, yet if a person on skates suffers an injury because of a hole in a sidewalk of which the city had constructive notice, and which was more or less dangerous to persons passing, whether walking or on skates, the city may be held liable: Collins v. Philadelphia, 227 Pa. 121, 136 Am. St. Rep. 873; and the fact that a child was playing in the street when injured will not bar a recovery: Gibson v. Huntington, 38 W. Va. 117, 45 Am. St. Rep. 853; nor will the fact that the child was rolling a hoop on the defective sidewalk: Chicago v. Keefe, 114 Ill. 222, 55 Am. St. Rep. 860.

A City has Been Held Liable for injury to a pedestrian caused by his tripping over a hose stretched across a sidewalk for the purpose of flushing sewers: City and County of Denver v. Maurer, 47 Colo. 209, 135 Am. St. Rep. 210; by the projection of steps into the sidewalk, it having the power of summary removal thereof: White v. City of New Bern, 146 N. C. 447, 125 Am. St. Rep. 476; by a projecting coal hole, if it knew, or if by exercising reasonable care it should have known, of the defect: Smart v. Kansas City, 208 Mo. 162, 123 Am. St. Rep. 415; and, while a city is not bound to maintain an even or perfect grade in its streets, it was held liable for an injury caused by a sudden drop or step of seven or eight inches: Blyhl v. Village of Waterville, 55 Minn. 115, 47 Am. St. Rep. 596.

Streets in Hands of Contractor.—A city cannot relieve itself from its obligation to keep its streets in a safe condition by turning them over to a paving contractor, and if the contractor leaves them in an unsafe condition, from which injury results, the city will be held liable: Hughes v. City of Detroit, 161 Mich. 283, 137 Am. St. Rep. 504; Turner v. City of Newburgh, 109 N. Y. 301, 4 Am. St. Rep. 453; but where a city has let the work of excavating in a street to an independent contractor, it will not be held liable for injuries suffered through the negligence of the contractor's servants: Deming v. Terminal Railway of Buffalo, 169 N. Y. 1, 88 Am. St. Rep. 521; and see note to Covington Bridge Co. v. Steinbrock, 76 Am. St. Rep. 417.

The Tendency of the Legislative Enactments has been in the direction of making less, rather than more, stringent rules of municipal liability in cases of accidents to persons using sidewalks: Gastel v. City of New York, 194 N. Y. 15, 128 Am. St. Rep. 540.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

**A. M. CAMPAU REALTY COMPANY v. CITY OF
DETROIT.**

[162 Mich. 243, 127 N. W. 365.]

BOUNDARIES—Lands Covered by Water.—The boundary line between two riparian owners, as to the land covered by water, is not in any way dependent upon the direction of the lines on land, but the lines from shore should run, as near as may be, perpendicular to the course of the stream. (p. 556.)

APPEAL—Nonprejudicial Error.—An error which gives to the appellant more than he is entitled to is not prejudicial and will not, therefore, be reviewed. (p. 558.)

William F. McCorkle and Beaumont, Smith & Harris, for the complainant.

Richard I. Lawson and P. J. M. Hally, for the defendants.

244 STONE, J. The bill of complaint in this cause was filed to quiet complainant's alleged title to a triangular parcel of land and dock frontage in the city of Detroit, on the Detroit river; also to remove a cloud arising from defendant's claim of title thereto; also to permanently enjoin defendants from interfering with complainant's possession of the disputed land, and from removing complainant's buildings now standing thereon. The answer denies all material averments of the bill. It insists that the title to the disputed parcel is in the city, and that complainant is in wrongful possession thereof. Upon the hearing on pleadings and proofs a decree was entered for the complainant in accordance with the prayer of the bill, and the defendants have appealed.

In this court the complainant contended that the decree of the circuit court should stand for either of two reasons: (a) The west line of the disputed triangle is the correct westerly line of that portion of complainant's lot 193; (b) Or if this is not so, then complainant has acquired title to the disputed triangle by adverse possession.

It appears that the complainant is the owner of a parcel of land fronting on the Detroit river, bounded on the east by Randolph street, on the north by a public alley, and on the west by property belonging to the city of Detroit, and used by it for a public lighting plant. Complainant's property is described as lots 193 and 27 (the latter north of the former) of section 4, of governor and judges' plan of Detroit. This property is almost entirely covered by brick and sheet-iron buildings, which have been standing for many years. Upon the entire river front complainant and its predecessors in title have maintained a private dock, extending out into the river, with the same western boundary lines, for about forty years.

²⁴⁵ The defendant city owns the property lying west of complainant's property. It comprises lots 192 and 170 (the latter north of the former) of said section 4, governor and judges' plan. It also has a dock along the front of its land.

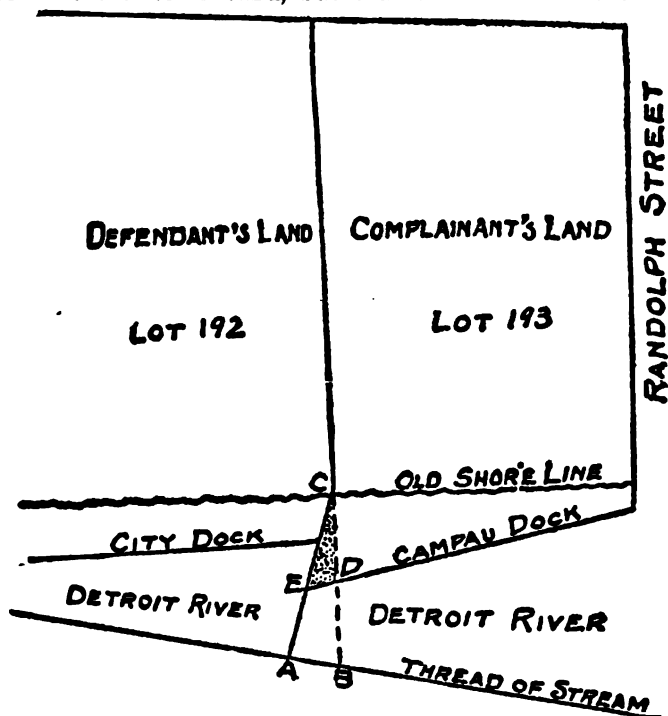
The parcel in dispute is a triangle which was originally wholly under water. It has its apex at a point where the lot line, on land, between lots 192 and 193, intersects the old shore or water line. The easterly line of this triangle is this lot line extended out into the river to the thread of the stream. The westerly line of the disputed triangle is a line, extending from the apex of this triangle on the old shore line, and running out into the river to, and at right angles with, the thread of the stream. The westerly line of complainant's dock, and of a sheet-iron shed standing on the dock, is identical with the westerly line of the disputed triangle.

The location of the disputed parcel can be seen from the following sketch, the lines A C and B C indicating the west and east lines of the triangle. C E D is a part of complainant's dock, and is included in the disputed triangle C A B.

It is well settled in this state that the boundary line between two adjoining riparian owners, as to the land covered by water, is not in any way dependent upon the direction of the lines on land, but that the lines from the shore should run, as near as may be, perpendicular to the course of the stream: *Clark v. Campau*, 19 Mich. 325; *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Rice v. Ruddiman*, 10 Mich. 125; *Bay City Gaslight Co. v. Industrial Works*, 28 Mich. 182; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453, 2 N. W. 639; *Backus v. City of Detroit*, 49 Mich. 110, 43 Am. Rep. 447, 13 N. W. 380; *Webber v. Pere Marquette Boom Co.*, 62 Mich. 626, 30 N. W. 469; *Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co.*, 102 Mich. 227, 47 Am. St. Rep. 516, 60 N. W. 681, 25 L. R. A. 815; *Pittsburgh etc. Iron Co. v. Lake* ²⁴⁶ *Superior Iron Co.*, 118 Mich. 109, 76 N. W. 395.

We do not understand that defendants' counsel disputes the above proposition, or its application to this case. We

quote from his brief wherein he says: "We are entirely satisfied, and agree with counsel for complainant, that the boundary line between adjoining riparian owners, as to the land covered by water, is not in any way dependent upon the direction of the lines on land, but that the line from the shore



should be run, as near as may be, perpendicularly to the course of the stream: *Clark v. Campau*, 19 Mich. 325. But the decree entered in the lower court in this case does not follow that rule of law, as a glance at the decree will disclose. At the bottom of page 6 of complainant's brief it is said: 'The west line of the disputed triangle is a line running approximately at right angles to the thread of the stream.'²⁴⁷ Why not run the line exactly at right angles with the thread of the stream, and have the decree so declare, if it is to stand? No reason is given for the departure from the rule."

Complainant answers this criticism of the decree by stating that if the west line of the disputed parcel ran exactly at right angles to the thread of the stream, it would be placed still farther west than it is, and the undisputed evidence in the record supports this position. The witness George Jerome testified: "The westerly line of the property in dispute, the dock property, we projected to the harbor line to make nearly a

right angle. It would be less than a right angle. In other words, if the line made is a right angle, it would have to be carried a little bit farther west."

Appellants would seem to have no reason to complain because of the line fixed by the decree.

Being of the opinion that the case is ruled by application, as between adjoining riparian owners, of the doctrine above stated, we do not consider the question of adverse possession.

The decree of the circuit court is affirmed, with costs.

Bird, C. J., and McAlvay, Brooke and Blair, JJ., concurred.

The Side Lines of Lands Extending to Low-water Mark must be run in the nearest direction, and without any regard to the course of the side lines on the upland. The mode of applying this rule is to draw a base line from the two corners of each lot where they strike the shore and from those two corners extend parallel lines to the low-water mark. If the line of the shore is straight, there will be no interference in running the parallel lines. If the lands are situated on a cove or the shore line is regularly or irregularly curved, there will be an interference with running such lines, and the loss occasioned by it must be equally borne or the gain equally enjoyed by the contiguous owners: *Emerson v. Taylor*, 9 Greenl. 42, 23 Am. Dec. 531.

The Running of Side Lines of Water Lots is the subject of a note to *Emerson v. Taylor*, 23 Am. Dec. 536.

Waters and Watercourses as Boundary Lines is the subject of a note to *Allen v. Weber*, 27 Am. St. Rep. 56, and of a note to *Ball v. Slack*, 30 Am. Dec. 278.

General Rules for the Location of Boundaries is the subject of a note to *Matheny v. Allen*, 129 Am. St. Rep. 990.

MICHIGAN SAVINGS BANK v. DIME SAVINGS BANK.

[162 Mich. 297, 127 N. W. 364.]

CORPORATIONS—Use of Similar Names.—Relief in Equity against the use by one corporation of a name similar to that of another corporation carrying on the same character of business is granted, because experience has demonstrated that the public is misled, and the corporation first established is defrauded on account of the similarity of the names. (p. 560.)

BANKS—Similarity of Names.—The Statutes (2 Comp. Laws, sec. 6091) prohibiting the use by a bank of a name similar to that of another bank, and Act No. 232 (Pub. Acts 1903), prohibiting the use by a corporation of a name similar to that of another corporation, were intended to prevent the public being misled or the older institution being defrauded, and to render resort to the courts for relief from such conditions unnecessary. (p. 560.)

CORPORATIONS—Similarity of Names—Injunction.—In an action to enjoin the use of a name by a corporation upon the ground that it is too similar to that of another corporation, the inquiry

must be whether it is likely that the public will be misled, and whether the complaining corporation is likely to be injured. Experience, not in the particular case, but in other cases, must be employed in determining the fact. Mere conjecture is not sufficient. (p. 560.)

CORPORATIONS—Similarity of Names.—The name "Bank of Michigan" is not so similar to "Michigan Savings Bank," in the absence of fraud or estoppel, as to prevent the use of the former. (pp. 560, 561.)

Stellwagen & MacKay, for the appellant.

Wilkinson, Post & Oxtoby, for the appellee.

²⁸⁸ **OSTRANDER, J.** The complainant has for more than thirty years conducted a general banking business in the city of Detroit under the name and style "Michigan Savings Bank," its corporate name being "Michigan Savings Bank of Detroit, Mich." The defendant bank has also conducted a general banking business in the same city since the year 1884, its corporate name being "The Dime Savings Bank of Detroit, Mich." The Dime Savings Bank acquired the business of the Citizens' Savings Bank of the same city and thereupon elected and determined to change its name to "The Bank of Michigan," and for that purpose resolved to amend its articles of association. This action was taken, notwithstanding protests from officers of the Michigan Savings Bank, which, in consequence, filed its bill in the circuit court for the county of Wayne, in chancery, against the Dime Savings Bank, the county clerk of Wayne county, the Secretary of State and the commissioner of banking, praying that the defendant bank be enjoined from using the name "The Bank of Michigan" or any other name similar in any material respect to the name of defendant, from executing a certificate setting forth that it has amended its articles of association by changing its corporate name as aforesaid, and from recording the same either in the office of the county clerk, the commissioner of banking, or the Secretary of State, and that the attempted action of its stockholders with reference to the change of its corporate name be declared to be of no effect. There were appropriate prayers for relief as to the other defendants. The bill was answered by the defendant bank, testimony was taken, and a decree was entered in accordance with the prayer of the bill. The Dime Savings Bank has appealed.

It is not claimed that the defendant bank has any fraudulent purpose—a design to mislead the public or to injure complainant—in changing its corporate name. No director of one bank is also a director of the other, no contract relations between the two institutions are relied upon by the complainant, and defendant bank is not estopped to ²⁸⁹ use the name. But it is claimed that if two banks, with offices upon

the same street, in the same city, use names so similar, confusion and injury will result; that the statute forbids the defendant bank to assume a name so similar to that of complainant bank, and that equitable principles support the decree appealed from.

The banking law, 2 Compiled Laws, section 6091, requires persons associating to organize a bank to specify in the articles of association, among other things: "The name assumed by such bank, which shall be, in no material respect, similar to the name of any other bank organized under the laws of this state."

So Act No. 232, Public Acts of 1903, in section 2 thereof, relating to names to be assumed by corporations, contains the proviso that "No name shall be assumed already in use by any other existing corporation of this state, or corporation lawfully carrying on business in this state, or so nearly similar as to lead to uncertainty or confusion."

Courts of equity are frequently called upon to remedy conditions which grow out of the use by a corporation of a name similar to the name of another corporation, carrying on a business of the same character. In such cases it is usually, if not always, true that relief is granted because experience has demonstrated that the public is misled, and the corporation first established is defrauded on account of the similarity of the names. We assume that the statutes referred to were intended to prevent, to some extent, the conditions which in such cases, when they arise, make a resort to the courts necessary. In this view of the legislation, in its enforcement by the courts as a preventive measure, it is necessary to consider, in advance of a demonstration based upon experience, and in a case where neither corporation has, or can acquire, the general right to an exclusive use of the words employed in the name, whether it is likely that the public will be misled, and whether the complaining corporation ³⁰⁰ is likely to be injured. It is evident that experience, not in the particular case, but in other cases, must still be employed in determining the fact, and that mere conjecture that some confusion may result is not ground for granting equitable relief. We may also consider that if relief is refused and conjecture is in actual experience made fact, the complaining corporation may have its remedy.

We are not impressed that the testimony introduced on the part of complainant supports even the conjecture that the public, using ordinary care, will be misled by the alleged similarity of the names of these corporations. If it is true, and we assume that it is, that the public is apt to seize upon some part of the corporate name and use it as descriptive of the whole and as designating the particular bank, we may also assume that the words "Michigan Savings" in one case, and "the Michigan" in the other, will be apt to be used and will

be properly and sufficiently distinctive. It is the general rule that when they are properly descriptive, the use of geographical words in a business name will not be enjoined, in the absence of estoppel or of actual fraud, or public misleading. In enforcing a statute intended to prevent some of these results, it must be made to appear that it is reasonably certain they will follow the use of the name sought to be enjoined. The principle is the same in either case.

The decree is reversed, and a decree will be entered in this court dismissing the bill, with costs of both courts to the defendant bank. It may be stated in the decree that it is without prejudice to the right of complainant to relief, if actual injury and confusion shall result from defendant's use of the proposed corporate name.

Hooker, Moore, McAlvay and Brooke, JJ., concurred.

The Names of Corporations as Trademarks or Trade Names are considered in the note to *Kyle v. Perfection Mattress Co.*, 85 Am. St. Rep. 83. The same rule as applies to firms and individuals in the use of trade names applies to corporations, and an injunction will lie to restrain the simulation and use by one corporation of the name of a prior corporation which tends to create confusion and enables the latter corporation to obtain the business of the prior one: *International Silver Co. v. William H. Rogers Corp.*, 67 N. J. Eq. 646, 110 Am. St. Rep. 506; *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 43 Am. St. Rep. 769. Intervention of the state is not necessary in such a suit, as it is not one to annul the corporation: *Armington v. Palmer*, 21 R. I. 109, 79 Am. St. Rep. 786; and if the name is misleading and calculated to injure the business of the prior corporation, the injunction may be granted irrespective of good faith or intent to mislead the public: *Nesne v. Sundet*, 93 Minn. 299, 106 Am. St. Rep. 438.

In 1889, the plaintiff was incorporated under the name of Northwestern Knitting Company, and engaged in the business of knitting underwear and other goods, disposing of them to dealers throughout the country, conducting all its business from Minneapolis and under its corporate name. Fifteen years after the defendant opened a factory for the same general class of goods at Duluth, under the name of Northwestern Knitting Mill, not knowing of the existence of the plaintiff. The plaintiff did not learn of the existence of the defendant for several years, and upon doing so immediately notified it of its prior adoption of its name and demanded that defendant discontinue the use of its name. It was held that by adoption and long use the plaintiff had acquired the right to its name as a trade name and to be protected in its use against unfair competition; that the use by the defendant of its name was likely to cause confusion in trade, deceive the public and prejudice the rights of the plaintiff; and that although the adoption of its name by the defendant was in ignorance of the plaintiff's rights, its continued use after notice was presumptively fraudulent, and an injunction against its further use was granted: *Northwestern Knitting Co. v. Garou*, 112 Minn. 321, 128 N. W. 288.

A corporation organized for the purpose of selling cloaks, suits and men's clothing has no exclusive right to use its name for that purpose throughout the state; and where its business has been confined to a

retail and mail order business in the vicinity of one city, it may be enjoined from opening a branch house in another city under the same name, the effect of which would be to defraud the public and a partnership which had been doing business there for several years under the same name, there being no confusion theretofore, as neither had invaded the territory of the other. The corporation which was first in the use of the name is not entitled to prevent its further use by the partnership, since the protection of a trade name is only coextensive with the market: *Eastern Outfitting Co. v. Manheim*, 59 Wash. 428, 110 Pac. 23.

A Fraternal Association may Enjoin the Unauthorized Use of Its Name: *Creswill v. Grand Lodge Knights of Pythias*, 133 Ga. 837, 134 Am. St. Rep. 231.

The Law of Trademarks and Trade Names in General is considered in *Atlas Assur. Co. v. Atlas Ins. Co.*, 138 Iowa, 228, 128 Am. St. Rep. 189; *Johnson v. Seabury*, 71 N. J. Eq. 750, 124 Am. St. Rep. 1007; *Giragosian v. Chutjian*, 194 Mass. 344, 120 Am. St. Rep. 570, and *George G. Fox Co. v. Glynn*, 191 Mass. 344, 114 Am. St. Rep. 619. The supreme court of California refused to enjoin the use of the Italian word "Tipo," meaning a kind or type, as a trademark for wines, where there was no intent to deceive or represent the article made by the defendant as that of the plaintiff, and where there was a marked difference in appearance between the labels, packages and forms of bottles used by the respective parties, upon the ground that the word was one indicating the character, kind, quality and composition of the article, and therefore not the subject of a trademark, its expression in a foreign language being immaterial: *Italian-Swiss Colony v. Italian Vineyard Co.*, 158 Cal. 252, 110 Pac. 913.

VON BEGROW v. VON BEGROW.

[162 Mich. 349, 127 N. W. 256.]

DIVORCE — Extreme Cruelty — Mental Suffering.—A showing that a wife interfered with and occasioned loss in her husband's business by fits of jealousy or temper; attempted to strike him with a chair; frequented cafés and places where liquor was sold with other men; remained out late at night and on one occasion all night; refused to prepare his breakfast; and applied to him such epithets as "a dirty dog," "a street angel" and "a house devil," is sufficient to entitle the husband to a divorce on the ground of extreme cruelty. (pp. 563, 564.)

Lehman, Riggs & Lehman, for the complainant.

Robert M. Brownson and Denton Guinness, for the defendant.

349 OSTRANDER, J. The bill in this cause was filed for a divorce from the bonds of matrimony, and it is alleged therein that the parties were married February 21, 1898, in the city of Detroit, where they have since resided, and where they lived and cohabited together as husband and wife until September 16, 1908. One child was born, which died. The

charge is that defendant has been guilty of extreme cruelty, which began soon after the marriage, and the particulars are that defendant began to "nag" and annoy complainant by her exhibitions of jealousy of women who had occasion to go to complainant's drug-store to make purchases, and would make remarks which gave offense to customers who happened to be in the store; that her jealousy had no foundation in fact, had a tendency to drive away business, and did actually cause complainant to lose customers; that during the ³⁵⁰ summer of 1907 complainant threatened to procure a divorce from defendant; and that thereupon the defendant, who has a most violent temper, "raised a chair and threatened to brain your orator, and he believes he would have suffered great bodily harm had he not succeeded in grasping said chair as the defendant was about to strike him over the head with it." He also charges that defendant has, in the company of men, frequented cafés and other places where intoxicating liquors are sold, has remained out until late hours at night, and on one occasion remained away from home all night without informing complainant of her intention to do so or offering any satisfactory explanation of her absence; that during the winter of 1907-08 she refused to prepare breakfast for complainant. Defendant answered, denying each and every of these charges of cruelty. There was a replication, a hearing in open court, and a decree dismissing the bill of complaint.

The testimony discloses that the parties to this suit were acquainted with each other for two years before they were married, during a portion of which time complainant boarded at defendant's home. A short time before the marriage, complainant, who is a druggist, failed in business and was adjudged a bankrupt. He began business again with very small capital, and for some time his wife was the reputed owner of his stock of goods. Defendant was a milliner, and continued her business for some time after the marriage. They have always lived in rented apartments, and he has done and is doing business in a rented store. Doing a small business, and obliged to keep his store open evenings, complainant has not spent much time in the society of his wife and has not often visited with her places of public or of private entertainment. The defendant testified that he neglected her during practically all of their married life. There is testimony tending to prove occurrences which amounted to some interference with and loss to his business; but whether her conduct was the result of jealousy or was a ³⁵¹ display of temper is not so clear. It is proved that she called him, upon occasion, such names as "a dirty dog," "a street angel," and "a house devil." The conduct which finally determined complainant to separate from her was her association with other men. It is not claimed that she was guilty of any crime; but it is proved

that upon one occasion, shortly before the separation, at 9 o'clock in the evening, she was seen by her husband with her sister, another woman, and some men, who were strangers to the husband, coming from a café where liquors were served and where the party had gone, not to eat, but to drink. He also, at about the same time, saw her riding in an automobile with men, or a man and other women. She admits that upon one occasion—he says it was four or five years after the marriage, she that it was before the marriage—she was at a road-house on Jefferson avenue with another woman and two men, “drummers,” drinking, and that the men became so familiar in their behavior that she was obliged to escape from them. She admits that after the bill was filed in this cause she passed him on the street, and he stepped one side without speaking to her, when she said: “Oh, Gus! How can you be such a dirty dog?” There was an occasion when she remained away from home all night, without notifying her husband of her intention to do so, returning about 10 o'clock in the morning. There was then a quarrel. She offers an explanation, it is true; but her husband says it is not the one she offered at the time. She does not deny that during a portion, at least, of two winters, she refused to get breakfast for complainant, and offers no excuse for not doing so. There have been frequent quarrels.

However innocent defendant's behavior may have been, such conduct is not calculated to inspire the confidence of the husband or to insure domestic tranquillity. The epithets she bestowed upon him are not approved expressions of respect or of affection. Such expressions made to him and such conduct away from him are calculated to ³⁵² induce the feeling that she cared nothing for him and but little for her reputation, to excite his distrust and anxiety. Self-respecting men do not submit to such treatment unless they are by circumstances obliged to do so. The law does not compel them. There are no children to be considered here. No question of permanent alimony is involved. We are of opinion that complainant is entitled to a divorce upon the ground of extreme cruelty. The decree below is reversed, and one will be entered in this court dissolving the marriage.

Defendant's motion in this court for an allowance for expenses of the appeal has been considered. Costs of defendant were taxed below at ninety-three dollars and ninety cents, including a solicitor's fee of thirty dollars. After the bill was dismissed, defendant obtained an order, at the circuit, that complainant pay to her three dollars a week during the pendency of the appeal and a solicitor's fee of twenty-five dollars. It is our understanding that this order for solicitor's fee was made in view of the requirement that defendant must be to the expense of preparing a brief on appeal. These sums have

been paid, the allowance from and after November 29, 1909. Defendant lives in an eight-room house, the rent of which is eighteen dollars a month, and has installed a telephone, a convenience the parties did not have when they lived together. She has possession of all the household furniture. Complainant pays for his room rent, one dollar and fifty cents a week. He does business in a one-story wooden structure situated some three miles from the business center of Detroit, and he is paid three hundred dollars per annum as postmaster. The figures are not before us; but it is said that in the court below the complainant exhibited a statement of his resources, after which the order for temporary alimony was entered.

An order may be entered that appellant pay to appellee the sum of fifty dollars in addition to the allowance made by the circuit court.

Bird, C. J., and Hooker, Blair and Stone, JJ., concurred.

Cruelty as a Ground for Divorce is the subject of notes to Reinhard v. Reinhard, 65 Am. St. Rep. 69; Nye's Appeal, 12 Am. St. Rep. 877; Palmer v. Palmer, 40 Am. Rep. 463; Morris v. Morris, 73 Am. Dec. 619; and Poor v. Poor, 29 Am. Dec. 674.

Personal Violence is not Absolutely Essential to Constitute Cruelty entitling the abused spouse to a divorce: Bloom v. Bloom, 57 Wash. 23, 135 Am. St. Rep. 965; Grow v. Grow, 134 Ky. 816, 135 Am. St. Rep. 440; Mosher v. Mosher, 16 N. D. 269, 125 Am. St. Rep. 654; Campbell v. Campbell, 149 Mich. 147, 119 Am. St. Rep. 660; Page v. Page, 43 Wash. 293, 117 Am. St. Rep. 1054; Green v. Green, 113 N. C. 533, 92 Am. St. Rep. 788; Gardner v. Gardner, 104 Tenn. 410, 78 Am. St. Rep. 924; Brauer v. Brauer, 194 Pa. 287, 75 Am. St. Rep. 699; Reinhard v. Reinhard, 96 Wis. 555, 65 Am. St. Rep. 66; Robinson v. Robinson, 66 N. H. 600, 49 Am. St. Rep. 632; Mayhew v. Mayhew, 61 Conn. 233, 29 Am. St. Rep. 195; Minzer v. Minzer, 83 Mich. 319, 21 Am. St. Rep. 605. But in Illinois physical violence has been held essential: Maddox v. Maddox, 189 Ill. 152, 82 Am. St. Rep. 431; and actual violence, to constitute a ground for divorce, must be attended with danger to life, limb or health, or be such as to cause reasonable apprehension of future danger: Morris v. Morris, 14 Cal. 76, 73 Am. Dec. 615.

A Single Act of Cruelty is not sufficient as a ground for divorce: Fritz v. Fritz, 138 Ill. 436, 32 Am. St. Rep. 156; Nye's Appeal, 126 Pa. 341, 12 Am. St. Rep. 873.

MORTON v. HANES.

[162 Mich. 366, 127 N. W. 269.]

LANDLORD AND TENANT—Fitness of Premises—Covenants. In the absence of fraud, there is no implied covenant that premises are fit for the purpose for which they are leased. (p. 568.)

LANDLORD AND TENANT—Fitness of Premises—Damages. Where a landlord makes false or fraudulent representations as to material facts not obvious to the lessee, or, knowing such facts, of which the lessee is excusably ignorant, conceals them, he may be held liable to the lessee for damages incurred in consequence thereof in an action for fraud and deceit, or the lessee may recoup such damages in the landlord's suit for rent. (p. 569.)

LANDLORD AND TENANT—Fraud of Landlord—Damages. A tenant, by remaining in possession, waives the right to rescind the lease for fraud or deceit of the landlord, whereby he was induced to enter into the lease, but he does not thereby waive his claim for damages occasioned by the fraud. (p. 569.)

LANDLORD AND TENANT—Fraud—Recoupment of Damages.—In an action for rent under a lease the tenant may show fraud and deceit of the landlord, whereby he was induced to enter into the lease, and recoup damages occasioned thereby. (p. 569.)

George J. Burke and M. J. Cavanaugh, for the appellant.

Blum & Sample and Arthur Brown, for the appellee.

³⁶⁶ **BLAIR, J.** This is an action of assumpsit upon a lease, executed March 16, 1907, containing, among other provisions, the following:

³⁶⁷ "Witnesseth, that the said party of the first part has agreed to let, and does hereby let to the said party of the second part, and the said party of the second part has agreed to take, and hereby does take, from the said party of the first part the following described premises situated in the city of Ann Arbor, county of Washtenaw and State of Michigan, to wit, the house and premises known as number 611 Church street in the city of Ann Arbor, State of Michigan, to be occupied as a residence by said second party with the privilege of keeping roomers and boarders. On this lease all moneys that are due or to become due shall be deposited in the State Savings Bank of Ann Arbor, Michigan, to the credit of Hudson T. Morton. For the term of three years (with the privilege of making it five) to commence on the first day of September, 1907."

Defendant gave notice under her plea of the general issue that she would prove that at the time she rented the house the defendant falsely and fraudulently represented to her that the house could be properly heated by the furnace then in the house, and that, in reliance upon these representations, she went to great expense in fitting up the house to accommodate student roomers and suffered great damages, in consequence

of the failure of the furnace to properly heat the house, which she would claim by way of recoupment.

Defendant occupied the house for ten months, and was finally ousted by summary proceedings, and this action was brought to recover the balance of the rent reserved in the lease.

In the course of the cross-examination of plaintiff, the following occurred:

"Mr. Burke: The defense is that under this lease there is a purpose for which this house was leased, that it was unfit for that purpose and Mr. Morton made certain representations. We have given notice in our plea that he made these representations. The lease was made with the privilege of keeping roomers. We expect to show that it was not only the privilege, but the purpose of the renter in accepting the contract. I think we have the right to show what the intent and purpose of the lease or contract is. This is not an attempt to change or vary the terms of the written agreement in any sense.

ses "The Court: What do you say to that?

"Mr. Brown: I think the arrangement was finally merged in the written instrument and that shows.

"Mr. Burke: We ought to be able to show any legal defect in those premises which was known to the plaintiff, but could not be known to the defendant, and which would entirely change the consideration of the lease.

"The Court: The language of this lease is that it was with the privilege of keeping roomers and boarders. If you are seeking to show that the house was not suitable by reason of this poor heating plant, it is my impression that it is not competent evidence, and that you cannot show it. You are not entitled to show that the house was not properly heated, that the heating arrangements would not heat the house properly. This case was tried once before and that testimony was admitted, but on reflection I am satisfied that was not competent. My present view is that I ought not to admit it."

Defendant testified in her own behalf:

"The first thing I asked him [Morton] on the fifteenth day of March was whether the house would heat.

"Mr. Brown: I object to any conversation at this time for the reason that it was merged in the written contract.

"The Court: I am inclined to think if you seek to show the heating plant of this house was inadequate to heat the rooms properly, you are not entitled to show that under this lease. That is not a defense to an action on this lease. If the heating plant was inadequate, she was under no obligation to remain there, but if she did, she is bound by it, and it would be no defense to an action for rent to show that that house was not properly heated.

"Mr. Burke: We take exception to the ruling of the court. Do I understand that the fact that the defendant had relied upon the representations of Mr. Morton, and had purchased furniture and moved there with the idea of keeping roomers, and she found she could not do so (because of the imperfect heating), that that defense could not be interposed to avoid payment of rent?

"The Court: Yes. Somewhat reluctantly I came to that conclusion, but I am satisfied that there is no implied guaranty that the apparatus is sufficient to heat according to her notion.

"Mr. Burke: We take exception to the ruling of the court. The case turns upon whether or not the defect in ³⁶⁹ the heating plant can be shown in defense on this action. We have no further testimony."

The court directed a verdict for plaintiff, and defendant brings the record to this court for review.

The position of defendant is shown by the following extract from the brief: "We contend that the failure of the heating plant to operate in a manner suitable for the purpose for which the house was rented caused the consideration for which the defendant was to pay rent to utterly fail. 'The law will not imply any covenant or warranty . . . with regard to the physical condition of the premises at the time of the letting, that they are in a tenantable condition.'

"This is the general rule as laid down in 18 American and English Encyclopedia of Law, second edition, page 613. But, where the lease limits the use of the premises to certain specified purposes without showing any intent on the part of the parties that the lessee should fit them for such purposes, there is an implied stipulation that the premises are fit for the specified purposes. This is identically the case in the lease under consideration: 1 Taylor on Landlord and Tenant, 9th ed., p. 481. This rule is followed by the case of Young v. Collett, 63 Mich. 331, 29 N. W. 850, which is the leading case on this question arising upon a lease."

The general rule undoubtedly is that, in the absence of fraud, there is no implied covenant that premises are fit for the purpose for which they are leased: Doyle v. Union Pac. Ry. Co., 147 U. S. 413, 13 Sup. Ct. Rep. 333, 37 L. ed. 223; Jaffe v. Harteau, 56 N. Y. 398, 15 Am. Rep. 438; Clark v. Babcock, 23 Mich. 164; Rhoades v. Seidel, 139 Mich. 608, 102 N. W. 1025.

In Young v. Collett, 63 Mich. 331, 29 N. W. 850, upon which defendant relies, it is said: "When a landlord rents a building, and in the lease, as in this case, limits its use to a certain specified purpose, and the tenant agrees to do no more than keep the same in as good repair as when taken, it is evident that the landlord recommends the building as suitable for that

purpose in the condition it then is, if there are no modifying ³⁷⁰ clauses to the contrary contained in the lease, and it should be so held; otherwise there would be no consideration for the tenant's agreement to pay rent: *Tyler v. Disbrow*, 40 Mich. 415; *Smith v. Marrable*, 11 Mees. & W. 5; *West Side Sav. Bank v. Newton*, 76 N. Y. 616; *Salisbury v. Marshal*, 4 Car. & P. 65."

This language was unnecessary to the determination of the case. The defendants had given up the room to the plaintiff for repairs, and he had taken possession for that purpose and taken up the floor of the lodge-room, rendering the room untenable, "and it was while in this situation the defendants were unable to get the landlord to make the needed change and repairs. This neglect to make the change and repairs necessary was, under all the circumstances, an eviction by the landlord."

Where, however, the landlord makes false or fraudulent representations as to material facts not obvious to the lessee, or, knowing such facts, of which the lessee is excusably ignorant, and which would seriously impair the value of the lease, conceals them, he may be held liable to the lessee for damages incurred in consequence thereof, in an action for fraud and deceit, or the lessee may recoup such damages in the landlord's suit for rent: *Steefel v. Rothschild*, 179 N. Y. 273, 72 N. E. 112, 1 Ann. Cas. 676; *Pryor v. Foster*, 1 N. Y. Supp. 774; *Norris v. McFadden*, 159 Mich. 424, 124 N. W. 54.

While the tenant, by remaining in possession, waives the right to rescind the lease, he does not waive his claim for damages for the fraud and deceit whereby he was induced to enter into the lease: *Pryor v. Foster*, 1 N. Y. Supp. 774.

We are therefore of the opinion that the court erred in refusing to permit defendant to show the alleged false and fraudulent representations as to the furnace set up in her notice.

The judgment is reversed and a new trial granted.

Bird, C. J., and Ostrander, Hooker and Stone, JJ., concurred.

That There is No Implied Covenant That Demised Premises are Fit or Suitable for the purpose for which they are demised is the subject of notes to *Minneapolis Co-operative Co. v. Williamson*, 38 Am. St. Rep. 477, and *Krueger v. Ferrant*, 43 Am. Rep. 227. See, also, on this question, *Clifton v. Montague*, 40 W. Va. 207, 52 Am. St. Rep. 872; *Hamilton v. Feary*, 6 Ind. App. 615, 52 Am. St. Rep. 485; *Blake v. Dick*, 15 Mont. 236, 48 Am. St. Rep. 671; *Minneapolis Co-operative Co. v. Williamson*, 51 Minn. 53, 38 Am. St. Rep. 477; *Murray v. Albertson*, 50 N. J. L. 167, 7 Am. St. Rep. 787; *Davidson v. Fischer*, 11 Colo. 583, 7 Am. St. Rep. 267; *Krueger v. Ferrant*, 29 Minn. 385, 43 Am. Rep. 223.

Furnished Houses and Apartments Demised or rented for immediate residence are by some cases excepted from the above rule: See the

note to Minneapolis Co-operative Co. v. Williamson, 38 Am. St. Rep. 479; Ingalls v. Hobbs, 156 Mass. 384, 32 Am. St. Rep. 460; but this has been denied in other cases; Franklin v. Brown, 118 N. Y. 110, 16 Am. St. Rep. 744; Foster v. Peyser, 9 Cush. 242, 57 Am. Dec. 43.

Fraudulent Misrepresentation of Condition of the Premises or Fraudulent Concealment of facts rendering them unfit for the purpose for which they are demised will render the landlord liable in damages: Myers v. Fear, 21 Okl. 498, 129 Am. St. Rep. 795; Maywood v. Logan, 78 Mich. 135, 18 Am. St. Rep. 431.

Recoupment or Setoff of Damages Caused by a Landlord's Fraudulent Misrepresentation of the condition and fitness of the premises for which they were demised, or for breach of covenants or warranties, may be claimed by the tenant in an action brought to recover the rent: Myers v. Fear, 21 Okl. 498, 129 Am. St. Rep. 795; McCoy v. Oldham, 1 Ind. App. 372, 50 Am. St. Rep. 208; Keating v. Springer, 146 Ill. 481, 37 Am. St. Rep. 175.

IN RE FITZGIBBONS' ESTATE.

[162 Mich. 416, 127 N. W. 313.]

MARRIAGE—Cohabitation After Removal of Impediment.—A woman will be regarded as the legal wife of a man at the time of his death where, in good faith and in ignorance of his prior undissolved marriage to another, she married him and cohabited with him during the lifetime of the former wife and after her death. (Brooke, Ostrander, Hooker and McAlvay, JJ., dissenting.) (pp. 572, 581.)

Sarah Jane Fitzgibbons petitioned for appointment as administratrix of the estate of William Fitzgibbons, deceased, claiming to be his widow, and was appointed by the probate court. Subsequently William Fitzgibbons, Jr., filed a petition asking for her removal and denying the validity of the marriage. This petition was granted and the administratrix removed, and she appealed to the circuit court. From a judgment determining that she was the lawful widow of the deceased, certain of his heirs brought error. Affirmed by an evenly divided court.

A. A. & H. A. Ellis, for the appellants.

R. A. Hawley, for the appellee.

⁴¹⁶ **BROOKE, J.** The writ of error in this case is prosecuted by certain heirs of William Fitzgibbons, deceased, for the purpose of reviewing a judgment of the circuit court, by which it was determined that Sarah Jane Fitzgibbons is ⁴¹⁷ the lawful widow of deceased, and, as such, entitled to participate in his estate.

Certain facts appear in the record, about which there is no dispute. William Fitzgibbons, deceased, was married to Armenia Allen, at New Haven, Oswego county, New York, in the year 1868. After the marriage, he and his wife lived at North Volney, New York, until 1876, during which time two

children, Grace and William, Jr., were born to them. The family then removed to Galt, Canada, where a third child, Ella, was born. When the youngest child, Ella, was about two years old, in 1878, deceased sent his wife, Armenia, and the three children back to New York state, and himself came to Michigan. From 1878 to June 20, 1881, deceased was in correspondence with his wife, Armenia. In 1880, he had settled in Saranac, Ionia county, this state, and there boarded with a family named Stewart. Deceased shortly began paying court to a daughter, Sarah Jane (appellee), who was then about nineteen years of age. On February 14, 1881, he took her to Grand Rapids and there went through a marriage ceremony with her, after which they returned to Saranac and commenced to live together as husband and wife. Their home remained in Saranac during the balance of his life, though he was absent at times on business. Appellee bore to deceased one child, a daughter, Madeline, born February 6, 1891. From 1881 to 1900 deceased had no correspondence with his family in New York, so far as the record discloses. In the latter year, his son, William, went to Saranac and discovered himself to his father. Deceased took his son to his home for dinner and supper and held a long conference with him, in which he told his son that he was in Armenia's power, that he did not want to be punished for bigamy, and that when he, the son, needed help, to let him know. Thereafter, and up to the month of his death (November 13, 1904), he paid various small sums to his son, which were devoted to the care of Armenia, who died September 3, 1903. It is apparent that deceased was not aware of the death of his wife, because ⁴¹⁸ he sent his son twenty dollars but a few days before his own death. During the twenty-three years appellee and deceased lived in Saranac, they were reputed to be husband and wife; they received and were received socially, moving among the best people of the vicinity. Deceased seems to have acquired the respect and confidence of the community, holding the office of postmaster at Saranac for seven or eight years preceding his death.

Prior to her marriage with deceased, appellee heard that deceased was a married man. Upon inquiry, deceased denied the fact of his prior marriage. Again, in 1891, shortly after the birth of the daughter, appellee was told by Mary Fitzgibbons, a sister in law of deceased, of the former marriage, and that there were three children. Appellee then made further inquiry of deceased, whereupon, she testifies, he admitted his former marriage, but claimed to have a divorce. She makes the claim that she implicitly relied upon the statements made to her by deceased, both before the marriage ceremony and later, when she taxed him with his bad faith. She states that in spite of the rumors which reached her ears she went through the entire twenty-three years of her association with deceased

in absolute ignorance of the existence of his wife, and in good faith believing herself to be his lawful wife. She swears that she had no knowledge of the death of Armenia, in 1903, because she never knew of Armenia's existence, and that after Armenia's death no new contract was made between herself and her husband, their relations continuing after that event (of which deceased also was ignorant) in reliance upon the ceremonial marriage, contracted in 1881.

Under the facts above disclosed, the court submitted to the jury the question of whether or not appellee was the legal widow of deceased, making the determination of the jury, upon that point, rest solely upon the good faith of appellee in entering into the contract and in continuing to live with deceased thereunder up to the time of his death, using the following language: ⁴¹⁹ "It is a question of belief. She must have been informed to that degree the burden is upon her to establish she was acting in good faith after the other side have once established there was a former wife living at the time of the marriage. Then the burden shifts to Jennie, and it is incumbent upon her to show by a preponderance of evidence she acted in good faith; that is, she believed William Fitzgibbons was her lawful husband, and there was no impediment to the marriage between her and William Fitzgibbons; if she honestly believed that, taking into consideration all that was said and told her in the discussion she had with her husband, if she was convinced from what he said, and other sources, these rumors were false and untrue, and she was laboring under the honest belief that she was his lawful wife, that she had the legal right to marry him, and he to marry her at the time it was done, she would be considered innocent, and the law would consider her the legal wife and widow of the deceased because of the inference that they had a common-law marriage after the death of the first wife, provided she was innocent all the way along."

The legitimacy of Madeline was made to depend upon the finding of the jury as to her mother's legal status. The jury, apparently with much difficulty, found that appellee was the legal widow of deceased and that Madeline was his legitimate daughter.

Section 8589, 3 Compiled Laws, provides: "Marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of parties capable in law of contracting, is essential."

Section 8616 provides: "All marriages which are prohibited by law, on account of consanguinity or affinity between the parties, or on account of either of them having a former wife or husband then living, . . . shall, if solemnized within this state, be absolutely void without any decree of divorce or other legal process."

It being conceded upon this record that the marriage between deceased and Armenia Allen, in 1868, was a valid union, and that Armenia was alive and undivorced in 1881, when the contract between deceased and appellee was entered ⁴²⁰ into, it is clear that the later marriage was absolutely void, and, during the life of Armenia, afforded no protection to appellee. At no time prior to Armenia's death was deceased legally competent to give his assent to a union with appellee. His relations with appellee during those twenty-two years were meretricious and known to him to be such, for on June 20, 1881, four months after the ceremony was performed between him and appellee, he wrote his wife, Armenia, acknowledging the receipt of a letter from her, and promising to return to her as soon as possible. On September 3, 1903, Armenia died. Then, for the first time, it became possible for deceased and appellee to intermarry. Did they in fact do so?

It is apparent from the record that during the last year of the life of deceased (following the death of his wife) he treated appellee in all overt respects as a husband should treat his wife. He addressed numerous letters to her as his wife, and subscribed them as her husband, and during that year he lived at their home with her for several months, during which time the relations of husband and wife seem to have been sustained, so far as was apparent to the world. His conduct, however, during this period was not different in any respect from his conduct during the preceding twenty-two years, when he knew his relations with her were adulterous. Under these circumstances, it is claimed by the appellee, and, in effect, so charged by the court, that, assuming the good faith of the appellee in entering into the void contract and continuing to live under it, a marriage should be presumed as soon as the impediment was removed. These facts and circumstances, if uncontradicted and unexplained, might support the inference that a new and valid contract was entered into upon the death of Armenia, but such inference is impossible, if negated by positive evidence.

Schouler's Domestic Relations, fifth edition, section 15, defines marriage as follows: "To constitute a perfect union, the contracting parties should be two persons of the opposite sexes, without disqualification ⁴²¹ of blood or condition, both mentally competent and physically fit to discharge the duties of the relation, neither of them being bound by a previous nuptial tie, neither of them withholding a free assent."

And further, at section 26: "A union once originating between man and woman, purely illicit in its character, and voluntarily so, there must appear some formal and explicit agreement between the parties thereto, or a marriage ceremony, or some open or visible change in their habits and relations, pointing to honest intentions, before their alliance can be regarded as converted into either a formal or an informal

marriage. Nor is the issue between informal marriage and illicit intercourse to be concluded by the conduct of the pair toward society. They may, for convenience or decency's sake, hold themselves out to third persons as man and wife, while yet sustaining at law, and intentionally, a purely meretricious relation."

Eversley on Domestic Relations, page 2, says: "Marriage is a state or relation depending for its existence upon the fact of parties competent to contract the relation, and their legally voluntary present consent to do so."

At page 7, he says further: "The presumption of marriage, arising from cohabitation and repute, can only be rebutted by clear and satisfactory evidence. . . . But this presumption of law in favor of marriage does not hold good under all circumstances."

In 1 Bishop on Marriage, Divorce and Separation, section 344, it is said: "Where all the facts are covered by direct proofs, and there is no room to presume others, they will be held to constitute marriage only when they disclose a concurring consent to it, by the two minds at the same instant."

Particular stress is laid by counsel for appellee upon some language contained in the opinion of this court, in the case of *Barker v. Valentine*, 125 Mich. 336, 84 Am. St. Rep. 578, 84 N. W. 297, 51 L. R. A. 787, but we ⁴²² believe that a careful reading of the case will disclose that it is not out of harmony with the earlier decisions of the court. In that case, Valentine had started divorce proceedings against his first wife, Ida, in New York. No divorce was granted. He removed to Michigan and entered into relations with the second woman, Margaret. After four years, he and Margaret, in September, 1889, returned to New York, where Ida caused a warrant to be issued against him for nonsupport. Ida died in October, 1889, a fact apparently known to both Valentine and Margaret. They returned to Detroit, where he made application in a fraternal order for insurance, describing Margaret as his wife. He introduced her as his wife, lived with her as such, and she was so recognized by his friends and relatives for seven years.

We understand that the court held in this case simply that the evidence disclosed by the record was sufficient to support an inference that the parties had entered into a new contract, after the removal of the impediment. For, in discussing the cases of *Rose v. Rose*, 67 Mich. 619, 35 N. W. 802, and *Van Dusan v. Van Dusan*, 97 Mich. 70, 56 N. W. 234, the court said: "There is nothing in either of these cases to indicate that if, after the impediment to a lawful marriage between them had ceased, they had intended to take each other as husband and wife, and had indicated that intention by treating each other in all respects as though they were married, and had introduced each other as husband and wife, and had so

held themselves out to the world, and had lived together as husband and wife, the court would not have held that the presumption that the illicit relation, which existed when they commenced to live with each other, continued after the impediment to their marriage ceased, was overcome."

An examination of the authorities cited in this case, both from Michigan and other states, shows that in each case the question as to whether or not a common-law marriage existed was determined upon the evidence.

A careful examination of all the cases in Michigan leads us to the conclusion that a contract of marriage cannot ⁴²³ be presumed when such presumption would be violence to the facts in the case, fully covered by the proofs: *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *Peet v. Peet*, 52 Mich. 464, 18 N. W. 220; *Rose v. Rose*, 67 Mich. 619, 35 N. W. 802; *Williams v. Kilburn*, 88 Mich. 279, 50 N. W. 293; *Van Dusan v. Van Dusan*, 97 Mich. 70, 56 N. W. 234; *Flanagan v. Flanagan*, 116 Mich. 185, 74 N. W. 460; *Lorimer v. Lorimer*, 124 Mich. 631, 83 N. W. 609; *Judson v. Judson*, 147 Mich. 518, 111 N. W. 78.

The question in the case at bar appears to us to be, Did deceased and appellee, at any time subsequent to the removal of the impediment, presently agree to take each other for husband and wife, and live together in that relation? Clearly they did not. He did not, because he died in the belief that his wife, Armenia, was still alive. Her assent to the new contract, if it could be assumed, and it is negatived by her own testimony, would avail nothing, for both must consent at the same time, else no contract follows. To predicate the legal status of the appellee upon her good faith alone is not only contrary to authority, but would result, possibly, in the absurdity of a man leaving two or more legal widows.

If deceased, in the case at bar, had entered into a contract of marriage with a woman in South Carolina, the state in which he was doing business at the time of his death, that woman, entering into the relation in good faith, would also have become his wife upon the removal of the impediment, and would now also be his legal widow. We are aware that the principle contended for by appellee has received recognition to some extent in some other jurisdictions, notably in a late case in New York (*In re Wells' Estate*, 123 App. Div. 79, 108 N. Y. Supp. 164, 194 N. Y. 548, 87 N. E. 1129), but we are satisfied that no such doctrine has been or should be incorporated into the law of this state.

The judgment should be reversed.

Ostrander, Hooker and McAlvay, JJ., concurred with Brooke, J.

⁴²⁴ MOORE, J. I cannot agree with the conclusion reached by Justice Brooke. The record shows that Mrs. Fitz-

gibbons entered upon and continued her relations with William Fitzgibbons and bore a child to him in full belief that she was lawfully wedded to him, and without knowledge that there was any legal impediment to their entering into the marriage. The record is equally clear that after the impediment to their marriage was removed Mr. Fitzgibbons held Mrs. Fitzgibbons out to the world as being his wife. After that event he addressed her as his wife in at least fifty letters and signed himself as her husband. Under conditions like these it must be said that the authorities are not agreed. The precise question has not been presented and passed upon by this court. There is an interesting discussion of the issue of marriage or no marriage in the case of *Bechtel v. Barton*, 147 Mich. 318, 110 N. W. 935. The nearest case in point to the one before us is *Barker v. Valentine*, 125 Mich. 336, 84 Am. St. Rep. 578, 84 N. W. 297, 51 L. R. A. 787, in which language is used in the opinion which the trial judge thought justified him in giving the charge he did. It may be true that the language used in the opinion was not necessary to the disposition of the case, but it was fully justified by the authorities cited on pages 342 and 343 of the opinion.

Is it necessary, in the interest of public policy, that when women enter into the marriage relation and continue it in the full belief that they are lawfully wedded wives, and bear children to their husbands in the full belief that those children have a right to bear his name, and the relation continues after the legal impediment is removed, the woman all the time believing she is a lawful wife, and the man holding her out as such, that she should be characterized as though she was a harlot, and had knowingly entered into meretricious relations? Can it be urged as in furtherance of good morals that children born under such circumstances may be truthfully characterized as ⁴²⁵ illegitimates? An affirmative answer to these questions shocks one's sense of justice.

This view has been taken by very respectable courts. The case of *In re Wells' Estate*, 123 App. Div. 79, 108 N. Y. Supp. 164, is directly in point. In the opinion occurs the following: "In the case of *Rose v. Clark*, 8 Paige (N. Y.), 582, Chancellor Walworth uses this language: 'After all that had transpired previous to the death of the intestate (in this case Arthur Wells), I think he would have been precluded from denying that she (the appellant) was his wife. . . . And if the evidence was sufficient to raise the presumption of a legal marriage as to him, in his lifetime, it must necessarily be sufficient to entitle her representative to the widow's portion of the estate, under the statute of distributions.'

"It is hardly conceivable that in the case at bar Arthur Wells, if living, would be heard to deny that the appellant was his lawful wife. Expression was given to the same principle

in the case of *Townsend v. Van Buskirk*, 33 Misc. Rep. 287, 68 N. Y. Supp. 512, in an opinion written by Mr. Justice Maddox. The justice said:

" 'There is to my mind a well-defined distinction between illicit relations, forbidden because of an undisclosed disability on the part of one of the parties thereto, and such relations as are mutually meretricious, involving on the part of the woman knowledge that its character is not, and is not intended to be, matrimonial, but of a wanton and lustful nature. . . .

" 'There can be no other conclusion, from all the evidence in the case, that she and Townsend desired marriage, that that was their intention, and consequently "their cohabitation, thus matrimonially meant," made "them husband and wife from the moment when the disability" on his part was removed, and it was immaterial whether he knew of that removal, . . . the fact being that it was removed, and their consent to the matrimonial relation may be inferred from their acts and conduct.'

"See, also, *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. Rep. 723, 31 L. ed. 654, where marriage is defined to be 'Something more than a mere contract, though founded upon the agreement of the parties. When once formed, a relation is created between the parties which they cannot change, and the rights and obligations of which depend, not upon their agreement, but upon the law, statutory or common.'

⁴²⁶ "In the case of *Eaton v. Eaton*, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605, 1 Ann. Cas. 199, the same question was considered, and the court said: 'Another question to be determined is the legal effect of the cohabitation of the parties after the impediment to their marriage had been removed. In this state the only thing essential to a marriage is the consent of parties capable of contracting. . . . If the parties live together and intend to sustain toward each other the relation of husband and wife, they are, in the absence of any impediment fatal to that relationship, legally married': See, also, *State v. Worthingham*, 23 Minn. 528.

"The position taken upon this question by the Illinois courts is illustrated in the cases of *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Robinson v. Ruprecht*, 191 Ill. 424, 61 N. E. 631; *Manning v. Spruck*, 199 Ill. 447, 65 N. E. 342. See, also, *Stein v. Stein*, 66 Ill. App. 526.

"Many other decisions rendered by the highest courts of other states might be cited to like effect. It seems to me, in view of the decisions and authorities which have been referred to, that the rule ought to be that where one person is free to enter into the matrimonial relation and does so in good faith, but the other party is incapable of entering into such relation because of a former wife or husband living, or other

impediment, when such impediment is removed, if the parties continue matrimonial cohabitation, continue to introduce and recognize each other as husband and wife, and are so recognized by their relatives, friends, and by society, it ought to be held that from such moment they are actually husband and wife, and that under such circumstances it is of no importance that a formal agreement to live together as husband and wife was not entered into, or that either did not know that the impediment to such an agreement had been removed, when, in fact, it had been so removed, and both parties were competent to enter into the matrimonial state."

In *Eaton v. Eaton*, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605, 1 Ann. Cas. 199, it appeared that the parties were married March 21, 1899; that plaintiff, Harriet M. Eaton, obtained a decree of divorce from Enis Goff in Johnson county, December 2, 1898; that said decree of divorce was obtained without the knowledge of Eli Eaton; that the parties to this suit lived together until November 30, 1899; that the decree of divorce from Enis Goff, the ⁴²⁷ former husband of plaintiff, was obtained less than six months prior to the marriage of plaintiff and defendant; that such marriage was in violation of law and a nullity; and that defendant had no knowledge of the time when the prior divorce was procured until just prior to the commencement of this action. The marriage between plaintiff and defendant was adjudged to be null and void.

In reversing this decree the court used the following language:

"Another question to be determined is the legal effect of the cohabitation of the parties after the impediment to their marriage had been removed. In this state the only thing essential to a marriage is the consent of parties capable of contracting: *Bailey v. State*, 36 Neb. 808, 55 N. W. 241; *Gibson v. Gibson*, 24 Neb. 394, 39 N. W. 450. Even a license is not indispensable: *Haggin v. Haggin*, 35 Neb. 375, 53 N. W. 209. If the parties live together and intend to sustain toward each other the relation of husband and wife, they are, in the absence of any impediment fatal to that relationship, legally married. The marriage between the plaintiff and defendant was an attempt made in good faith to form a legal union. Both intended to live in wedlock. In the absence of an impediment to the marriage no ceremony would have been required; the mutual consent of the parties would have been sufficient. When the impediment was removed, why may not consent be inferred from continued cohabitation? This exact question arose in the house of lords in the case of *De Thoren v. Attorney General*, reported in L. R. 1 App. Cas. 686, decided in 1876. The question turned upon the legitimacy of certain children born to a man and woman who were married in Scotland, going through a public ceremony in a church, be-

lieving the marriage a valid one. The man, however, had been divorced, and the time for appeal from the decree at nisi prius had not expired at the time of the public marriage. In that case the contention was that the inference of marriage was rebutted, because the parties had commenced living together in pursuance of an invalid marriage, and that the consent deducible from cohabitation must be referred to the ineffectual ceremony. But it was there decided that 'It must be inferred that the matrimonial consent was interchanged ⁴²⁸ as soon as the parties were enabled, by the removal of the impediment, to enter into the contract.'

"And further: 'The ceremony which took place, although invalid, was undoubtedly a consent by the parties to live together as husband and wife. And their subsequent cohabitation was proof of continued consent.'

"In the case cited, Lord Chelmsford said: 'Taking the facts as they are stated in the case, and applying the law to them, the court of session is of opinion that, assuming the ignorance of the parties of the invalidity of the ceremony of marriage during the whole period of their cohabitation, yet after the removal of the impediment to their marriage and before the birth of their eldest son, they became married persons. I agree entirely with this opinion.'

"In *Rose v. Clark*, 8 Paige (N. Y.), 574, Chancellor Walworth says: 'It appears, however, from decisions in our own courts, as well as in England, that a subsequent marriage may be inferred from acts of recognition, continued matrimonial cohabitation, and general reputation, even where the parties originally came together under a void contract of marriage': *Fenton v. Reed*, 4 Johns. (N. Y.) 52, 4 Am. Dec. 244; *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245. In the recent case of *University of Michigan v. McGuckin*, 62 Neb. 489, 87 N. W. 180, 57 L. R. A. 917, it was held, although the relations of the parties were originally meretricious, that marriage is a social status, the existence of which may be shown by conduct clearly indicating free consent and mutual intention to live in wedlock. Upon the conceded facts in this case, our conclusion is that the parties, by continuing to live together in the matrimonial relation, contracted a valid marriage."

In the case of *Robinson v. Ruprecht*, 191 Ill. 424, 61 N. E. 631, *Curtis E. Robinson and Johannah Schoeninger* began living together without pretense of marriage. In April, 1873, they went before a justice of the peace, where a marriage ceremony was performed. Previous to this ceremony both parties had been married. The woman supposed her first husband ⁴²⁹ was dead, though he in fact was still living. Mr. Robinson had a prior wife living from whom he had not been divorced, as he well knew. The parties continued to live together as husband and wife until the death of Johannah, which occurred in

April, 1891. The undivorced wife of Mr. Robinson died in December, 1875. Gottlieb Schoeninger, husband of said Johannah, died in May, 1890. There is nothing to indicate that knowledge of his death came to either of the parties. In disposing of the case the court used the following language:

"The formal statutory celebration of marriage between said Curtis E., Sr., and said Johannah, indicated that it was their desire their subsequent connection should be considered and understood to be matrimonial. They in good faith, so far as this record discloses, at the time of the marriage, believed that Johannah was a widow and might lawfully marry, but Curtis E., Sr., at least, knew that he then had a living wife and could not lawfully enter into another marriage union. In 1875, about two years after their formal marriage, Mary J., the wife of said Curtis E., Sr., died, and within a few months thereafter said Curtis E., Sr., and Johannah, were advised that said Mary J. was no longer living. They then believed there was no impediment to their legal union as husband and wife. There is no direct proof they subsequently entered into a statutory marriage, but their actions, conduct, their cohabitation and repute, were foreign to and inconsistent with any relation other than that of husband and wife, and there can be no doubt but that after the death of said Mary J. the cohabitation between said Curtis E., Sr., and said Johannah was matrimonial in the intent and belief of both of them. Their actions, life, and repute from henceforth during the remainder of their lives were those of husband and wife. The impediment to that legal relation was removed May 13, 1890, by the death of said Gottlieb, the husband of said Johannah. There is no proof on the question whether they were or were not advised of his death. They believed that he was dead when the ceremony of marriage was performed in McHenry county, in 1873, and so far as the record discloses were never advised to the contrary. Johannah lived nearly a year after the death of Gottlieb and died, April 14, 1891, and said Curtis E., Sr., survived Johannah but ⁴³⁰ about one year. It was lawful after the death of Gottlieb for them to enter into the marriage relation. They believed their cohabitation was matrimonial, intended it should be so, and the presumption of marriage from cohabitation apparently matrimonial became applicable to their relation as husband and wife in aid of the legitimacy of their children. . . . The acts of each toward the other were those of husband and wife, and to said Martha J., Curtis E., Jr., and Bessie L., their children, who were members of the family, they deported themselves as father and mother. Their whole life was inconsistent with any other relation than that of husband and wife. A few months after the death of said Gottlieb Schoeninger, they, with the appellee children, visited the relatives of the husband in Massachusetts. Curtis

E., Sr., introduced Johannah to his kindred as his wife, and the appellee children as their children. He manifested parental pride in the children, was anxious the appellee daughters should exhibit their proficiency in music to his kindred, and declared his satisfaction that through appellee Curtis E., Jr., his name would be perpetuated. A family reunion was held at the house of his brother, Nathan S., at which Curtis E., Sr., Johannah, and the appellee children attended as a family. . . . A pew was rented in the South Park Avenue Church, and Curtis E., Sr., and Johannah attended services together there. Deeds were executed conveying to them property as husband and wife, naming them as such, and they uniformly treated and called each other husband and wife. Curtis E., Sr., applied for letters of administration on the estate of Johannah, declaring under oath therein that he was her widower. He received an engrossed copy of resolutions passed by a lodge of which he was a member, extending sympathy and condolence on the death of his wife, and he brought such copy home to the children. He directed her name, as Johannah Robinson, to be engraved upon the plate of her coffin, and an inscription to be engraved on her monument in which she was declared to be his wife, and caused to be published an obituary notice of her death, naming her as 'Johannah, beloved wife of C. E. Robinson.' A common-law marriage was thus established, and such marriages are valid in this state: *Port v. Port*, 70 Ill. 484; *Elzas v. Elzas*, 171 Ill. 632, 49 N. E. 717."

What was done in the case just quoted was no more ⁴³¹ than was done in the case at bar. Mrs. Fitzgibbons all the time supposed she was the lawful wife of Mr. Fitzgibbons, and he having so represented her to the public and to herself after the legal impediment passed away, it is but scant justice to Mrs. Fitzgibbons and to her child and to the public to hold that she was at the time he died his legal wife.

The judgment should be affirmed.

Bird, C. J., and Blair and Stone, JJ., concurred with Moore, J.

Common-law Marriages in General is the subject of a note to Klepfel v. Klepfel, 124 Am. St. Rep. 104.

Where Cohabitation is Illegal in Its Inception, the Relation Between the Parties will not be Transformed into Marriage by evidence of continued cohabitation, or by any evidence which falls short of establishing, either directly or circumstantially, the fact of an actual contract of marriage after the bar has been removed: *Lanham v. Lanham*, 136 Wis. 360, 128 Am. St. Rep. 1085. If the solemnization of a marriage is unlawful, cohabitation under it is unlawful in the beginning, and can only become lawful upon a new solemnization after the impediment is removed: *Commonwealth v. Stevens*, 196 Mass. 280, 124 Am. St. Rep. 555. See, further, the note to *Kepfel v. Kepfel*, 124 Am. St. Rep. 116. A statute providing that if a person having a living spouse enters into a marriage, the other party to which acts

in good faith, if the former marriage is subsequently annulled and the parties thereafter continue to live together as husband and wife, they shall be held to have been legally married from and after the removal of the impediment, has no extraterritorial effect; and if the impediment is removed while the parties reside in another state, it has no effect upon the status of the parties, although they subsequently remove to the state where such statute is in force: *Commonwealth v. Stevens*, 196 Mass. 280, 124 Am. St. Rep. 555. But a marriage entered into in good faith and followed by continued cohabitation after the removal of the impediment will be rendered legal by force of the statute: *Turner v. Williams*, 202 Mass. 500, 132 Am. St. Rep. 511.

The Burden of Proof to establish the termination, or want of termination of the first marriage where a second has been contracted, and what evidence is sufficient to establish the fact, is the subject of a note to *Pettinger v. Pettinger*, 89 Am. St. Rep. 198.

What Marriages are Void is the subject of a note to *State v. Lowell*, 79 Am. St. Rep. 361.

PEOPLE v. DETROIT UNITED RAILWAY.

[162 Mich. 460, 125 N. W. 700, 127 N. W. 748.]

STREET RAILWAYS—Extension of Line and of City Limits. An ordinance granting certain privileges to a street railway company, and requiring it to carry passengers within the city limits on certain terms, applies to the city limits as subsequently extended and to an extension of the line by purchase or otherwise. (p. 583.)

STREET RAILWAYS—Extension of System.—There are Two Methods of extending street railways. One is by construction and the other by purchase. A purchased railway becomes as much a part of the system as does the road as constructed. (p. 583.)

STREET RAILWAYS—Franchise—Construction of Ordinance. An ordinance granting certain privileges to a street railway company and requiring it to carry passengers within the city limits on certain terms, accepted by the company, must be held to have been granted and accepted in view of the power to change or extend such limits, and that neither the city nor the company contemplated a change of the terms in the event of an extension of the city limits or an extension of the lines within the city. (pp. 583, 584.)

MUNICIPAL CORPORATIONS—Ordinances—Change of Boundaries.—A municipal law or ordinance designed for a city at large operates throughout its actual boundaries, whatever they are, and is not affected by the fact that these are enlarged from time to time. (p. 585.)

FRANCHISE—Construed Strictly Against Grantee.—The terms of a franchise granted by a municipal corporation must be construed strictly against the grantee. (p. 586.)

John J. Speed, Charles D. Joslyn, William L. Carpenter and John C. Donnelly, for the appellant.

Bernard F. Weadock and P. J. M. Hally, for the people.

⁴⁶¹ MONTGOMERY, C. J. The Detroit City Railway Company obtained a franchise from the city of Detroit in 1862. At that time the city limits were located at Mt. Elliott avenue. In 1885, by amendment of the charter, the city limits were extended to Baldwin avenue. In 1889 an ordinance was passed by the council and accepted by the Detroit City Railway Company, providing for the sale of workmen's tickets, so called, eight for twenty-five cents during certain hours of the day, good over any of its lines in said city for a single fare. This ordinance also gave the right to the company to extend its double track on Jefferson avenue to the easterly limits of the city of Detroit. The Detroit City Railway Company continued to operate the line until 1890. Its rights and franchises were subsequently assigned to the defendant. A later ordinance imposes the duty of keeping these workmen's tickets on sale by conductors. The defendant subsequently purchased a street railway located wholly without the city limits, and maintained under authority of a franchise from the township of Grosse Pointe and the village of Fairview.

In 1907 the city limits of Detroit were extended to include a large portion of this territory. These two cases were brought to enforce penalties in the one case for refusing to accept a ticket good in the city of Detroit for passage over this last-named territory, and the other to recover a penalty for failure to keep tickets entitling a passenger to ride over this territory from any point in the ⁴⁶² city on sale. The question in each case is, therefore, whether the requirements of the ordinance of 1889, that passengers should be conveyed to any point in the city limits, binds the defendant, as assignee of the Detroit City Railway Company, to transport passengers to the easterly limits of Jefferson avenue as extended, notwithstanding that the defendant company is the assignee of the franchise granted by Grosse Pointe township and approved by the village of Fairview.

It is the contention of the city that, when the provision was made in the ordinance for transporting passengers anywhere within the city limits, it means the city limits as they may from time to time be fixed. On the other hand, the defendant contends that the defendant occupies the position of an assignee of the Grosse Pointe Railway Company, and that it is not, as to the railway in the late village of Fairview, an assignee of the Detroit City Railway Company. There are two methods of extending street railways. One is by construction, and the other may be by purchase under section 6448, 2 Compiled Laws. The purchased railway becomes as much a part of the system as does the railroad as constructed. So we think it after all gets back to the question of whether the real intent of this ordinance was to provide for single

fares within the city limits as such limits should from time to time be fixed.

We think it not unreasonable to hold that this mutual contract was made in view of the power of the legislature of the state to increase or diminish the territory within the city, and that neither the city nor the company contemplated that in case of an extension of the lines of the company within the city, either by purchase or acquisition from another company, an increased fare should be demanded. The case of *Township of West Bloomfield v. Detroit U. Ry.*, 146 Mich. 198, 117 Am. St. Rep. 628, 109 N. W. 258, involved a question not entirely dissimilar. In that case the company had contracted that the fare from any point in said township to the city of Detroit and ⁴⁶⁸ vice versa should not exceed the rate then charged by the company from Pontiac to Detroit and vice versa. The company while in competition with another line maintained a fare of twenty-five cents. It subsequently purchased the competing line, and over the line passing through West Bloomfield increased the fare from Pontiac to Detroit to thirty-five cents. It was held that the language of the provision that the rate of fare from any point in the township to Detroit should at no time exceed the rate then charged from Pontiac to Detroit and vice versa referred to the company mentioned in the franchise, and it included any line which that company or its assignee might at any time build or purchase.

A case almost on all-fours with the case at bar is that of *Indiana R. Co. v. Hoffman*, 161 Ind. 593, 69 N. E. 399. Its reasoning is convincing, and we think the case should be followed. The case presented does not involve in this view an interference with any vested right of the company as assignee of the Fairview Railway, but resolves itself simply into a question of the construction of the ordinance, and we construe the ordinance to include any street railway constructed or purchased by the defendant which shall be within the city of Detroit as the limits of said city may from time to time be fixed by the legislature.

The convictions are affirmed.

McAlvay, Brooke, Blair and Stone, JJ., concurred.

ON REHEARING.

STONE, J. A rehearing having been granted in these cases, they have been reargued and reconsidered. The sole question here involved, as we view it, is the construction to be placed upon an ordinance granted the Detroit City Railway in 1889. Subdivision D of section 3 of such ordinance reads as follows: "Such arrangements shall be made by said company that within two months after this ordinance shall

have been accepted by said company it shall carry such passengers ⁴⁶⁴ as shall have taken passage on the cars between the hours of five-thirty o'clock and seven o'clock in the morning, and between the hours of five-fifteen o'clock and six-fifteen o'clock in the afternoon, over any of its lines in said city for a single fare, to be paid for by a ticket sold at the rate of eight tickets for twenty-five cents, for one continuous trip, with all the rights of transfer and through carriage provided for in paragraphs 'A,' 'B' and 'C' of this section."

The ordinance was duly accepted. It is conceded that the Detroit United Railway has become the successor and assignee of the Detroit City Railway Company by purchase. This being so, we think it accepted the benefits of the franchise granted, as well as assumed the obligations imposed upon it.

Does the ordinance relative to workmen's tickets have application to that territory now a part of the city, but without its confines at the time the ordinance was granted? A further investigation of the questions involved satisfies us of the correctness of the reasoning and conclusion of Chief Justice Montgomery, who wrote the former opinion in these cases (ante, p. 582), to which opinion reference is here made. He cited and followed the case of *Indiana R. Co. v. Hoffman*, 161 Ind. 593, 69 N. E. 399, decided by the supreme court of Indiana. That case is well reasoned, and is supported by the authorities therein cited, and we think it should be followed in these cases. It may be asserted as a general proposition, applicable here, that a municipal law or ordinance designed for a city at large operates throughout its actual boundaries, whatever they are, and is not affected by the fact that these are enlarged from time to time. The following authorities support the proposition that a municipal ordinance, regulation, or contract designed for a city at large operates throughout its boundaries whatever their change: *McQuillin on Municipal Ordinances*, sec. 218; 1 *Dillon on Municipal Corporations*, 4th ed., sec. 185, citing *St. Louis Gaslight Co. v. City of St. Louis*, 46 Mo. 121; *Town of Toledo v. Edens*, 59 Iowa, 352, 13 N. W. 313.

⁴⁶⁵ In *St. Louis Gaslight Co. v. City of St. Louis*, 46 Mo. 121, above cited, which involved the amount due the company for gas furnished the city in its enlarged boundaries, the court said: "The additional orders for lamps were all to be within the city, and the city is a unit, though with changing boundaries. There might be a question as to the extension of the exclusive rights of the plaintiff, for grants of monopolies are to be strictly construed; but there is no doubt that a city ordinance, or a city contract, designed for the city at large, operates throughout its boundaries whatever their change."

In *Town of Toledo v. Edens*, 59 Iowa, 352, 13 N. W. 313, it is said: "If an ordinance be enacted and afterward the

city limits be extended by adding thereto adjacent territory, no one would contend that a new ordinance must be passed in order to be operative in the newly acquired territory."

It is true that that case involved a police regulation, but the authorities cited seem to make no distinction between such a regulation and an ordinance or contract relating to traffic regulation.

We agree with Chief Justice Montgomery that the cases presented do not involve an interference with any vested right of the company as assignee of the Fairview Railway, but resolves itself into a question of the construction of the ordinance. The rule that the terms of the franchise must be construed strictly against the respondent, as held in *Township of West Bloomfield v. Detroit U. Ry.*, 146 Mich. 198, 117 Am. St. Rep. 628, 109 N. W. 258, is applicable here.

We see no reason to recede from the former ruling in these cases, and the convictions are affirmed.

Bird, C. J., and Ostrander, Hooker, Moore, McAlvay, Brooke and Blair, JJ., concurred.

A Line Acquired by Purchase is a Part of a Street Railway System, and included within a provision of an ordinance granting a franchise to the company to construct its road through a township, providing that the rate of fare from any point in the township to the city of Detroit, and vice versa, shall at no time exceed the rate fixed by the company from Pontiac to Detroit, and vice versa: *Township of West Bloomfield v. Detroit United Ry.*, 146 Mich. 198, 117 Am. St. Rep. 628.

Existing Corporate Limits are not Alone Contemplated by a provision of the constitution that no railroad thereafter constructed shall pass within three miles of a county seat without passing through it, and the provision is satisfied by passing through the limits of a county seat as subsequently enlarged: *State v. Mobile etc. Ry. Co.*, 86 Miss. 172, 122 Am. St. Rep. 277.

An Ordinance Requiring the Sale of Tickets on Cars, good for transportation during certain hours of the day, at the rate of eight for twenty-five cents, does not impair or destroy the rights or franchises of a street railway company, where the ordinance granting its franchise contained a reservation "to make such further orders, rules or regulations as may from time to time be deemed necessary to protect the interests, safety or accommodation of the public: *City of Detroit v. Fort Wayne etc. Ry. Co.*, 95 Mich. 456, 35 Am. St. Rep. 580.

An Irrevocable Contract is Made by the Acceptance of an Ordinance Granting a Franchise and imposing terms upon the grantee, and the rights so conferred cannot be amended or diminished without the consent of the grantee: *Shreveport Traction Co. v. Shreveport Co.*, 123 La. 1, 129 Am. St. Rep. 345; *Mayor etc. of City of Houston v. Houston City Street Ry. Co.*, 83 Tex. 548, 29 Am. St. Rep. 679; *Western Paving & Supply Co. v. Citizens' Street R. R. Co.*, 128 Ind. 525, 25 Am. St. Rep. 462; and see note to *People v. Detroit United Ry.*, 134 Mich. 682, 104 Am. St. Rep. 637.

The Power of Municipalities to Make and Enforce Regulations Respecting Street Railways for the protection of the public is the subject of a note to *People v. Detroit United Ry.*, 104 Am. St. Rep. 626.

BARNES v. SPENCER & BARNES COMPANY.

[162 Mich. 509, 127 N. W. 752.]

CORPORATIONS—Declaration of Dividends.—A Resolution will be construed as equivalent to a declaration of a dividend, where any other construction would amount to an illegal preference among the stockholders (p. 595.)

CORPORATIONS—Declaration of Dividends—Informal Action. A dividend may be legal even though not formally declared, it being paid by common consent. The stockholders may agree among themselves informally to distribute a certain sum as dividends without going through the form of corporate action. (p. 595.)

CORPORATIONS—Declaration of Dividends—Promissory Note. Where all of the stockholders of a corporation have, by common consent, been paid money as dividends in proportion to the stock carried by them, except one to whom a promissory note was given, and all of the stockholders and directors knew of and approved that course of procedure, such note will not be held void as given without consideration or authority. (p. 596.)

CORPORATION—Promissory Note.—A Failure to Deny, under oath, the execution of a promissory note executed by the president of a corporation, in its behalf, set out in the complaint, makes the note competent evidence, and when introduced in evidence, it makes a prima facie case against the corporation. (p. 596.)

CORPORATIONS—Promissory Note to President.—A promissory note of a corporation, executed by its president to himself, for property sold to the corporation in good faith and for a fair value, and with the knowledge and subsequent approval of the directors and stockholders, is valid. (p. 596.)

CORPORATION—Dealings With Officer.—An officer of a corporation may deal with it if his acts are open and fair and known to the directors and stockholders. (p. 596.)

CORPORATIONS—Profits by Officer—Remedy.—Where it is claimed an officer of a corporation has made a profit from his dealings with the corporation, the remedy, if any, is a suit in equity for an accounting. (p. 598.)

Gore & Harvey, for the appellant.

M. L. Howell and Humphrey S. Gray, for the appellee.

⁵¹⁰ **MOORE, J.** The plaintiff sued defendant in an action of trespass on the case upon promises, and gave notice that upon the trial under the money counts he would give in evidence certain notes. One of them was for \$1,000, payable to Mrs. J. E. Barnes, guardian, etc., and was dated July 1, 1903. It had on the back of it the indorsement: "Pay to the order of J. E. Barnes, Mrs. J. E. Barnes, guardian."

⁵¹¹ It also had eleven indorsements showing the interest had been paid up to July 1, 1908, and nine indorsements showing payments upon the principal. One of the notes was for \$5,000, dated January 1, 1904, payable to the order of J. E. Barnes, and had many indorsements showing upward of \$1,200 paid upon the principal, and many indorsements

showing payment of interest up to July 1, 1908. There was another note for \$3,000 and two notes for \$2,000 each. All of these notes were signed: "The Spencer & Barnes Company, by J. E. Barnes, President." Each note had many indorsements showing payments upon the principal, and many indorsements showing payments of the interest up to July 1, 1908.

The defendant did not deny under oath the execution of any of these notes. It pleaded the general issue, and gave notice of several defenses, one of which was to the effect that when the notes were given the payee was president of the company, under a large salary, and owed all his services to the company; that he engaged in outside business under the firm name of Barnes & Robinson, which firm dealt with defendant company. We quote from the plea and notice:

"That by virtue of such sales the said John E. Barnes realized large profits, which said Barnes then and there converted to his own use, and which said sums of money the defendant avers lawfully and of right belonged to the defendant, and which said amounts the plaintiff has refused to pay over and account for to the defendant, though the same have often been demanded of plaintiff.

"The defendant avers that by virtue of such manipulation and by reason of plaintiff's interest in said contracts with the Spencer & Barnes Company, that the said plaintiff, John E. Barnes, has realized large profits on said contracts, amounting to the sum of \$10,000, and said profits lawfully and of right belong to said defendant. That no part thereof has been paid by plaintiff to the defendant, though often requested so to do, and thereby the plaintiff became and is indebted to the defendant in the sum of \$10,000.

"That said John E. Barnes, in violation of his contract ⁵¹² obligations to the defendant, as aforesaid, whose president and financial manager he was, made several purchases of timber and timbered lands for his own account and not for the account of the Spencer & Barnes Company, as he was under contract and legally bound to do. That said plaintiff, John E. Barnes, scheming and designing to deprive the defendant of its just share of the profits in said purchases of timber and timber lands, entered into a copartnership with one John Robinson under the firm name and style of 'Barnes & Robinson,' and also under the name of the 'Weesaw Lumber Company, John E. Barnes, Manager,' for the purpose of purchasing large tracts of timbered lands located in the county of Berrien, and for the cutting of the timber thereon and the sale thereof upon the market. . . . Said John E. Barnes realized large profits therefrom, the exact amount whereof is unknown to defendant, but defendant avers that from such sales the plaintiff reaped large profits, to wit, the

sum of \$10,000. That said profits justly and legally belonged, and do now belong, to the defendant, and, although often requested, the plaintiff has refused and neglected, and still refuses and neglects, to pay the same, or any part thereof, to the defendant."

Notice was given of the following:

"That said defendant will insist that said notes and each thereof are null and void.

"That defendant will insist that said notes, and each thereof, are void because each of said notes was made, executed, and delivered by said plaintiff to himself or to others for his benefit, while president of the Spencer & Barnes Company, defendant, without authority so to do.

"Defendant will show in evidence that there has been no ratification by the stockholders of the making, execution, and delivery of said notes by the plaintiff, as president of the Spencer & Barnes Company, to himself."

The plea ended with the following statement: "You will further take notice that, pursuant to circuit court rule 24c, the defendant hereby waives the benefit of the general issue, and admits the facts alleged in the plaintiff's declaration (that is to say, defendant admits that, except for the facts set forth in this notice, the plaintiff would be entitled to recover upon the promissory notes set forth in the declaration herein, and waives the necessity⁵¹³ of the introduction of said notes in evidence for the purpose of proving the signatures thereon and the delivery thereof, and waives the necessity of the computation of the amount due thereon), and, hereby relying on the defense herein set forth, this defendant claims the benefit of said rule 24 in respect to the opening and closing in the taking of testimony and in the argument on the trial of said cause."

Upon the trial the notes were introduced in evidence, and many witnesses were sworn on the part of the defendant. At the close of the testimony, after hearing arguments of counsel, the circuit judge expressed himself as of the opinion that the defense of invalidity of the notes and of offset could not be urged in an action at law. He said:

"In this suit, gentlemen, Mr. Barnes is a party on one side and the corporation on the other, and the stockholders are not made parties. I hold equal justice could not be done unless all the stockholders are brought in, and I also hold that so far as offsets are claimed in this case they are matters for a court of chancery for similar reasons, and therefore the plaintiff as far as this action is concerned is entitled to judgment upon the notes.

"A court of chancery may hereafter determine as to what offsets will be allowed to the corporation, and perhaps determine what remedies may exist between the various stock-

holders of this company. Therefore, as a matter of law, I have come to the conclusion that the plaintiff is entitled to a judgment upon those notes, and that there is no legal defense whatever to the notes. The amount of those notes has been computed and amounts to \$20,841.83."

He directed a verdict for the above amount. The case is brought here by writ of error.

The important alleged errors relied upon are stated by counsel as follows:

"(1) The court erred in sustaining the validity of all the notes sued on (except the note, dated July 1, 1903, for \$1,000), because each thereof was given without consideration, without authority of the directors, and because the ⁵¹⁴ plaintiff as president of the corporation, without specific authority so to do, made the notes to himself as payee.

"(2) The validity of the notes dated January 1, 1904, for \$5,000 each, are assailed as invalid because each thereof is without consideration and each thereof purports to be a contract between the plaintiff as president of the defendant corporation and himself as payee; and because there is no authority in the charter, by-laws, or elsewhere for making said notes and no attempted ratification thereof by the directors or stockholders.

"(3) The court erred in permitting a recovery upon the two notes for \$2,000 each, dated July 1, 1905, wherein Z. Dotte Waite, guardian, etc., and Z. Dotte Waite, the plaintiff's daughter, is payee, because it conclusively appears there was no consideration for such notes; that said notes were wholly unauthorized and ultra vires.

"(4) The note for \$2,000 dated July 22, 1905, is void because it is shown by undisputed proof to have been given by the plaintiff to himself on account of the sale of certain logs belonging to plaintiff at Union Pier, Michigan, and sold by plaintiff to himself as president of the defendant company. No other officer or person was a party either to the contract of sale or the promissory note in question.

"(5) The note for \$3,000 dated December 1, 1903, wherein plaintiff is both payee and maker, is void. It is wholly unauthorized and without consideration. The only action taken by the directors during the year 1903, referring to dividends, was that all small stockholders be paid the amount of dividends due, 20.2 per cent.

"(6) The fiduciary relation of the plaintiff to the defendant is involved. He was its president and was paid by it for his time and services, and it was his duty to purchase timber, logs, lumber, and timbered lands for and on account of the defendant, and his embarking, against the protest of the other officers, in such enterprises for his individual profit at the expense of the company whose president he was, and

in violation of his trust relation and contract of employment, renders the profits so earned and held by him as money had and received for the defendant's benefit. The court erred in ruling that said moneys could not be recovered by the defendant in this suit."

Counsel are agreed upon the following:

"Upon the organization of this company there was ⁵¹⁵ issued 2,000 shares of preferred stock to B. H. Spencer and 2,000 shares of preferred stock to John E. Barnes; and 1,340 shares of common stock issued to John E. Barnes, and 50 shares of common stock issued to Z. Dotte Ortland, daughter of John E. Barnes. There was issued to B. H. Spencer 1,370 shares of common stock and to his daughter, Mary L. Spencer, 20 shares of common stock, making a total stock issue at par of \$67,800. It is thus seen that the stock in this company was owned by these two families, B. H. Spencer and John E. Barnes. Later stock was transferred by B. H. Spencer to other members of his family. In 1899 Frank T. Plimpton became a stockholder in the company, and he has continued as such ever since.

"From the organization of the company in 1896 until 1903 the amount of the stock owned by B. H. Spencer and the members of his family was exactly equal to the amount of stock owned by John E. Barnes and the members of his family. During all this time John E. Barnes was president of the company, and as such exercised the powers and performed the duties laid down in the by-laws, and B. H. Spencer was vice-president and superintendent, and as such exercised the powers and performed the duties provided in the by-laws except as hereinbefore stated. The same board of directors served the company from its organization in 1896 to 1907. These directors were John E. Barnes, B. H. Spencer and Mary L. Spencer. The latter was secretary and treasurer of the company. She was also head bookkeeper of the company. The business was apparently conducted with little regard for the by-laws."

The purpose of the corporation is stated in its articles to be "the manufacture of various kinds of furniture from wood, iron, or brass, as the demands may require." The preferred stock drew a fixed dividend of six per cent. The by-laws provided that the president should have full charge of all the offices and business and should sign all drafts, notes, checks, and contracts and all papers pertaining to the business of the company wherein there was a money consideration making the company liable. They also contained the following provisions: "The dividends shall be declared on the first day of ⁵¹⁶ March after the annual inventory. All profits shall be divided with the preferred stockholders up to six per cent and the remainder with the preferred and com-

mon stockholders share and share alike and shall be paid within sixty days thereafter."

An annual meeting was held each year. A yearly inventory was taken, and a statement made showing resources and liabilities, and also showing whether the business had been profitable or unprofitable. The action was sometimes somewhat informal as to the declaration of dividends, but there were some entries made upon the books in relation thereto. At the annual stockholders' meeting February 2, 1899, the following action was taken: "It was moved and carried that small stockholders be paid the five and eight-tenths per cent which is the per cent of gain after preferred stockholders' six per cent is deducted from whole gain."

At the stockholders' meeting of January 23, 1900, the following appears upon the minutes, to wit: "Moved that all stockholders except B. H. Spencer and J. E. Barnes be paid in full twenty-five and thirty-five hundredths per cent, which is per cent after six per cent on preferred stock has been deducted, and as all stockholders except B. H. Spencer and J. E. Barnes have always been paid in full, the balance is to be divided equally between them, and to be drawn out as business will allow. Motion was carried."

At the annual meeting of directors for 1901 the following appears: "It was moved that surplus on account of B. H. Spencer and J. E. Barnes be taken up by notes with interest at four per cent per annum from January 1, 1901, interest payable quarterly. Motion carried. It was then moved that \$4,000 of undivided profits be set aside for building account and balance, \$3,064.24, be paid in dividends as provided by by-laws. Motion was carried."

At the annual meeting of the stockholders February 3, 1902, the following appears: "Moved by J. E. Barnes and supported by B. H. Spencer ⁵¹⁷ that the notes held by B. H. Spencer and J. E. Barnes bearing 4 per cent be taken up and new notes be given drawing 6 per cent interest per annum, payable quarterly. Motion carried. It was then moved that small stockholders be paid fourteen and eleven hundredths per cent dividends in full and large stockholders be given notes, bearing six per cent interest per annum, interest payable quarterly. Motion was carried."

At the annual meeting of the directors, January 20, 1903, the following appears: "It was moved by J. E. Barnes that all small stockholders be paid the amount of dividends due, twenty and two-tenths per cent. Motion carried."

At the annual meeting of the directors, January 30, 1904, the following appears: "Moved by J. E. Barnes and supported by B. H. Spencer that small stockholders, Irven Spencer and W. S. Waite, be paid as soon as convenient and that

notes be made for J. E. Barnes and B. H. Spencer as in previous years. Motion carried."

At the annual meeting of the directors, January 16, 1905, the following appears: "Moved by M. L. Spencer that stockholders be paid dividends due and that Irvén Spencer and W. S. Waite be paid five (5) per cent of the net profits of 1904 as per agreement as soon as convenient. Supported by B. H. Spencer and carried."

At the annual meeting of the directors, January 24, 1907, the following appears: "It was then moved that stockholders be paid their share of profits on or before March 1, 1907. Motion carried."

The record is clear that the stockholders and directors were fully advised as to what was done. From time to time the small stockholders were paid dividends in cash. The profits were often shown to be in the form of accounts, notes, and merchandise. Mr. B. H. Spencer and the plaintiff owned the great bulk of the stock, and, instead ⁵¹⁵ of being paid cash, as were the smaller stockholders, they were credited the amount of the dividends due them upon the books of the company, or notes were given to them for these amounts.

The record indicates pretty clearly that no one thought that there was anything irregular about the method of making dividends or of paying them. Miss Spencer, who was secretary and treasurer of the company and the daughter of B. H. Spencer, vice-president and superintendent of the company, and the two constituting a majority of the directors, testified that not until August, 1907, did she have any knowledge "as to what legal authority the president of a manufacturing corporation like Mr. Barnes had in the manner and matter of drawing promissory notes. I was not informed in regard to the limitations upon that power until after this suit was commenced. I did not have knowledge until after this suit was commenced as to the power or authority of an officer of the company to execute and deliver so-called dividend notes."

On the cross-examination she testified: "The books of the Spencer & Barnes Company show that interest was paid on these notes. It is regularly entered upon the books. The interest indorsed upon these notes was entered upon the books of the company. Witness wrote some of the notes and made indorsement for interest on some."

Witness' attention was called to \$5,000 note, January 1, 1904, and she testifies that was given for a dividend.

"Q. Did you and all the other stockholders of the company receive the same percentage of dividend that those notes were on the stock held by Barnes; that is, were the dividends equal in per cent of the stock—I mean all the common stock?

A. Yes, sir; the common stock all got the same dividend,

and the preferred stock all got the same dividend. At the time Mr. Barnes got those two \$5,000 notes, my father got two \$5,000 notes. They did not hold the same amount of stock at this time, Mr. Spencer had some more. It might have been sixty shares more; it might not have ⁵¹⁹ been that much. He had a majority of the stock at that time. He got the same percentage on the stock that Barnes did. His notes were canceled and stock issued to him for them. I would not be positive these were the notes for which stock was issued. His notes were all taken up in this manner by the company, except one note of \$1,200. He has received all but \$1,200 of the dividends. The other stockholders have all been paid except Mr. Barnes."

The indorsements on the \$5,000 note were identified by witness as all in her handwriting, with the exception of one made by the assistant bookkeeper, Mrs. Clark. Exhibit 3, indorsements made of interest by Mrs. Clark, Mr. Belding, a clerk in the office, and some by the witness. Exhibit 3 was a dividend note. It is dated December 1, 1903.

"Q. That was given for a dividend declared about that time? A. No, sir.

"Q. For what was it given? A. Part of a dividend note of, I think, \$7,000, and \$4,000 was paid. Three thousand dollars was the renewal of the note.

"Q. The other stockholders got the same per cent of dividends that went into this note; that is, the common stockholders got the same per cent with each other and the preferred stockholders got the same per cent with each other? A. Yes, sir; that is, the common stockholders shared with the preferred stockholders after the six per cent.

"Q. As far as you were concerned, those dividends were voted in good faith, all of them, were they not?

"Mr. Gore: That is assuming that they were voted. One of our claims is that they were not voted, and the record don't show the authority for it. (Objection overruled. To which ruling of the court the defendant by its counsel duly excepted.)

"The Court: (To the witness.) Did you understand the question?

"A. Yes, sir; he asked about voting on the question. I do not think the records of the meeting would say that we did vote on the question.

"Q. The dividends you say that were declared and the notes that were issued, was that done in good faith?

⁵²⁰ "Mr. Gore: That assumes what the witness has not said. She has not said dividends were declared.

"(Last question read.)

"The Witness: There is no record of the dividends being declared; but, as far as my action is concerned in writing

out the notes, it was in good faith. The records that I kept of the minutes showing the earnings of the company, its assets and liabilities, are correctly shown, and correctly show the profits that appeared by the books to have been made.

"Q. So that when they did show that the profit, or so much remained, that was believed to be so in every case, was it not? A. Yes, sir. At the time this \$3,000 note dated December 1, 1903, was given, my father had a majority of the stock; I can't tell how much either one of them had. The books show that. Notes were issued to my father and to Mr. Barnes at the same time; whenever one got a note the other got one. This was always so, and each for the proportion of the dividend due him according to the computation."

Though the record does not show that as formal action was taken as would be shown by the records of a carefully conducted corporation, we think it cannot be said that dividends were not authorized and declared. It must be remembered that no question of the right of creditors is involved: See 2 Cook on Corporations, 6th ed., sec. 534; *Hartley v. Pioneer Iron Works*, 181 N. Y. 73, 73 N. E. 576; *Rorke v. Thomas*, 56 N. Y. 559; *Reading Trust Co. v. Reading Iron Works*, 137 Pa. 282, 21 Atl. 169, 170; *McKusick v. Seymour, Sabin & Co.*, 48 Minn. 172, 50 N. W. 1116; *Pennsylvania Iron Works Co. v. Mackenzie*, 190 Mass. 61, 76 N. E. 228.

A resolution will be construed as equivalent to a declaration of a dividend where any other construction would amount to an illegal preference among the stockholders: *Redhead v. Iowa Nat. Bank*, 127 Iowa, 572, 103 N. W. 796.

A dividend may be legal even though not formally declared, it being paid by common consent, and hence cannot be recovered back on that ground after being actually⁵²¹ paid: *Berryman v. Bankers' L. Ins. Co.*, 117 App. Div. 730, 102 N. Y. Supp. 695.

The stockholders may agree among themselves informally to distribute a certain sum as dividends without going through the form of corporate action. No formal declaration is necessary, either by the stockholders or board of directors, and a distribution of profits by a unanimous consent without corporate action is legal: *M. Groh's Sons v. Groh*, 80 App. Div. 85, 80 N. Y. Supp. 438.

A division of profits is a dividend, even though not called such and not considered such by the directors or stockholders: 2 Cook on Corporations, 6th ed., sec. 534, p. 1445, and cases cited. A scrip dividend is resorted to where company has profits not in cash: 2 Cook on Corporations, 6th ed., sec. 535.

It is impossible to read this record without reaching the conclusion that in what was done about the dividends everybody acted in good faith, believing they had been earned. All of the stockholders have been paid upon the same ratio

in proportion to the stock carried by them, except this plaintiff. It is also clear that all the stockholders and directors knew the course of procedure and approved of it. The other two directors knew of the giving of these notes, for what they were given, and the treasurer from time to time made payments thereon, and made indorsements thereon. The authorities cited by counsel fail to show that notes made under the circumstances disclosed by this record were void.

As to the \$2,000 note given in payment for certain logs sold by plaintiff to defendant, there is nothing in the record to indicate that they were not sold for a fair price. The other directors knew all about the transaction. By failing to deny the execution of this note under oath, it was competent to introduce it in evidence, and when offered in evidence, it prima facie made a case, which case has not been overcome by the defense interposed. A time came when Mr. Spencer and his family got a controlling share of the stock. They had control when the logs were bought for which this note was given. Mr. Barnes was ⁵²² credited on the books for the amount of these logs before the note was given.

There came a time when there was a discussion between the plaintiff and the other stockholders about his engaging in outside operations. The record would indicate that the discussion resulted in an understanding with reference to what should be done, and Mr. Barnes wrote the following letter:

“Benton Harbor, Mich., 1/14/1905.

“I, J. E. Barnes, agree that I will close up my land, log and wood matters as fast as I can without loss, and from this date will not buy any of the above except for the firm of Spencer & Barnes Company while I am an officer of said company.

(Signed) “J. E. BARNES.”

The Spencers then had a majority of the stock, but Mr. Barnes was continued as a director and the president. The record does not disclose any departure from this agreement.

It is not the law that an officer of a corporation cannot deal with the corporation if his acts are open and fair and known to the directors and stockholders: See 10 Cyc., p. 794; *Ft. Payne Rolling Mill v. Hill*, 174 Mass. 224, 54 N. E. 532; *Africa v. Duluth News-Tribune Co.*, 82 Minn. 283, 83 Am. St. Rep. 424, 84 N. W. 1019; 2 *Cook on Corporations*, 6th ed., sec. 652; *United States Steel Corp. v. Hodge*, 64 N. J. Eq. 807, 54 Atl. 1; *Ten Eyck v. Pontiac etc. R. R. Co.*, 74 Mich. 226, 16 Am. St. Rep. 633, 41 N. W. 905, 3 L. R. A. 378; *Henry v. Michigan S. & Ben. Assn.*, 147 Mich. 142, 110 N. W. 523.

At the annual meeting held in January, 1907, a full settlement, except the notes, was had with Mr. Barnes. In the

statement of the affairs of the corporation appeared the notes held by Mr. Barnes and Mr. B. H. Spencer as bills payable, and, as already appears, Mr. Spencer was afterward paid nearly all his notes. B. H. Spencer, M. L. Spencer and Irven Spencer were elected as directors. The records of the meeting show the following: ⁵²³ "That the stockholders of the Spencer & Barnes Company extend their thanks to John E. Barnes, the retiring president, for the services rendered by him during the past ten years. That this resolution be spread upon the minutes of the company and a copy of the same be presented to Mr. Barnes. Carried unanimously."

These notes had been included after they were made in every annual report made to the stockholders. January 26, 1907, the following resolution was adopted: "It was moved that whereas it was shown by the books of the company that there is an outstanding indebtedness exceeding \$50,000, and whereas in view of recent changes in the management and policy of the company a larger amount of capital is necessary to properly and successfully carry on the business of this company: Now therefore be it resolved, that the president and secretary of this company be and the president and secretary hereby are authorized to sell all the unissued stock in the treasury of this company, to wit, 1980 shares at not less than \$10 per share (par value)."

Miss Spencer, the secretary, testified: "That indebtedness, referred to in the minutes of 1907, of over \$50,000, included all notes in this suit on February 5, 1907."

Mr. Barnes was not a director at this time. If this record does not show knowledge and ratification of the acts of the plaintiff, it is difficult to see how a record could show them.

In relation to the matter of the setoff, in addition to what we have already said about what is contained in the notice attached to the plea, is the following: "Defendant gives notice of its intention to file a bill of complaint in equity for the purpose of obtaining a full and complete accounting from the plaintiff of the profits made and received by him out of sales to this defendant and to other persons, firms and corporations, during the time the said plaintiff was president of the defendant corporation and owed to it his time, services, and business ability. That this action should abate until such accounting ⁵²⁴ between the parties is had. Wherefore, the defendant demands that the amounts due it from the plaintiff, when ascertained, be set off against the demands of the plaintiff sued upon in this action."

No such accounting had been made when the case was tried. In 10 Cyc., p. 794, in discussing the matter of profits received by an officer of a corporation, it is said the rule applies to secret and not to open profits, and as to them, "Such contracts will be scrutinized in equity and will be set aside if

not made in the utmost fairness and good faith. . . . The rule is especially applicable where, although the director received a profit out of the transaction, the contract was made in good faith, was not improvident, had been performed, and the corporation had received the benefit of its performance, under which circumstances it has been held that it could not be undone by a receiver subsequently appointed for the corporation."

It is said at page 795: "Rule subject to maxim that he who seeks equity must do equity. The rule under consideration does not extend so far as to work entire confiscation of the property of the unfaithful director, which he may have attempted to sell to his corporation at an advance over its cost to him, so as to derive a secret profit therefrom; but in the accounting which takes place under the principle, the director will be compelled to yield to the corporation the secret profit, but will be allowed a credit for the property sold to the corporation at its real value."

The stockholders of this corporation are practically the same as they were during all the time the plaintiff was president. All of them except the plaintiff have received and retained dividends. As has already appeared, they knew of the contracts before mentioned; they had and used the material furnished. The proof as to profits consisted largely of so-called admissions which were more in the nature of an expression of hope or expectation before the transaction referred to was closed than a statement of fact as to conditions after a final disposition of the business ⁵²⁵ had been reached. If any defense is open to the defendant, we think it clear it can only be upon an accounting where all the equities of the parties can be reached.

Judgment is affirmed.

McAlvay, Brooke, Blair and Stone, JJ., concurred.

VALIDITY OF CONTRACTS BETWEEN A DIRECTOR AND HIS CORPORATION.

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- II. Trustee's Personal Interest as Antagonistic to the Trust, 601.
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I. A Trustee may not Buy at His Own Sale.

This rule is so elementary as to be almost an axiom. Nobody, even where there is ignorance of law in its strictness, needs to be warned of it, having at least acquaintance with common every-day business; that is, when the words are to be applied in their first significance. As Wayne, J., said in *Michoud v. Girod*, 4 How. 503, 11 L. ed. 1076: "The rule of equity is in every code of jurisprudence with which we are acquainted." According to what has been termed "The Great Case," *York Buildings Co. v. Mackenzie*, 8 Brown H. L. Cas. 42, this concurrence of civilized men in giving it respect to-day is not more to be remarked than is the fact that it has borne the test of ages. "To show," it was said there, "the universality and extent of the principle now contended for there needs but to observe that particular law among the Romans, by which magistrates and others in the provinces were disabled from making purchases at sales under their own authority, and the heavy penalty inflicted if they attempted it."

Sugden, in the famous work on *Vendors*, lays down the proposition, broader than the one expressed above, that trustees, agents, commissioners of bankrupts, assignees of insolvents,—or their partners in business, solicitors to persons in these formal capacities, auctioneers, creditors—at least such creditors as have been consulted as to the mode of sale—counsel and, generally, anyone who through being employed or concerned in the affairs of another has acquired a knowledge of the estate of this other, are incapable of being purchasers in a sale of property of individuals toward whom they stand in any of the relations named. "For," he says, "if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information and not exercise it for the benefit of the person relying on their integrity." He adds the comment that the characters of trustee and purchaser are inconsistent, explaining in a brief Latin phrase which I take the liberty of rendering into rather free English, "The price cannot be too low to suit the buyer nor too high to suit the seller": Sugden on *Vendors*, 566.

In *Fox v. Mackreth*, 2 Brown Ch. 400, a trustee for the sale of estates for the payment of debts himself had bought at the sale. He, Mackreth, the trustee, had resold at an advanced price, and the court said that in respect of the product of the second sale he was in the attitude of trustee for the original owner, which dictum was affirmed thereafter by the house of lords: 4 Brown H. L. Cas. 258. The displeasure of Mackreth over the event of the case has properly no place in the history of jurisprudence, but it is interesting to know

that, disgusted at being made to disgorge in this way, that gentleman sought out the leading counsel on the winning side and challenged him to mortal combat. This was no less a person than Sir John Scott, who became Lord Eldon in course of time, and it is fortunate for the profession, perhaps, that the duel never came off. Mr. Mackreth might have been more successful on the field than in the forum, and we by consequence deprived of that treasury of decisions that has been and still is the resort of every inquirer into the subject now before us.

It was to Lord Eldon that most of the cases, now so instructive, went, and, although it would appear he was on the wrong side there, he argued together with the other principal lawyers of his day, pro and con, "The Great Case" already mentioned and to be mentioned again hereinafter. Of the cases preceding that one, the most notable was *Whelpdale v. Cookson*, 1 Ves. Sr. 8, the opinion in which Lord Eldon, as we shall see presently, was to question afterward in one particular while following only too willingly its broad doctrine. The report is so brief it might as well be quoted here, omitting the questioned portion, which portion has no bearing upon the discussion just at this point. "On devise of lands in trust for payment of debts the trustee himself purchased part. The lord chancellor (Lord Hardwicke) said he would not allow it to stand good although another person, being the best bidder, bought it for him at a public sale, for he knew the dangerous consequence. Nor is it enough for the trustee to say, 'You cannot prove any fraud,' as it is in his power to conceal it."

There is no necessity to discuss fraud in connection with these trust dealings, for fraud vitiates, of course, any transaction whatever of which it is a part, but a word may be said, in passing, as to the above reference to it, after which the two features of *Whelpdale v. Cookson*, 1 Ves. Sr. 8, that go to form the excuse for bringing that case into the discussion will be given attention—the two features outside of the bare fact of the purchase by a trustee. The word in passing is that the court in *Ex parte Bennett*, 10 Ves. 385, pointed to a danger, in addition to that mentioned by Lord Hardwicke, of leaving the door open, on any such theory as that no fraud could be proved on the trustee. Said Lord Eldon: "If a trustee can buy in an honest case, he may in a case having that appearance but which from the infirmity of human testimony may be grossly otherwise." The two features in *Whelpdale v. Cookson*, 1 Ves. Sr. 8, to be noticed are: First, the trustee there had purchased not in his own proper person but through another, and, second, the purchase had been at public vendue; but, as is seen, neither fact was regarded by the chancellor as mitigating the evil of the transaction. As to the first, there is little comment called for—*qui facit per alium facit per se*; the second, though, has a plausible side that in a later case was urged for the purchaser with some force. The main reason, as appears from the quotation from Sugden early in this note, why this right is denied a trustee is that the position of the latter must have afforded him knowledge not open to others of the thing to be sold and of facts and conditions all around and about the selling important for anybody to know who may nourish a thought—all the way from a notion to a fixed purpose—of buying the property.

There is, though, another way in which it would be possible for this presumption of the trustee's knowledge to affect the circum-

stances of the sale. If a man known to be thoroughly advised about a thing offers to buy it, the fact might stimulate others to venture with an offer better than his. It does not seem to be sophistical, this view of the case—at least, not altogether so, particularly when the sale is one at auction. The point was pushed in the notable case of *Ex parte James*, 8 Ves. Jr. 337. There had been a sale for creditors and the solicitor for the assignees had bought the property. As the court—Lord Eldon again—sagely intimated, the solicitor for the assignees, if he attended to his business, knew more about the property than the assignees themselves could know. But it was contended for him that “the circumstance of the solicitor bidding—the auctioneer having declared that all the bidders were real bidders—must, from his knowledge of the value, have greatly enhanced the bidding.” Lord Eldon admitted that there was some merit in the contention and he said: “The sale by auction is evidence of fairness unquestionably. . . . But,” he added, “that makes no difference as to the principle. . . . It is obvious . . . that the trustee or solicitor bringing it [the property] to sale may have a great deal of information which may bring it up to a price beyond that which it may reach at an auction; for instance, in the case of mines. If the solicitor or assignee knows that circumstance, he may buy under a knowledge which some, at least, of the others have not. So there may be a great many clandestine dealings which may bring it to a price far short of that which would be produced if full information was given.”

There was no suggestion of fraud in *Ex parte James*, 8 Ves. Jr. 337. Speaking of the purchasing solicitor, Lord Eldon said: “I believe he acted purely at the moment of the sale”; though he added, “but the circumstances show how necessary it is that those who have duties to others imposed upon them should not deal for themselves.” Further on he said: “I believe he purchased at a price then understood to be full value, for I proceed not upon the undervalue but upon this principle, that there is that general rule in this court which, under such circumstances, would not permit that purchase to be held if recently disputed. . . . My opinion in this case is clearly upon the principle. . . . I have no reason to think the sale was not fairly had for what was considered at that time by all the parties a good price; and in a moral view Jones [the solicitor] dealt as fairly and actively for the creditors as if acting for himself. But notwithstanding that, I am clearly of opinion principle requires—and I add the circumstance of a sale by auction—that an assignee under a commission of bankruptcy cannot buy the property sold under it unless he shakes off the character altogether.” The last few words of the quotation bear upon a part of the subject not yet reached, we being here concerned still with only the rule that the trustee shall not buy at his own sale as such trustee, and the reason underlying that rule.

II. Trustee's Personal Interest as Antagonistic to the Trust.

In *Whichcote v. Lawrence*, 3 Ves. 740, Lord Loughborough in his opinion set out a cause of the trustee's incapacity to buy that might seem at first blush outside of just the knowledge of facts and conditions that his trusteeship must of itself have brought him; but Lord Eldon, in *Ex parte Lacey*, 6 Ves. 625, commenting some years

afterward on this opinion, showed how the one cause and the other merged into a common moral disability. Lord Loughborough said: "The real proposition—which is very plain in point of equity and a principle of clear reasoning—is that he who undertakes to act for another in any matter shall not in the same matter act for himself. Therefore, a trustee to sell shall not gain advantage by being himself the person to buy." And to the sentiment as so put Lord Eldon addressed himself thus: "The rule I take to be this, not that a trustee cannot buy from his cestui que trust, but that he shall not buy from himself. If a trustee will so deal with his cestui que trust that the amount of the transaction shakes off the obligation that attaches to him as trustee then he may buy. If that case is rightly understood, it cannot lead to much mistake. The true interpretation of what is there reported does not break in upon the law as to trustees. The rule is this: A trustee who is intrusted to sell and manage for others undertakes at the same moment in which he becomes a trustee not to manage for the benefit and advantage of himself."

III. Who is a Trustee.

It is said in *York Buildings Co. v. Mackenzie*, 8 Brown H. L. Cas. 42: "It is needless to enter into refinements or niceties as to the nature of trusts or the specific name of trustee. There is no magic in the term. He is a trustee who is vested with property in trust for others; but every man has a trust to whom a business is committed by another, or the charge and care of any concern is confided or delegated by commission." Sugden has been quoted above, where he makes a partial enumeration of persons to whom the trust character affixes itself; but a further enumeration, and later with authorities, is furnished in a note to *Van Epps v. Van Epps*, 9 Paige Ch. 237, in Book IV of the *Lawyers' Co-op. Edition*, on page 682. It is sufficient for the purpose here to say that a director—or a member of a board of directors—of a corporation has that character fixed upon him.

IV. Director of Corporation as Trustee.

To that effect Lord Cranworth expressed himself in *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. H. L. 461. That case has been cited and commented upon by so many of our American courts, and its doctrine has been so generally accepted, that some account of its facts cannot be out of place here. Briefly, then, Messrs. Blaikie, iron founders, in Aberdeen, with whom a contract had been made by the railway company for the purchase from them of some iron chairs, brought suit to enforce the contract. The principal defense was that Mr. Thomas Blaikie, the managing partner, was at the time of the making of the contract a director in the railroad company—not only so, but chairman of the board, wherefore a contract of the company with his firm could not be enforced; that as chairman of the company he had a casting vote, and clearly, therefore, was a trustee. It was argued in this behalf that the law applicable to fiduciaries "interdicted him from making a contract in the business of the company for his own individual benefit. This was decided . . . by the judgment of this house in *The York Buildings Co. v. Mackenzie*, 8 Brown H. L. Cas. 42, a case that was argued by the most eminent lawyers then at the bar. The rule was applied by Lord Eldon in bankruptcy, with perhaps a stricter jealousy than in

the administration of ordinary trusts in the court of chancery. The case of *Ex parte James*, 8 Ves. Jr. 337, shows this." Lord Cranworth's opinion thereupon was: "The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature toward their principal; and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting—or which, possibly, may conflict—with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into."

The cases are numerous which recognize that the relation of a director to his corporation is that of a trustee, and that he cannot use his position to gain any advantage at the expense of the corporation: *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550, and cases cited in the cross-reference note thereto; *Livermore Falls etc. Banking Co. v. Riley (Me.)*, 78 Atl. 980; *Hoffman Steam Coal Co. v. Cumberland Coal etc. Co.*, 16 Md. 456, 77 Am. Dec. 311; *Pearson v. Concord R. R. Corp.*, 62 N. H. 537, 13 Am. St. Rep. 590; *Marr v. Marr*, 73 N. J. Eq. 643, 133 Am. St. Rep. 742, 70 Atl. 375; *Cumberland Coal etc. Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Bird Coal etc. Co. v. Humes*, 157 Pa. 278, 37 Am. St. Rep. 727, 27 Atl. 750; *Commonwealth Title Ins. etc. Co. v. Seltzer*, 227 Pa. 410, 136 Am. St. Rep. 896, 76 Atl. 77; *People v. Powell (N. Y.)*, 94 N. E. 634; *Michond v. Girod*, 4 How. 503, 11 L. ed. 1076; *In re Castle Braid Co.*, 145 Fed. 224.

It would be hard to conceive of a case better fitted by its facts to bring out the evil possibilities of freedom in this respect allowed directors than *Port v. Russell*, 36 Ind. 60, 10 Am. Rep. 5. As the court said, it "affords a fine illustration of the danger of permitting a conflict of self-interest and integrity." The company was one organized to conduct as a stock enterprise a gravel road. The board of directors, after preliminary surveys, etc., had been had, put out contracts for construction containing, among other things, a requirement that the gravel to be used must first be made free from earth. However, afterward, one of the directors became interested personally in one contract and others in other contracts in the same connection, and then the board passed an order imposing upon the company itself the removing of earth from the gravel, increasing the cost of construction about sixteen hundred dollars; all which the stockholders were to pay and the directors designed putting into their own pockets. The case was disposed of in an elaborate decision rehearsing at some length the old English holdings on the subject and the standard decisions up to date (1871) in this country, to wit: *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456; *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Michond v. Girod*, 4 How. 503, 11 L. ed. 1076.

V. Persons Trustees or not Informally.

"A distinction is recognized in the books between corporate officers whose offices are of the essence of the corporation and those

whose offices are merely ministerial. Courts of equity deal with the former as trustees, with the latter as agents": *Cook v. Berlin Woolen Mills*, 43 Wis. 433. Nevertheless the chief justice in that case was constrained to hold that the person under criticism there—one not a director of the company, but who was and always had been the superintendent and manager of its works—had had such a trust quality infused into him by reason of the intimate knowledge he must have acquired of the company's affairs, as to make invalid a sale to him by the board effected under authority from the stockholders to sell to the best advantage. "Constrained" is used advisedly, for the court was hardly driven to pass upon the question, inasmuch as the purchaser had arranged with members of the board—after the actual sale, to be sure, but before it was absolutely beyond recall—to aid him, as private individuals, in carrying the property afterward. On authority (*Mellish, L. J., in Parker v. McKenna, L. R. 10 Ch. App. 96*) the court held that point to be fatal even if the other had not been so.

But in *Palmer v. Cypress Hill Cemetery*, 122 N. Y. 429, 25 N. E. 983, a superintendent who had bought from the board, knowingly to sell again, several of the lots laid out was decided not to be so affected; and yet in his capacity of surveyor he had laid out all the lots, and therefore must have been well aware of values.

In *Union R. R. Co. v. Dull*, 124 U. S. 173, 8 Sup. Ct. Rep. 433, 31 L. ed. 417, the person under notice had acquired or accepted an interest in the profits of construction contracts made while he was in the employ of the chief engineer; but the court said that as he had no such interest when the contracts were made—as he did not represent the company in the making of the contracts—and as he had no connection, while in the service of the company or of its chief engineer, with the supervision and control of the work under the contracts or with the ascertainment of the amount due the contractors, his mere acceptance of part of the profits was not in violation of the rules of equity in this regard.

Where one, the local agent for an extrastate fire insurance company, was made receiver of certain goods, in an attachment proceeding, and therefore, as such agent, issued to himself, as such receiver, a policy on the goods, the transaction did not stand: *Wildberger v. Hartford Fire Ins. Co.*, 72 Miss. 338, 48 Am. St. Rep. 558, 17 South. 282, 28 L. R. A. 220. In this connection, see the note to *Potter's Appeal*, 7 Am. St. Rep. 280.

In *Hitt v. Sterling-Gould Mfg. Co.*, 111 Iowa, 458, 82 N. W. 919, a stockholder had the position of secretary, but was not on the board of directors. An agreement made by him with the board was decided to be not one made with himself. But in *Stetson v. Northern Investment Co.*, 104 Iowa, 393, 73 N. W. 869, the character of fiduciary was successfully fixed upon a person who was not a stockholder and not, in strictness of law, a director. The home of the corporation was in a far distant state and six of the seven directors lived there. He, although no stockholder, had been named and was regarded by the company as the seventh director. He acted for the company in his locality and the transaction had reference to property there situate.

Underlying all these decisions seems to be the question—not, Did the party hold this or that specific office in the corporation?—but,

Was his connection with its affairs so intimate and confidential that as to those affairs he must have had knowledge not open to persons on the outside?

VI. Competency of Trustee Generally to Hold Under a Trust Sale.

Before going at any length into the American cases, it is to be inquired whether, so far, there was any way indicated by which the benefit of these dealings might be retained or the dealings themselves kept alive. Were they dead things of themselves or was it left always to the pleasure of somebody to deprive them of life? It will be remembered that Lord Cranworth said: "So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into": *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. H. L. 461; and see *Pearson v. Concord R. R. Corp.*, 62 N. H. 537, 13 Am. St. Rep. 590. That looks as though the thing was dead, for the court speaks of the rule, not merely what the disposition was to be in that particular case; and the rule, as Lord Eldon and others iterated and reiterated, was founded on public policy—something it was not left to the parties immediately concerned to regulate. On the other hand, Chancellor Kent said, commenting approvingly on the decision in *Campbell v. Walker*, 5 Ves. 678, 13 Ves. 600, "That the master of the rolls, Lord Alvanley, said that the rule did go to the extent that the cestui que trust had a right to set aside the purchase and have the estate resold, if he chose to say in any reasonable time that he was not satisfied with it. The trustee purchases subject to that equity. He buys with that clog": *Devoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252. When considering *Ex parte James*, 8 Ves. Jr. 337, we saw that there Lord Eldon, although stripping the solicitor of the property he had acquired at the sale, eulogized this solicitor as a man and signalized his actions as "pure," and, as for the sale itself, intimated that, as sales go, it was a pretty good one. Naturally, in the circumstances, the solicitor felt encouraged to ask if it could not be managed for him to hold on to the property. The lord chancellor's answer was: "With respect to the question now put whether I will permit Jones to give up the office of solicitor and to bid, I cannot give that permission. If the principle is right, that the solicitor cannot buy, it would lead to all the mischief of acting up to the point of the sale, getting all the information that may be useful to him, then discharging himself from the character of solicitor and buying the property. Infinite mischief would be the consequence in a number of cases." In imagination we can almost see the lord chancellor shrug his conservative shoulders at this point. His feeling probably was that he would like to say, "The thing is impossible," but he adds: "On the other hand, I do not deny that those interested in the question may give the permission. The rule is that a trustee shall not become the purchaser until he enters into a fair contract, that he may become the purchaser, with those interested. . . . It is a question of prudence for the creditors and the persons entitled to the surplus to settle for themselves": *Ex parte James*, 8 Ves. Jr. 337. It is tantamount to a fresh dealing that the lord chancellor suggested then, and, as it was, the suggestion cost him evident pain. In *Ex parte Lacey*, 6 Ves. 625, he had said: "I disavow Lord Rosslyn's doctrine that the trustee must make advantage. I say, whether he makes advantage or not, if the con-

nection does not satisfactorily appear to have been dissolved, it is in the choice of the cestui que trusts whether they will take back the property."

The true rule, considering the views thus variously expressed, seems to have been well put by the late William Schley, one of the ablest American lawyers of his time, in his brief for appellants in the case of *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311: "In equity (in the absence of fraud in fact), dealings between a trustee and cestui que trust are not regarded as void ab initio, but merely as voidable at the election of the cestui que trust, binding, nevertheless, on the trustee unless avoided by the cestui que trust, and capable of being rendered unavoidable even by the cestui que trust, by confirmation, by ratification, by estoppel and even by acquiescence."

Though contracts made by a corporation with its officers are scrutinized by the courts, and are voidable at the instance of the beneficiary, they are not void: *Copsey v. Sacramento Bank*, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7, 204; *Singer v. Salt Lake etc. Co.*, 17 Utah, 143, 70 Am. St. Rep. 773, 53 Pac. 1024.

VII. Extreme Cases.

It is less difficult to state with certainty what order of dealings would not pass muster under this test than what would—those namely, that bear a savor of fraud about them, even if not quite criminal. Take *Hudson's Case*, 16 Beav. 485, cited by Lord Cranworth in *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. H. L. 461; one's mind could hardly grasp the thing as a "dealing with the corporation" that was the grievance there. What of that nature there was had gone before—all the stockholders had participated in it and accepted the fruits. The offending director was of a masterful personality, to be sure, in whose hands the rest of the board were pawns; but that is neither here nor there—there usually is such on every board. He devised a scheme for watering the stock of the company. The new shares were allotted to the stockholders in proportion to their old holdings, except that a batch of stock was put into this director's hands to be used for some purpose indefinite on the outside. In these days we would name that purpose "graft," probably, but, at any rate, so far all was done with the assent of the stockholders; and these accepted their allotments and approved of the object to which the unallotted shares were intended finally to go. After a while, however, upon a well-founded suspicion that these shares had not gone as intended, the director was called upon to produce the stock or disclose what he had done with it. It was a clear case of misappropriation, or malappropriation.

It was different in the case of *Wardell v. Union Pac. R. R. Co.*, 103 U. S. 65, 26 L. ed. 509. The circumstances were quite scandalous enough, but they brought the transaction more within the idea of a "dealing." There a director was instrumental in getting up another company, he being largely interested in it, and then contracted with it, as for the railroad company, to mine coal, wherever coal was along the latter company's lines and on its lands, and sell it to that company; in short, to sell the railroad company the latter's own coal. And see the somewhat similar case of *Thomas v. Brownville etc. R. R. Co.*, 109 U. S. 522, 3 Sup. Ct. Rep. 315, 27 L. ed. 1018, where the

second corporation was a construction company. In that case Miller, J., said: "The conduct of these directors is utterly indefensible."

In *San Diego v. San Diego etc. R. R. Co.*, 44 Cal. 106, the offenders were trustees of the town and at the same time interested in the company, and as such trustees dealt with the company: See, also, *Memphis etc. R. R. Co. v. Woods*, 88 Ala. 630, 16 Am. St. Rep. 81, 7 South. 108, 7 L. R. A. 605; *O'Conner Min. etc. Co. v. Cross Furnace Co.*, 95 Ala. 614, 36 Am. St. Rep. 251, 10 South. 290; *Pearson v. Concord R. R. Corp.*, 62 N. H. 537, 13 Am. St. Rep. 590; *Sweeney v. Grape Sugar etc. Co.*, 30 W. Va. 443, 8 Am. St. Rep. 88, 4 S. E. 431.

In the case of *People v. Township Board of Overysel*, 11 Mich. 222, the court applied the principle—of one's individual interest in conflict with the trust relation—to a contract for the construction of some public works for several towns. The contract had been let by a "harbor committee," acting for the towns, and the contractors, in part, were of it, although a minority. And see *Nye v. Storer*, 168 Mass. 53, 46 N. E. 402, where all the directors dealt with themselves. It was said there: "A contract by all the acting directors with themselves as individuals involves a constructive fraud." And see *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. 553, where the court observes that there being a number of directors does not render the duty of any one of them less in guarding the company's welfare. So, too, the court said in *Port v. Russell*, 36 Ind. 60, 10 Am. Rep. 5: "All experience demonstrates that the increase in the number of the agents in no degree diminishes the danger of unfaithfulness. *Whichcote v. Lawrence*, 3 Ves. 740, was a case of several trustees. In this case Lord Loughborough says: 'There are more opportunities for that species of management which does not betray itself much in the conduct and language of the party where several trustees are acting together. I am sorry to say there is greater negligence where there is a number of trustees.'"

It is the opportunity afforded a man by this relation to feather his own nest that Lord Eldon had in mind when saying: "A trustee who is intrusted to sell and manage for others undertakes at the same moment in which he becomes a trustee not to manage for the benefit and advantage of himself."

Of the three cases pronounced in *Port v. Russell*, 36 Ind. 60, to be the leading American ones on this subject, the New York case and the Maryland case arose out of a single iniquity, that of one Sherman, a director of the Cumberland Coal & Iron Company, who manipulated through his board a sale of the company's lands for the enhancement of his own fortunes. The case came back in Maryland in 1863: *Cumberland Coal & Iron Co. v. Sherman*, 20 Md. 117; and the ghost of it returned in 1875: *Cumberland Coal & Iron Co. v. Parrish*, 42 Md. 598. There Alvey, J., says: "The transaction may not be ipso facto void, but it is not necessary to establish that there has been actual fraud or imposition practiced by the party holding the confidential or fiduciary relation, the onus of proof being upon him to establish the perfect fairness, adequacy and equity of the transaction."

Pepper v. Addicks, 153 Fed. 383, was a case where a director dominating the board procured the purchase by the company of worthless bonds of another company in which he was interested. The director realized a large profit from the transaction, but he was held

to be, as to this, a trustee for the company purchasing the bonds. *Field v. Western Life Indemnity Co.*, 166 Fed. 607, was a case of misappropriation of funds. In another case the president of a company agreed in his individual capacity, to equip a college laboratory, and attempted to carry out his agreement afterward at the expense of the company in labor and materials: *Worthington v. Worthington*, 100 App. Div. 332, 91 N. Y. Supp. 443. In another, an officer of a corporation, after being given authority to make for the company a specific contract, had inserted in the contract a provision not within the specifications. This provision the company had repudiated at once on discovering it, and it was held that the officer could base on it no claim against the company: *Hart v. Mt. Pleasant Park Stock Co.*, 97 Iowa, 353, 66 N. W. 190.

Where the effect of a corporation contract was to create a company liability in satisfying the indebtedness of one director to another, it was held that the contract was to be construed in the way most favorable to the company: *Main Jellico Mountain Coal Co. v. Lotspeich* (Ky.), 20 S. W. 377. A man, who was the promoter, president and largest stockholder of a railroad company, took a conveyance of some lots from the grantee of a land owner, who, in consideration of the company engaging to construct its line over other land of his, had previously given to it a contract for these same lots, accepting at that time from the company bonds for faithful performance. The conveyance to the man was, by its express words, given to carry out the contract with the company. The court held the man took as trustee: *Scott v. Farmers' & Merchants' Bank*, 97 Tex. 31, 104 Am. St. Rep. 835, 75 S. W. 7.

A director holding property in trust to convey it to his company entered into a contract with a stockholder whereby the latter was to give him a bonus for making the conveyance. The court held it was against public policy for the officer of a corporation to take pay from a stockholder for doing only what he ought to do: *Robinson v. Jewett*, 14 N. Y. St. Rep. 223.

These are a few of the many cases showing how the courts are controlled by Lord Eldon's rule that in undertaking his trust capacity the trustee ipso facto and instantly undertakes in no wise to manage in that connection for his own advantage. "Managing officers of a corporation are under an inherent obligation not in any manner to use their positions to advance their individual interests as distinguished from the interests of their corporation": *Commonwealth Title Ins. etc. Co. v. Seltzer*, 227 Pa. 410, 136 Am. St. Rep. 896, 76 Atl. 77.

VIII. Trust Character not Simple Beneficence.

Notwithstanding the fidelity required of one having a trust capacity, it is not to be inferred that such a one has sunk himself utterly and for all purposes in the constituent. This would be as extreme in the one direction as fraud upon the company would be in the other, besides being opposed to all common sense. The trustee has rights of his own, and in these he will be maintained; the law's aim being to work hardship to nobody, even while its chief vigilance is reserved for the protection of the cestui que trust. "A director of a corporation may have rights not arising out of express contract—such as the right to pass over its railroad or transport his goods over its canal, on paying reasonable tolls, or to have money which

he has loaned it repaid to him": *Stewart v. Lehigh Valley R. R. Co.*, 38 N. J. L. 505. But that is putting it mildly: See, also, *Smith v. Skeery*, 47 Conn. 47.

Where the president of a company had, at a time preceding his becoming an officer in that company, performed services for the latter, his taking its note afterward for the compensation was not an obtaining by him of such an advantage of the stockholders as would render the transaction voidable: *Smith v. New Hartford Water-works*, 73 Conn. 626, 48 Atl. 754.

The directors of a corporation, looking about for the most competent person available to manage the company's affairs at a certain salary, fixed upon the president; but the latter found he could not devote his time and efforts to the company's business without first disposing of his own, whereupon it was resolved by the board to buy him out in order to secure his services. It was held that this was binding on the company: *Iowa Drug Co. v. Souers*, 139 Iowa, 72, 117 N. W. 300, 19 L. R. A., N. S., 115. A contract with a corporation for the services and compensation of a director as manager is valid—subject to judicial review, without regard to the source of the complaint against it—whether a stockholder of a solvent or a creditor of an insolvent concern: *Mitchell v. United Box etc. Co.*, 72 N. J. Eq. 580, 66 Atl. 938. A director, employed in good faith by the board to perform services outside of duties his by the bare fact of his being a director, is entitled to the compensation fixed at the time by the board: *Bennett v. St. Louis Car Roofing Co.*, 19 Mo. App. 349.

When a corporation had continual occasion for having certain work done, and no facilities of its own for doing it, so that it had to be put out to be done by contract, but the superintendence of it lay within the duty of no salaried officer, a contract between the company and a director for him to do the work was not improper: *Strobell v. Brownell*, 40 N. Y. Supp. 702. A contract by a director with persons outside the corporation to negotiate a purchase by them of the company's stock or property is not in violation of law or public policy: *Briggs v. Chamberlain*, 47 Colo. 382, 135 Am. St. Rep. 223, 107 Pac. 1081.

A liveryman, after prosecuting his business privately, consolidated with and became a director in a corporation in the same line. The latter occupied a shed of his, and it was held his being a director did not bar his right to rent for this shed: *Wright v. Knoxville Livery etc. Co.* (Tenn. Ch.), 59 S. W. 677.

A corporation sued for breach of a contract of lease, it was held in another case, cannot plead in defense that plaintiff is one of its directors, since the terms of the lease may have made the transaction valid: *Vonnoh v. Sixty-seventh St. Atelier Buildings*, 55 Misc. Rep. 222, 105 N. Y. Supp. 155.

Where a solvent corporation contracted to purchase the stock of its president in consideration of his resigning, the corporation and its subsequent creditors were estopped to rescind the contract after insolvency, being unable to place him in statu quo: *Joseph v. Raff*, 176 N. Y. 611, 68 N. E. 1118.

A surety who is a director in a corporation—the obligee of the bond—may rely on the latter's disclosing to him material facts affecting his liability; and its concealing such will, without regard to

motive, avoid his liability, provided he has shown no laches: *Harrison v. Lumbermen's etc. Ins. Co.*, 8 Mo. App. 37.

The secretary of a corporation procured oil leases from outside parties and turned them over to his company in exchange for stock, and the court said that in the absence of fraud this was legitimate: *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184, 79 Pac. 838. A managing officer may transfer to his corporation a contract made before the latter was organized, to which contract he had been a party, and may ratify it in the corporation's behalf, if apparently a reasonable means of carrying out any of the company's authorized purposes: *Pratt v. Oshkosh Match Co.*, 89 Wis. 406, 62 N. W. 84.

A corporation's treasurer bought coal on his own account and some time after, on the company's needing coal, sold it to supply the need, taking a profit; the court said the case was not as if he had bought the coal for the corporation in the first place, and it was difficult to see how he could be looked upon as the company's agent in the transaction: *Parker v. Nickerson*, 137 Mass. 487. A somewhat similar case was where an officer of a water company constructed as a private enterprise pipe extensions to points beyond a terminus of the lines of the company. Subsequently he sold to the company and included in the consideration the reasonable price of his services. It was held there was no reason why this should be withheld from him: *Gamble v. Queens Co. Water Co.*, 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201. And where an officer had bought with his own funds a judgment against his corporation for less than its face, and had then assigned it, the assignee was allowed to have payment of the corporation for what the judgment expressly called for: *Inglehart v. Thousand Island Hotel Co.*, 32 Hun, 377.

In a suit in Massachusetts brought against a director to recover money received or retained by him as discount upon debts of the corporation which he had settled under authority given by the board, he not participating, the decision was adverse. Holmes, J., said of the contract: "It was not illegal or void because made with a director, the only person likely to be willing to make it. In this country it very generally has been deemed impracticable to adopt a rule which absolutely prohibits such contracts": *Fort Payne Rolling Mill v. Hill*, 174 Mass. 224, 54 N. E. 532, citing *Nye v. Storer*, 168 Mass. 53, 46 N. E. 402.

In another case a director, the sole licensee in the state for the manufacture and sale of a patent barrel, under a contract with the corporation, installed the article in the latter at much pecuniary risk to himself and with results highly advantageous to the company, which was in the lime business; and it was held that the contract, if fair and aboveboard, was not invalid: *Cowell v. McMillan*, 177 Fed. 25, 100 C. C. A. 443. Again, two persons, directors, were virtually owners of all the stock of a company engaged in the manufacture of cotton cloth, one receiving a regular salary. Outside of business hours this one devised a method for making cloth of a peculiar sort and obtained a lucrative order for it. Communicating the fact to the other, he asked his aid in getting an outside company to make the stuff, but was persuaded to have this done by their own company and promised one-half the profits. This, too, was held to be valid: *Given v. Gans*, 181 N. Y. 538, 73 N. E. 1124.

These cases were, of course, most of them, for money, etc., claimed by the director to be properly his as the outcome of the contract in

question, and they seem to be covered by the clear reasoning of Chancellor Runyon in *Gardiner v. Butler*, 30 N. J. Eq. 702, as will appear a little further on, where he ventures on what might have been the decision in the *Aberdeen Railway* case (1 Macq. H. L. 461), had *Blaikie* sued for the price of the chairs already furnished. The next case, now, was of another sort, and in considering it one may see the bearing of Lord Cranworth's language in *Aberdeen Ry. v. Blaikie*, 1 Macq. H. L. 461, that the director shall not "be allowed to enter into engagements in which he has or can have a personal interest conflicting—or which may possibly conflict—with the interests of those whom he is bound to protect. So strictly is the principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into." "A corporation had been organized to manufacture and sell gas machines, and a contract very lucrative to the inventor of the machines, who was a director, was made by it with the latter in that connection. The court said: "This case involves the question whether a director, having duties of a fiduciary nature to discharge toward the stockholders, shall be allowed to enter into a contract of this kind, in the making of which he has a personal interest conflicting with the interests of the stockholders whom he is bound to represent and protect and shall be allowed to enforce such contract against the resisting corporation. We have not been able to find any case where such a contract has been so enforced, and we think that this one cannot be": *Charter Gas Machine Co. v. Charter*, 47 Ill. App. 36.

IX. Right of Director to Enforce His Remedy as Against Corporation.

To use the sentiment, if not the precise words, of Blackstone, whenever a right is had by anybody, by virtue of the common law, there is at hand for that person a means for having that right enforced. So, then, an aggrieved director is allowed, after complying with certain conditions, to bring his offending company into court in order to have it made to do him justice. It seems, too, that even when the dealing is one it may reject, he is not in all cases left without any compensation. In order to collect what is owed him, he may assume an attitude of antagonism to the corporation and the stockholders by bringing action and pushing the action to judgment and execution, but he must first have dropped his fiduciary character for the time being. And there must have been nothing hidden about this last feature of his proceeding. His trust quality must have been left off in an open manner with fair notice to the company: *Marr v. Marr*, 73 N. J. Eq. 643, 133 Am. St. Rep. 742, 70 Atl. 375.

The basic rule against purchases by trustees at their own sales is adhered to in *Marshall v. Carson*, 38 N. J. Eq. 250, 48 Am. Rep. 319, since, as the court says there, it is impossible to follow one of these throughout every step he takes in his trust character to satisfy itself there has been no fraud. "But," the court proceeds to ask, "how far is the rule modified when the trust or agency arises out of the fact that one is president or director of a corporation, and he, at the same time is a creditor of the company, and the company's property is brought to judicial sale for the purpose of satisfying such debt?" A director, even though not always at liberty to contract with the corporation, may if it is a bona fide debtor of his, enforce his claim by judgment and execution, after putting aside his official

being: *Marr v. Marr*, 73 N. J. Eq. 643, 133 Am. St. Rep. 742, 70 Atl. 375; *Gardiner v. Butler*, 30 N. J. Eq. 702.

In the case last cited it was said: "Stockholders, because they are directors, are not compelled to commit the success of their company to strangers, or else render their own services gratuitously." After, then, some further observations the court adverted to *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. H. L. 461, and while giving all deference to the decision, continued: "It was properly held that the company had a right to repudiate the contract and that it could not be enforced against their consent. If (though) the action had been brought to recover for the chairs which had been delivered and accepted, I apprehend it would not have been held in any court that the company could have retained the property and have refused pay for it—not the contract price, but what it was reasonably worth. . . . It may be safely asserted that no authority can be produced which will permit a corporate body to retain property conveyed to it, or to receive services—which he was not bound to render as a director—without paying him a fair equivalent. . . . The right of a trustee to recover on the quantum meruit where the contract is illegal is recognized in our courts." The court, Chancellor Bunyon, cites *Mulford v. Minch*, 11 N. J. Eq. 16, 64 Am. Dec. 472; *Huston v. Cassidy*, 13 N. J. Eq. 228; *Stratton v. Allen*, 16 N. J. Eq. 129; *Smith v. Drake*, 23 N. J. Eq. 302. And see *Sims v. Petaluma Gas-light Co.*, 131 Cal. 656, 63 Pac. 1011, and *Thompson v. Blackwater Boom & Lumber Co.*, 55 W. Va. 604, 48 S. E. 442, 69 L. R. A. 124, cases much more recent than the New Jersey cases and directly in point. See, also, *Polk v. Reynolds*, 54 Ind. 449, and *Ward v. Polk*, 70 Ind. 309.

X. Dealings Sanctioned Generally Between Corporation and Officer.

In *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328, it was said by Miller, J., that a director of a corporation is bound by all those rules of conscientious fairness imposed by courts of equity as guides for his dealings with his company, but that there is no rule forbidding one director among several to loan money to the corporation when it needs it, the transaction being open and otherwise free from blame. "No adjudged case," he went on, "has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously and best qualified to judge of the necessity of that aid and of the extent to which it may safely be given." An advance of money by a director to his corporation may be secured upon corporation property, and in satisfaction this may be sold him, subject to review to test fairness: *Mitchell v. United Box etc. Co.*, 72 N. J. Eq. 580, 66 Atl. 938.

In *Seeley v. San Jose Ind. Mill & Lumber Co.*, 59 Cal. 22, a director, at request of the president and superintendent, paid certain notes of the company to save the latter from an impending lawsuit, and the president executed and gave him notes of the company in reimbursement, and this was subsequently ratified by the board. The court sustained the transaction: See, too, *Santa Cruz R. R. Co. v. Spreckels*, 65 Cal. 193, 3 Pac. 661, 802; *Sutter St. R. R. Co. v. Baum*, 66 Cal. 44, 4 Pac. 916; *Phillips v. Sanger Lumber Co.*, 130 Cal. 431, 62 Pac. 749.

A corporation was judgment debtor to an outside party, and one of its officers, to enable it to pay off the judgment, indorsed its notes, upon an agreement that for his security the company would assign him a certain chose in action. The company was solvent, the dealing bona fide, and the money so obtained went to clear up the indebtedness as proposed. This transaction also was sustained: *Anglo-American Provision Co. v. Davis Provision Co.*, 112 Fed. 574. The court said: "If the transaction were one where a director has taken or concealed the property of the company for his own advantage to pay his antecedent debts or to prevent it from being reached by the creditors, a very different case would be presented. Here, on the contrary, the action of Weed in procuring thirteen thousand five hundred dollars on his personal credit and paying it into the company's treasury was an act from which he could derive no personal benefit and which was likely to result—as, in fact, it has resulted—in pecuniary loss to him. It was not an act in hostility to the company and its interests, or the interests of the creditors, but was for the benefit of all these. It was done apparently in entire good faith to enable the company to pay its debts and continue in business."

It is of interest in connection with the above remarks to read a passage in the decision of *Brewer, J.*, in *Sanford Fork & Tool Co. v. Howe*, 157 U. S. 312, 15 Sup. Ct. Rep. 621, 39 L. ed. 713: "It is a familiar fact that in the early days of any manufacturing company, and before its business has become developed, the value of the plant is less than the amount of money which it has cost; and if the directors cannot indemnify themselves for the continued use of their personal credit for the benefit of the corporation, many such enterprises must stop in the very beginning." And read further *Holmes, J.*, in *Fort Payne Rolling Mill v. Hill*, 174 Mass. 224, 54 N. E. 532, where the director having, under authority of the board, settled the debts of the corporation, retained a discount to recompense himself for his risk and trouble. "Whatever small conflict of interest between himself and the company there may have been was no greater or other than that between a broker paid by a percentage and his principal. It was manifest and must have been understood. The contract called for action outside the defendant's duty as director, . . . for it was no part of the defendant's duty as director to advance his own money. Assuming the contract to have been a provident one, . . . it seems to us not much more open to objection than a contract with a managing director to pay him a salary."

Hyde v. Equitable Life Assur. Soc., 61 Misc. Rep. 518, 116 N. Y. Supp. 219, was a complicated case. The society, already controlling, through stock ownership, a trust company, thought proper, for saving itself in a transaction with a bank, to take assimilar control there. But this bank had made an excessive loan, and directly the controller of the currency notified it to make good the resulting impairment of its capital, with his shutting its doors as the alternative. This could be effected by payment or by an assessment of the stock, but the debtor was in no condition to pay, and an assessment must necessarily injure the bank's credit and depreciate its stock; and this the society would feel gravely in respect of its assets locked up in that stock. The society turned then to the trust company and, exerting its control there, had it take over the indebtedness and the collaterals from the bank. After that the debtor borrowed

more and more—to push the enterprises represented by the collaterals and make the latter, if possible, of real value, and soon the indebtedness reached something over two million dollars. The state superintendent of banks interfered then and notified the trust company as previously the controller of the currency had notified the bank. In this emergency the society, by promises of indemnification, induced plaintiffs to guarantee the debt. Afterward, being sued on the guaranty, these plaintiffs would have had the society come to their relief as promised, but the society refused to do this, inasmuch as plaintiffs, some of them at least, had been of the number of its directors at the time of the arrangement. The transaction, however, had been managed throughout all so palpably for the society's advantage that the court rather belittled such a defense. The society, it said, was bound to preserve and maintain its capital and surplus for its stockholders, and was under a like obligation to uphold its solvency and financial security for its policy-holders. The bank stock and trust company stock formed part of its assets, and the society was charged with a duty to take all reasonable means to shield and protect both against loss or depreciation.

Marine etc. Mfg. Co. v. Bradley, 105 U. S. 175, 26 L. ed. 1034, was a case where a corporation contracted in writing with its president—the latter signing for the company, as president—for the renewal and extending, and an increase of the rate of interest upon, a company obligation which had become his by assignment. The court, through Matthews, J., said: "The bond of the company was purchased with his [the president's] own means and not those of the company; the value paid was full, and every step when taken was made known and assented to by the directors of the corporation. The transaction was legitimate in itself and beneficial to the company, and the dealing was not by the president with himself, but with the corporation in fact, represented by and acting by other directors with full knowledge of all the facts."

XI. Director not Permitted to Contract With Himself.

In the case last above cited, if the transaction had been all as the court stated except for the feature of the corporation being represented in it by other directors, it probably would have been decided the other way. It was this feature the case lacked in *Smith v. Los Angeles I. etc. Assn.*, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677. There the president of a company executed, as such, a promissory note to himself as a private person. It was for a debt honestly contracted and due him by the corporation, but it was not authorized by the board to be made and not ratified by it afterward, and so was held invalid.

A director cannot make with himself or for his benefit a contract with his corporation so as to bind it: *Gardner v. Butler*, 30 N. J. Eq. 702. On the other hand, if a corporation is solvent, any of its agents or officers may deal with it, provided it is represented in the deal by other agents: *Matson v. Alley*, 41 Ill. App. 72.

Contracts voidable because made between a corporation and a director do not include one known and consented to by all the members at the time it was made, the fruits of which have been kept and enjoyed by the company: *Battelle v. Northwestern Cement etc. Co.*, 37 Minn. 89, 33 N. W. 327. And see *Ashhurst's Appeal*, 60 Pa. 290. But the assent of each one of the stockholders is not indis-

pensible to the validity of such dealings, if only these dealings are approved by the majority of them, signified either actually or through the directors as a body. With all deference to the court in *Pearson v. Concord R. R. Corp.*, 62 N. H. 537, that case appears to have been considered on the theory that each stockholder is a cestui que trust. The individual stockholder is not that. He is a factor merely—a factor of what goes to make up the cestui que trust; the cestui que trust is the sum total—the stockholders in solidio; that is, the corporation: *International Wrecking Co. v. McMorran*, 73 Mich. 467; *Henderson v. San Antonio R. Co.*, 17 Tex. 560, 67 Am. Dec. 675. The director and the stockholders cannot be explained by reference to Lord Eldon's trustee and cestui que trust so readily as to Lord Hardwicke's trustee and creditors.

In stating on a preceding page the report of Lord Hardwicke's decision in *Whelpdale v. Cookson*, 1 Ves. Sr. 8, the last sentence was omitted, as not in point at that time. In stating the case again, it will be with the omission of what has been already quoted. "On devise of lands in trust for payment of debts, the trustee himself purchased part. The lord chancellor said he would not," etc. "But if the majority of the creditors agreed to allow it, he should not be afraid of making the precedent." At any rate, coming back to the corporation, the board of directors represent this, and it is the board whose assent, in the first instance, is necessary to give validity to these dealings. If the dealing is not to the satisfaction of a majority of the stockholders, these can override the board. As for a minority stockholder, it is his privilege to take the matter into court to have it inquired into as to fairness and good faith: *Memphis etc. R. R. Co. v. Woods*, 88 Ala. 630, 16 Am. St. Rep. 251; *Bird v. Western Union Tel. Co.*, 16 Fed. 14.

Of course, the contract with the director may be approved by the stockholders themselves in advance: *Gordon v. Plattsmouth Canning Co.*, 36 Neb. 548, 54 N. W. 830; *Stephany v. Marsden*, 75 N. J. Eq. 90, 71 Atl. 598; *Ashhurst's Appeal*, 60 Pa. 290. That would be best; the assent of all the stockholders would include the directors. This would be rendering assurance doubly sure, very much to the content of the other party as making the contract the company's beyond all peradventure. It was said in *United States Steel Co. v. Hodge*, 64 N. J. Eq. 807, 54 Atl. 1, that a contract by stockholders with directors—or one that the stockholders have expressly authorized the board to enter into with directors—results in the stockholders being put upon the inquiry as to the number of, and the names of, the directors interested and in their being charged with notice accordingly. "The management of the business and property of a corporation is intrusted to its officers, and they are empowered to act for the whole body of stockholders. They therefore occupy the position of trustees for the stockholders as a body in respect to such business and property": *Hooker v. Midland Steel Co.*, 215 Ill. 444, 106 Am. St. Rep. 170, 74 N. E. 445; *Lillard v. Oil etc. Co.*, 70 N. J. Eq. 197, 56 Atl. 254, 58 Atl. 188; *United States Steel Co. v. Hodge*, 64 N. J. Eq. 807, 54 Atl. 1.

The director's relation to individual stockholders is none other than that of a fellow-member of the corporation. In *Hooker v. Midland Steel Co.*, 215 Ill. 444, 106 Am. St. Rep. 170, 74 N. E. 445, the complainant considered himself wronged through the purchase of his shares by the company's president, whose superior knowledge of the

company's affairs gave him an advantage in any such transaction. The court said: "It is contended that Beatty, being the president and a director of the Midland Steel Company, was a trustee for the complainant as a stockholder, and was therefore in a fiduciary and confidential relation requiring him to disclose all such facts within his knowledge, and that he could not retain a benefit acquired by a breach of that duty, or use knowledge in his possession to obtain a bargain from the complainant. The management of the business and property of a corporation is intrusted to its officers, and they are empowered to act for the whole body of stockholders. They therefore occupy the position of trustees for the stockholders as a body in respect to such business and property, and cannot have or acquire any personal or pecuniary interest in conflict with their duty as such trustees. A director has not, however, that relation to an individual stockholder with respect to his stock over which he has no control whatever, but he may deal with an individual stockholder practically on the same terms as a stranger." And see *Walsh v. Goulden*, 130 Mich. 531, 90 N. W. 406; *Carpenter v. Danforth*, 52 Barb. 581. But see *Steinfeld v. Neilson*, 12 Ariz. 381, 100 Pac. 1094; *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232. However, the facts in the Georgia and Arizona cases went to show actual fraud on the part of the director in suppressing knowledge which it is the stockholder's right to have access to as a stockholder, since the latter is charged with notice of what the company's books, etc., contain.

The directors cannot do as they please, regardless of the wishes of the stockholders, for the authority the directors have is that only which the stockholders have given them by voting them into office. However, having given that authority, it is to be presumed that the board represents their sentiments in the conduct of the business; and an act of the board is their act, or, in other words, what they would have had the board do. If it is not, then it is their place to say so. If the act amounts to a deal of some sort with one of its members, the presumption is just the same. The transaction stands or falls according to whether it meets or does not meet the approval of a majority of the stockholders: *United States Steel Co. v. Hodge*, 64 N. J. Eq. 807, 54 Atl. 1. But the disapproval must be manifested in some way, or the transaction will stand anyhow: *Aetna Indem. Co. v. Altadena Min. & Inv. Synd.*, 11 Cal. App. 26, 165, 104 Pac. 470; *Union Pac. Ry. Co. v. Credit Mobilier*, 135 Mass. 367; *Kelley v. Newburyport & A. Horse Ry. Co.*, 141 Mass. 496, 6 N. E. 745; *United States Steel Co. v. Hodge*, 64 N. J. Eq. 807, 54 Atl. 1; *Lillard v. Oil etc. Co.*, 70 N. J. Eq. 197, 56 Atl. 254, 58 Atl. 188; *Ashhurst's Appeal*, 60 Pa. 290; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328; *Omaha Hotel Co. v. Wade*, 97 U. S. 13, 24 L. ed. 917. That is, unless some minority stockholder, on a reasonable suspicion that something about the transaction was not what it ought to have been, proceeds to have a court of equity scrutinize it. That we shall come to presently, but meantime it is to be said that the disapproval of a majority of the stockholders nullifies the transaction even if it is fair: *Stewart v. Lehigh Valley Ry. Co.*, 38 N. J. L. 505.

XIII. Director Deals With Company as Stranger.

The next remark in order is that a director having such transactions with the corporation is, while having them, not a director; that is, he throws off the character of an officer for the time being.

It has been said that in any such negotiation a director deals as a stranger: *Beach v. Miller*, 130 Ill. 162, 17 Am. St. Rep. 291, 22 N. E. 264; *Stratton v. Allen*, 16 N. J. Eq. 229; *Gardiner v. Butler*, 30 N. J. Eq. 702; *Berks etc. Turnpike Road v. Meyers*, 6 Serg. & R. (Pa.) 12, 9 Am. Dec. 402; *Gordon v. Preston*, 1 Watts (Pa.), 385, 26 Am. Dec. 75; *Central R. R. & B. Co. v. Claghorn*, 1 Speer Eq. (S. C.) 545; *Hill v. Manchester Waterworks*, 5 Barn. & Adol. 866; citing *Dunstan v. Imperial Gaslight Co.*, 3 Barn. & Adol. 125. And see *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328. He deals with it as a stranger, because in any such deal the company must be represented, and its advantage, as against his, looked to by other members of the board, a majority only of the members of which can give the deal the corporate sanction: *Matson v. Alley*, 41 Ill. App. 72.

Thus it was held in *Hill v. Marston*, 178 Mass. 285, 59 N. E. 766, that a bill of sale, executed by a corporate president to himself and wife, of corporate assets to secure indorsements they had made of notes of the company, was not valid until ratified by the other directors. And see *Smith v. Los Angeles I. etc. Assn.*, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677; also *Ashhurst's Appeal*, 60 Pa. 290. That is the crux, not merely his official relation to the company. "Directors are trustees, and their dealings with the corporation will be set aside on slight evidence of fraud, or as being detrimental to its interests; but the contract is not void just because of the fiduciary relation": *In re Castle Braid Co.*, 145 Fed. 224.

It was said in *Tevis v. Hammersmith (Ind. App.)*, 81 N. E. 614, that the president and general manager, bearing, as he does, a fiduciary relation to the company, may not, without the latter's consent, retain profits that have come to him because of his having those positions. However, it was added that if the company chose to ratify the thing, it could, and he then would hold in trust for the company. The court cited *Pratt v. Luther*, 45 Ind. 250; *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487; *Drury v. Cross*, 74 U. S. 299, 19 L. ed. 40. And see *Battelle v. Northwestern Cement etc. Co.*, 37 Minn. 89, 33 N. W. 327.

In *Ashhurst's Appeal*, 60 Pa. 290, so often cited herein, it was the stockholders themselves who acted, as it might be said, for the company, for their assent was given in advance of the transaction. Since the director cannot contract with himself, but must have the other directors interposed between him and the company, it follows that he cannot deal with the company at all when his official action is necessary to authorize the transaction: *Davis v. Neuces Valley Irr. Co. (Tex.)*, 126 S. W. 4. And when he has so influential a position it is not for him to plead that he has purposely kept aloof during the consideration of the matter by the company's representatives. "Nor is it proper for one of a board of directors to support his contract with his company on the ground that he abstained from participating as director in the negotiations for and final adoption of the bargain by his codirectors; the words in which he asserts his rights declare his wrong. He ought to have participated—and in the interest of the stockholders; and if he did not and they have thereby suffered—of which they shall be the judge—he must restore the rights he has obtained; he must hold no advantage that he has got through neglect of his duty toward them": *Stewart v. Lehigh Valley Ry. Co.*, 38 N. J. L. 505. As for these interposed directors, the members of the

board exclusive of the interested one, which members are looked to deal for the company in the transaction, these cannot act, of course, if themselves personally interested or if controlled by one who is: *Moore v. United States One Stave Barrel Co.*, 238 Ill. 544, 128 Am. St. Rep. 152, 87 N. E. 536; *Pepper v. Addicks*, 153 Fed. 383. See, also, *Northwestern Transp. Co. v. Beatty*, L. R. 12 App. Cas. 589. On the other hand, see *Farwell v. Babcock*, 27 Tex. Civ. App. 162, 65 S. W. 509.

In *Moore v. United States One Stave Barrel Co.*, 238 Ill. 544, 128 Am. St. Rep. 152, 87 N. E. 536, the court held that a resolution for the benefit of a director, as against that of the company, is not valid if passed with the aid of the votes of the interested directors and of other directors under his control, the rest of the board being in opposition. As authority there was cited *Adams v. Burke*, 201 Ill. 395, 66 N. E. 235, where, as the court said, "A board of directors being necessary, these parties (three of the total five directors) were used merely as pegs to fill the required places and were moved or substituted by Adams, the owner of three-quarters of the stock, to suit his interest or convenience." But see *Cowell v. McMillin*, 177 Fed. 25, 100 C. C. A. 443.

A contract or dealing of the sort under discussion should be considered necessarily by a quorum of the board and passed by a majority of that; but it would not be void in all cases where the interested member took part and voted on the question, in the absence of a charge of fraud or bad faith: *Brown v. United States Board & Paper Co.*, 20 Ohio C. C. 351; *Leavitt v. Oxford & Geneva Silver Min. Co.*, 3 Utah, 265, 1 Pac. 356.

The articles of incorporation or the by-laws ought to provide for time and place for board meetings, the manner of calling them and of giving notice to the members to attend, etc.; but in *Leavitt v. Oxford & Geneva Silver Min. Co.*, 3 Utah, 265, 1 Pac. 356, the articles being silent on the subject, but having given the directors "full power to ordain and make all by-laws," which power the board had not exercised, it was held that a common-law quorum was competent; also that, in the absence of affirmative evidence to the contrary, the presumption was that due and legal notice had been given. The court relied upon *Lane v. Brainerd*, 30 Conn. 565; *Sargent v. Webster*, 13 Met. 497, 46 Am. Dec. 743; *Edgarly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207; *Wells v. Rahway W. Rubber Co.*, 19 N. J. Eq. 402. "At common law," said the Utah court, "a majority of the board constitutes a quorum: *Sargent v. Webster*, 13 Met. 497, 46 Am. Dec. 743; *Kent's Commentaries*, 293; *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516; *Hayward v. Pilgrim Soc.*, 21 Pick. 270. In the light of these authorities, there being no issue or charge of fraud or want of good faith on the part of the plaintiff with reference to his vote at the meeting of the directors, I see no reason why his presence and vote should nullify the unanimous vote of the quorum, or the vote of his three associate directors who were a majority of all present and against the validity of which no charge has been made": *Leavitt v. Oxford & Geneva Silver Min. Co.*, 3 Utah, 265, 1 Pac. 356; citing *Smith v. Skeary*, 47 Conn. 47; *United States Rolling Stock Co. v. Atlantic etc. R. R. Co.*, 34 Ohio St. 450, 32 Am. Rep. 380; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328.

The interested director's vote, therefore, amounts to nothing one way or the other. In *Singer-Bigger v. Young*, 166 Fed. 82, where

the owner of one-half of the stock had appointed one of the directors to look after his interests, the court said that the first duty of the appointee was to look after the interests of the company. Directors owning all the stock are not, however, within the rule: 21 Am. & Eng. Ency. of Law, 898, citing *McCracken v. Robinson*, 57 Fed. 375, 6 C. C. A. 400.

XIII. Contract With Company for Salary.

A contract between a director and his corporation for giving him a salary is voidable at suit of a dissatisfied stockholder: *Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166; *Lillard v. Oil etc. Co.*, 70 N. J. Eq. 197, 56 Atl. 254, 58 Atl. 188; *Mitchell v. United Box & Paper Co.*, 72 N. J. Eq. 580, 66 Atl. 938. But in *Hodderd v. Hogg*, 230 Pa. 9, 79 Atl. 156, the stockholder complaining was himself a director, was present at the board meeting when the resolution was passed, and profited by the latter in respect of a salary to himself. Salaries are, however, properly to be arranged for in the company's by-laws: *Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166. In *Dunstan v. Imperial Gaslight Co.*, 3 Barn. & Adol. 125, Parke, J., said: "Here the character of the party for whom remuneration is claimed is not that of a servant, but of a manager. He can therefore recover no recompense from the company unless by virtue of an express resolution, in the nature of a by-law." The opinion in *Bennett v. St. Louis Car Roofing Co.*, 19 Mo. App. 349, explains why. "That directors stand in the relation of trustees to the stockholders and cannot dispose of the trust property to promote their individual interests . . . does not prevent their employing one of their number, in good faith, to perform services for the corporation which are not necessarily incident to his duties as director. The compensation, however, should be fixed by by-law or resolution before the services are actually rendered, so as to contain the necessary elements of a contract supported by a sufficient consideration. In *Dunstan v. Gas Co.*, 3 Barn. & Adol. 125, *Loan Assn. v. Steinmetz*, 29 Pa. 536, *Holder v. Railroad Co.*, 71 Ill. 106, and *Butts v. Wood*, 37 N. Y. 318, the vote or resolution for giving the directors compensation for past services, and therefore not supported by a sufficient consideration."

And yet we have seen how directors have been reimbursed for loans to and advances for the company already made by them—voluntary acts, purely, in some cases. There was no consideration of the sort contemplated in the cases last cited; there was no question of salary involved, but no promise preceded the service. The words of Holmes, J., in *Fort Payne Rolling Mill v. Hill*, 174 Mass. 224, 54 N. E. 532, although not entirely appropriate, are sufficiently so to bear repetition just here. "In this country it very generally has been deemed impracticable to adopt a rule which absolutely prohibits such contracts."

What was said in *Adams v. Burke*, 201 Ill. 395, 66 N. E. 235, was: "The law is that where a salary or compensation is voted to an officer, the resolution is illegal if it is carried by his vote or produced by his influence when he has a controlling interest." The court refers to *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954, which says: "Directors cannot vote a salary, much less a large bonus or compensation, in addition to a salary, to one of their number, as president, when he takes part in the proceeding or his vote is essential to the adoption of the resolution."

Indeed, most of the published adjudications seem to go, not so much to the voting of the salaries, as to the manner in which the favorable vote was effected. There was another case, one where a company president, not content with a salary fixed beforetime by the directors and with which he had expressed himself as satisfied, took now credit on the books for a sum in excess of it, and attempted a ratification of his act by a vote of the directors, four to four, and he giving the fifth vote. The court said: "He could not at the same time and in the same matter act for himself and the corporation of which he was agent and trustee, being both director and president. The attempted ratification thus brought about by his own vote was of no validity": *Ward v. Davidson*, 89 Mo. 445, 1 S. W. 846. The authorities given were *Butts v. Woods*, 37 N. Y. 318, and *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854.

The right of corporate affairs to compensation is the subject of a note in 136 Am. St. Rep. 909.

XIV. Affirmance by Corporation.

The method of the negotiation—how it is to be brought about so as to bind all the company where the interest individually of a member is involved—was made clear by Sir R. Baggalley, J., in *North-western Transp. Co. v. Beatty*, L. R. 12 App. Cas. 589. "The general principles," he said, "applicable to cases of this kind are well established. Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question upon which the company is legally competent to deal, is binding upon the minority and consequently upon the company; and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject matter opposed to, or different from, the general or particular interests of the company. On the other hand, a director of a company is precluded from dealing on behalf of the company with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director. Any such dealing or engagement may, however, be affirmed or adopted by the company, provided such affirmation or adoption is not brought about by unfair or improper means and is not illegal or fraudulent, or oppressive toward those shareholders who oppose it." A director is a shareholder, and so it is to be gathered from what has just been quoted that at a shareholders' meeting he may vote even on matters of his concern as opposed to that of the rest of the company; as a director, though, that adverse concern puts him outside of the company *pro hac vice*. He deals as a stranger to it and has no voice in the board. The stand taken in *Gardiner v. Butler*, 30 N. J. Eq. 702, was quite consistent with that of Sir R. Baggalley above: "The language of Judge Strong (whose views and conclusions were approved by the supreme court of Pennsylvania in *Ashhurst's Appeal*, 60 Pa. 290) is pertinent: 'I come, then, to consider the facts that the purchasers were the same persons as those who, as directors, sold and as stockholders authorized the sale. It is often said, and truly, that the same persons cannot be buyers and sellers in the same transaction. They

were not, strictly, in this. All the purchasers were not directors who made the sale, but I make no account of that. Still, why may not directors of a corporation sell to themselves? Each director has an interest distinct and antagonistic to his interest as a mere man. There is identity of persons but not of interest. There must be many things which directors can do for their individual benefit which are binding upon the corporation of which they are directors. If they have advanced money I cannot doubt they may pay themselves with corporate funds. If they have been liable as sureties for the corporation, they may provide for their indemnity. And though ordinarily the law frowns upon contracts made by them in their representative capacity with themselves as private persons, such contracts are not necessarily void. They are carefully watched, and their fairness must be shown.’”

This fairness must be shown in order to make the transaction pass muster with the majority stockholders, if they choose to take exception in the premises. The fact that directors are personally interested in a contract made with the corporation and are to profit by it does not condemn the transaction, but merely calls upon them to justify it: *Teller v. Tonopah & G. R. R.*, 155 Fed. 482. It will be borne in mind that the majority need not find fraud or unfairness in it in order to repudiate the matter; that has been shown some pages back. The majority of the stockholders is the corporation. “The directors of a corporation are its trustees, and the validity of their contracts made with a corporation depends upon the nature and terms of the contract itself and the circumstances under which it is made and the effect of its provisions”: *Hubbard v. New York etc. Inv. Co.*, 14 Fed. 675. This is for the corporation to consider, approving it then if the contracting director does manage to justify it. And if the corporation, that is, the majority, does approve it, it is presumed to be in all respects what it ought to be. The director is no longer called upon to justify it. Its bona fides may be impeached by a minority stockholder afterward, but the burden of proof is upon him then, not the contracting director. “In an action by a stockholder seeking avoidance of a contract of a corporation with its trustees there is no presumption of dishonesty in the trustees which the latter must overcome; the burden is on the plaintiff. It would be the contrary if the action was by the corporation itself”: *McNaughton v. Osgard*, 41 Hun, 109.

XV. Suit by Minority Stockholder.

Chief Justice Ryan, of Wisconsin, speaking of proceedings to avoid a dealing of this sort, said: “The right of action is primarily in the corporation itself; but every stockholder takes the right, in lieu of the corporation upon refusal of the governing body”: *Cook v. Berlin Woolen Mills*, 43 Wis. 433. That is, he must go to the corporation first and propose that it bring the action. On its declining to do so he then proceeds in his own name, putting in his bill, or complaint, an averment that before proceeding he presented to the corporation a request that it should do so: *Memphis etc. R. R. Co. v. Woods*, 88 Ala. 630, 16 Am. St. Rep. 81, 7 South. 108, 7 L. R. A. 605; *Bill v. Western Union Tel. Co.*, 16 Fed. 14.

To repeat what has already been said so often, the warrant for his suit is not the mere fact that the same person was on each side of the contract. He cannot have the contract avoided on that ground

against the will of the corporation: *Wallace v. Long Island R. R. Co.*, 12 Hun, 460. On the other hand, he may have the transaction adjudged voidable when corporation property is sold to a director to satisfy his advances: *Mitchell v. United Box & Paper Co.*, 72 N. J. Eq. 580, 66 Atl. 938. But he can have the matter so adjudged only after showing to the satisfaction of the court that the transaction was not all fair and square and aboveboard. It would be a versatile judge that would have unerring knowledge as to how every description of business should be run with respect to methods of management; so any question of that sort is not heard at all. "To warrant the interposition of the court in favor of the minority stockholder in a corporation or joint stock association, as against the contemplated action of the majority, when such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequence to the company, and in a manner inconsistent with its interests. Otherwise the court might be called upon to balance probabilities of profitable results to arise from the carrying out of the one or the other of different plans proposed by or on behalf of different stockholders in a corporation, and to decree that line of policy which seemed to it to promise the best results, or, at least, to enjoin the carrying out of the opposite policy. This is no business for any court to follow": *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527.

Thus it will be seen that though, as said in *Gardiner v. Butler*, 30 N. J. Eq. 702, "a director cannot make with himself or for his benefit a contract with his corporation to bind it, it may be repudiated at the instance of a stockholder," it cannot be so repudiated, against the will of the corporation itself, unless the stockholder proves something positively bad about the contract—something iniquitous. Such dealings are "carefully watched, and their fairness must be shown": *In re Lafferty*, 2 Pa. Dist. Rep. 215; *Singer v. Salt Lake City Copper Mfg. Co.*, 17 Utah, 143, 70 Am. St. Rep. 773, 53 Pac. 1024. That is the position the courts take in this connection. If, being scrutinized closely, they are found not to be fair and bona fide, the courts will not sustain them: *Marr v. Marr*, 73 N. J. Eq. 643, 133 Am. St. Rep. 742, 70 Atl. 375.

"In the absence of prohibitory statute a trustee may contract with his corporation if he does so openly": *Budd v. Walla Walla Printing & Publishing Co.*, 2 Wash. Ter. 347, 7 Pac. 896. "Contracts between directors and the corporation, if fair and bona fide, not securing undue benefits to the former, and in which the interests of the individuals and the duty of the officers work together for the welfare of the corporation, are valid": *Wyman v. Bowman*, 127 Fed. 257, 62 C. C. A. 189. And see *Savage v. Medalia Farmers etc. Co.*, 98 Minn. 343, 108 N. W. 296; *Roy & Co. v. Scott, Hartley & Co.*, 11 Wash. 399, 39 Pac. 679; *Wausau Boom Co. v. Plumer*, 35 Wis. 274.

"The theory of a stockholder's suit is that the stockholder has sustained a wrong through the injurious effect upon his stock of the wrong done the corporation": *Babcock v. Farwell*, 245 Ill. 14,

137 Am. St. Rep. 284, 91 N. E. 683, 19 Ann. Cas. 74. It follows, therefore, that to make such a voidable contract void some injury must be shown: *Copsey v. Sacramento Bank*, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7; *Cowell v. McMillin*, 177 Fed. 25, 100 C. C. A. 443.

XVI. Restitution by Director Wrongfully Contracting.

In the fore part of this note some attention was given to the old English case of *Fox v. Mackreth*, 8 Brown H. L. Cas. 42, before Thurlow, Lord Chancellor, and Kenyon, Master of the Rolls, where, greatly to his indignation, the purchasing trustee was required by the court to take the profits coming to him out of the transaction and hand them over to the cestui que trust. In these corporation cases a similar requirement is made of the director shown to be similarly at fault in dealing with his company. If the transaction has been unfair, on the director's part, in either conception or accomplishment, and the director has been the gainer by it in tangible benefits, the court will, in a proper case, decree that these benefits are held by the director, not for himself, but in trust for the company: See *Rutland Electric Light Co. v. Bates*, 68 Vt. 579, 45 Am. St. Rep. 904, 35 Atl. 480; *Tewis v. Hammersmith* (Ind. App.), 81 N. E. 614.

"A director is a trustee for all the stockholders and his assumption of office is an undertaking to give his best judgment to the interests of the corporation in all matters in which he acts for it, untrammelled by any hostile interest in himself or others; and all secret profits obtained by him in any dealing in regard to the corporate enterprise must be accounted for to the corporation": *Bird Coal & Iron Co. v. Humes*, 157 Pa. 278, 37 Am. St. Rep. 727, 27 Atl. 750. And see, for analogy, Lord Eldon's language in *Ex parte Lacey*, 6 Ves. 625.

And when an officer of a corporation has acted, in any dealing, contrary to the interest of the corporation, the mere fact that the means employed by him, leading to the unlawful end he had in view, would, if considered apart from the transaction, be lawful, the fact would not alter his responsibility to account for profits coming to him which otherwise might have gone to the company: *Commonwealth Title Ins. etc. Co. v. Seltzer*, 227 Pa. 410, 136 Am. St. Rep. 896, 76 Atl. 77.

A corporation officer must account to the company for profits which he, as partner in another concern, realized out of a contract of the company with the latter, made without the company being advised at the time that he was a member of the partnership: *Rickert v. White*, 54 Misc. Rep. 114, 105 N. Y. Supp. 653. A corporation officer who, directly or indirectly, uses the company's money in buying its stock, holds the stock bought in trust for the company: *Barker v. Montana Gold etc. Min. Co.*, 35 Mont. 351, 89 Pac. 66. When a land owner has deeded land to a railroad company's president in consideration that the line of the company should traverse other land of his, the president must be deemed to hold the land so deeded in trust for the company, unless the latter has authorized him to hold for himself; and this, even though he claims to be the promoter of the road and its virtual owner: *Scott v. Farmers' etc. Nat. Bank*, 97 Tex. 31, 104 Am. St. Rep. 835, 75 S. W. 7.

A director dominating the rest of the board, whereby the latter is procured to have the company buy worthless bonds of other corporations in which he has an interest, all to his financial benefit, must account to the corporation so buying for what he has made by the transaction: *Pepper v. Addicks*, 153 Fed. 383. In a case where the president of a corporation had used his wife as a subterfuge, buying property for four hundred and fifty dollars in her name and selling it to his company for three thousand dollars, a bare majority of the board participating in the passage of the resolution to buy from her and she acting as secretary at the meeting, the court decreed that the price to the company should be pared down to four hundred and fifty dollars: *Voorhies v. Nixon*, 72 N. J. Eq. 791, 66 Atl. 192.

XVII. Stranger Co-operating With Offending Officer.

In *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311, and *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. (N. Y.) 553, particularly mentioned hereinbefore, it was pressed that Dean, who purchased with Sherman, was no director of the company, although Sherman was, and was not even a member of it; but he was, nevertheless, dispossessed by the courts along with Sherman—the baneful result of being in bad company. In those cases there were only two purchasers, but the effect is similar if there are many, and the disloyal director only one of them. “A party joining in a purchase from a corporation with knowledge that his copurchaser was a director in the corporation is affected with whatever of legal disability belonging to the director by reason of that relation”: *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311. To the same effect, see *People v. Township Board of Overijssel*, 11 Mich. 222. Where one of several persons, who together entered into a contract with a corporation, was a director of the company, the latter was held to have the option to avoid the contract: *Munson v. Syracuse etc. R. R. Co.*, 103 N. Y. 58, 8 N. E. 355.

In *Voorhees v. Nixon*, 72 N. J. Eq. 791, 66 Atl. 192, the court declared that the policy which forbids a contract between a corporation and its director necessarily includes a director's wife. “A trustee,” the court went on, “or an agent to sell lands, could not properly be permitted to make sale of the trust property to his wife. Irrespective of the husband's interest in his wife's property, present or prospective, his interest in her welfare would in such cases necessarily interfere with an impartial exercise of his duties to his trust. A contract made by a trustee to purchase lands owned by his wife would in like manner operate as a strain upon his duties to his trusteeship.” The court cites *Reed v. Aubrey*, 91 Ga. 435, 44 Am. St. Rep. 49, 17 S. E. 1022, and the cases there collected.

XVIII. Effect on Contract of Company Withholding Protest.

It was said above, quoting Mr. Schley, in *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311, that these contracts were “capable of being rendered unavoidable, even by the cestui que trust, by confirmation, by ratification, by estoppel and even by acquiescence.” A ratification is defined to be “equivalent to a previous authority. It operates upon the act rati-

fied in the same manner as if the authority had been originally given": *McCracken v. San Francisco*, 16 Cal. 591. "A ratification must be made by a board composed of disinterested directors. The least that can be required in such a case is that the directors concerned in the contract shall resign and allow their places to be filled by persons who can without bias represent the interests of the corporation and particularly of the interested stockholders": *McCrary, J.*, in *Thomas v. Brownville etc. Ry. Co.*, 1 *McCrary*, 392, 2 *Fed.* 877, where the directors had contracted with themselves. The court goes on to intimate, however, that, notwithstanding the activity of interested directors, it might be that the enjoyment by the corporation thereafter of patent benefits brought about by the contract would entitle the other parties to payment of a quantum meruit; not, however, when the contract was tainted with vice or immorality; citing *Creath v. Sims*, 5 *How.* 192, 12 *L. ed.* 110.

In *United States Steel Co. v. Hodge*, 64 *N. J. Eq.* 807, 54 *Atl.* 1, it is said, in effect, that a contract of a director with his corporation which, although not void ab initio, is voidable at the company's option, may be ratified subsequently by the stockholders. In *Davis v. Neuces Valley Irr. Co. (Tex.)*, 126 *S. W.* 4, there had been passed a resolution by the board empowering the president of the company to sell corporation lands to members. This he had done, selling to, among others, his wife, who was a stockholder, whereby the subject of this particular sale became community property: See *Parker v. Worthington*, 101 *Tex.* 505, 109 *S. W.* 909. The price was full value and cash was paid, accepted by the company and expended in improvements. There was no concealment of facts. Plaintiff, who was a stockholder, had knowledge at the time of the whole transaction, and made no objection, and never did make objection, to the other sales, although in some of these directors had been buyers also. The sale was ratified by a new board of directors. It is hardly necessary to add that the court did not sustain the objecting stockholder. And see *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 *Mo.* 133, 28 *Am. St. Rep.* 405, 17 *S. W.* 644.

A corporation bought property of a director, paid off the encumbrances it had assumed in the negotiation, and had possession, management and control of the premises for about three years. The facts raised a presumption that the sale had been ratified, and in an action for the price it was not sustained as a defense that the director had acted in bad faith in his statements as to value: *Stetson v. Northern Investment Co.*, 104 *Iowa*, 393, 73 *N. W.* 869.

The right of a corporation to avoid the sale of its property by reason of the fiduciary relations of the purchaser must be exercised within a reasonable time after the facts connected therewith are made known, or can by due diligence be ascertained: *Twin Lick Oil Co. v. Marbury*, 91 *U. S.* 587, 23 *L. ed.* 328. Speaking of a contract between a corporation and certain of its directors for service by the latter as its selling agents, the court said it was valid if made openly and with the assent, express or implied, of all the stockholders; and added that such assent might be inferred from long-continued acquiescence: *Warren v. Para Rubber Shoe Co.*, 166 *Mass.* 97, 44 *N. E.* 112. And see *Kelley v. Newburyport etc. Ry. Co.*, 141 *Mass.* 496, 6 *N. E.* 745, where it is said the right to dissent may be waived. See, also, *Stewart v. Lehigh Valley Ry. Co.*, 38 *N. J. L.* 505.

To quote Ashhurst's Appeal, 60 Pa. 290, once more: "If a trustee to sell become the purchaser, his purchase is generally voidable, but the cestui que trust must move to avoid it within a reasonable time: Citing *Campbell v. Walker*, 5 Ves. 678; *Hawley v. Cramer*, 4 Cow. 718; *Prevost v. Gratz*, 1 Pet. C. C. 368; *Clegg v. Edmundson*, 3 Jur., N. S., 299. This last case is instructive in many particulars. In *Beckford v. Wade*, 17 Ves. 87, Sir William Grant said: 'It is certainly true that no time bars a direct trust as between cestui que trust and trustee; but if it is meant to be asserted that a court of equity allows a man to make out a constructive trust at any distance of time after the facts and circumstances happened, out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be; so far from it, that not only in circumstances where the length of time would render it exceedingly difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who after a long acquiescence comes into a court to seek that relief. In proof of this it is not necessary to produce any other case than that of *Bonney v. Ridgard* (cited in 4 Brown C. C. 138), in which Lord Kenyon, when master of the rolls, on the sole ground of length of time, reversed a decree by which Sir Thomas Sewell had granted relief against a fraudulent purchase and had declared the purchaser to be trustee for the plaintiff in the cause, Lord Kenyon agreeing perfectly that the purchase was originally fraudulent and that the defendant must have been held to be a trustee if the suit had been brought in proper time.' See, also, *Hovenden v. Lord Annesley*, 2 Schoales & L. 633; *Wentworth v. Lloyd*, 32 Beav. 32 (affirmed in the house of lords), 10 H. L. Cas. 589. . . . But what is the reasonable time within which a constructive trust must be asserted? The cases do not clearly define it, and perhaps it is incapable of strict definition. It must vary with the circumstances of each case." The court goes on to suggest that when a party seeks to have another held to be a trustee of personal property under a constructive trust, "the statute of limitations be allowed to influence a court somewhat in deciding within what time the claims ought to have been asserted": *Ashhurst's Appeal*, 60 Pa. 290. And see, generally, *Union Pac. Ry. Co. v. Credit Mobilier*, 135 Mass. 367; *Omaha Hotel Co. v. Wade*, 97 U. S. 13, 24 L. ed. 917.

In *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328, it is said by Miller, J.: "As the courts have never prescribed any specific period as applicable to every case, like the statute of limitations, the determination as to what constitutes a reasonable time must be arrived at by a consideration of all the elements which affect that question." Ratification must be with full knowledge of all the facts: *Pacific Vinegar & P. Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42, 78 Pac. 550. It was said by Le Grand, C. J., in *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311, that ratification must be also with knowledge of how a court of equity would decide upon those facts. That would seem to involve a question of itself; the law is not an exact science, and as administered in courts of equity it is not intended to be so.

XIX. Director's Incapacity Does not Avail an Outside Person.

It remains to be said that public policy, respect for which renders voidable a contract made thus by a corporation's officer, does not lend itself to a stranger who is enmeshed by the contract in some way and attempts to get out of it: *Briggs v. Chamberlain*, 47 Colo. 383, 135 Am. St. Rep. 223, 107 Pac. 1082. And see *Marston v. Umpqua Valley Oil Co.*, 49 Or. 374, 90 Pac. 151, 12 L. R. A., N. S., 825.

CASES

IN THE

SUPREME COURT

OF

MISSOURI

STATE v. MARTIN.

[230 Mo. 1, 129 S. W. 931.]

CRIMINAL LAW.—A Plea in Abatement must be supported by proof of the truth thereof by affidavit or other evidence. (p. 631.)

CRIMINAL LAW.—Plea in Abatement.—A pleading alleging that an indictment is violative of certain provisions of the constitution, and therefore should be quashed and the prosecution abated, not supported by affidavit or other proof, cannot be considered a plea in abatement. (p. 631.)

APPEAL.—Record.—A Demurrer is a Pleading and should be made part of the record proper; its preservation in the bill of exceptions is insufficient to preserve it for review in the appellate court. (p. 631.)

APPEAL.—Constitutional Questions, How Preserved.—In a case submitted on an agreed statement of facts raising the question of the constitutionality of certain statutes, the question may be preserved for review by presentation in a motion for a new trial and a motion in arrest of judgment. (pp. 631, 632.)

INTOXICATING LIQUORS.—Local Option Law.—Construed With Existing Statutes.—The object of the legislature in the passage of the local option act was to afford the people in their respective counties and cities an opportunity to say whether or not intoxicating liquors should longer be sold under the provisions of the law in existence at the time of the submission of the question to the voters, and the local option act must be read in connection with the general dramshop law. (p. 633.)

INTOXICATING LIQUORS.—Meaning of Local Option Law.—The local option law is supplemental to the general dramshop law, and is in pari materia with it, and therefore they should be considered together in construing the local option law. When so construed the definition of intoxicating liquor contained in the dramshop law must be read into the local option law, and thus, any beverage containing alcohol in any quantity whatever is an intoxicating liquor under the provisions of the latter law. (p. 634.)

INTOXICATING LIQUORS.—Statutory Definition Controlling. Where the statute has provided that any beverage containing alcohol in any quantity whatever is an intoxicating liquor, it is not permissible

to inquire into the actual intoxicating properties of any composition containing any alcohol whatever, nor is the percentage of alcohol contained in such composition at all material. (p. 636.)

CONSTITUTIONAL LAW—Title of Local Option Law.—The local option law must be considered to have been framed and enacted with reference to the existing laws upon the subject, and the expression "intoxicating liquor," used in the title of the act, to be used in the sense given it and as defined by the general law of the state then in force, and as meaning any beverage containing alcohol in any quantity whatever. (p. 636.)

INTOXICATING LIQUORS.—In an indictment for selling intoxicating liquor, it is not necessary to use the terms, "sold intoxicating liquor," or "that the liquor or beverage sold was intoxicating liquor," but if the ingredients of the composition sold as a beverage are designated and charged, and the component parts make it an intoxicating liquor, this is sufficient. (p. 637.)

CRIMINAL LAW—General Finding on Two Counts.—Where it is apparent from the record that two counts of an indictment have reference to a single transaction, and the charge in the indictment has been treated by both parties as having reference to simply one offense, a general finding of guilty will not be reversed. (pp. 637, 638.)

CRIMINAL LAW—Instructions—Trial by Court.—Where the trial is by the court upon an agreed statement of facts, there is no necessity of instructions or of the court directing itself as to the law of the case. (p. 638.)

INTOXICATING LIQUORS—Trial—Agreed Statement of Facts.—A statement in an agreed statement of facts that a nonintoxicating liquor was sold is not binding on the court where the agreed statement also shows the beverage sold was such as the law declares to be an intoxicating liquor. (p. 638.)

W. M. Fitch, for the appellant.

Elliott W. Major, attorney general, and John M. Atkinson, assistant attorney general, for the state.

7 FOX, J. On October 20, 1908, the grand jury of De Kalb county duly returned an indictment in two counts, charging appellant with a violation of the local option law of this state. The first count of said indictment charged that appellant "did then and there unlawfully sell one quart of beer" on August 12, 1908, for the price and sum of twenty-five cents, contrary to the provisions of the statute in such cases made and provided, and against the peace and dignity of the state. The second count of said indictment charged that appellant "did then and there sell a fermented, malt beverage containing alcohol, to wit, one quart ^s of temperance beer, a fermented and malted beverage, containing alcohol," on August 12, 1908, for the price and sum of twenty-five cents, contrary to the provisions of the statutes in such cases made and provided and against the peace and dignity of the state.

Appellant challenged the sufficiency of said indictment, by what he denominated a "plea in abatement, or demurrer," which the court overruled.

This cause was submitted to the court on the following agreed statement of facts:

"AGREED STATEMENT OF FACTS.

"It is agreed that this case may be submitted and tried on the following facts as evidence.

"1st. That on or about the 12th day of October, 1907, an act of the Legislature of the State of Missouri, approved 1887, commonly known as Local Option Law, and being article 3, chapter 22, Revised Statutes of Missouri 1899, was duly and legally adopted in said county, and was thereafter in full force and effect in said county.

"2d. That said county contained no town with a population of twenty-five hundred inhabitants.

"3d. That afterwards, on or about the 12th day of August, 1908, the defendant, Charles H. Martin, at and in De Kalb county, Missouri, did sell one quart of a certain nonintoxicating beverage known as 'Temperance Beer,' and bearing the following label: 'Temperance Beer. Nonintoxicant. Brewed from Malt and Hops. Contains less than one-half per cent of alcohol in volume. Guaranteed under the Pure Food and Drugs Act, Serial Number 8650. Brewed and bottled by M. K. Goetz Brewing Co., St. Joseph, Mo.,' to Howard Wilson, Jr., for the sum of 25 cents of lawful money of the United States.

"4th. It is further admitted that the substance sold was the same substance described in the above ² label, and was sold for a beverage, and that said beverage contained some alcohol at the time of said sale in the following quantities: By weight it contained 32-100 of one per cent, and by volume it contained 40-100 of one per cent.

"5th. It is further admitted that the United States Government does not require a license for the manufacture or sale of a beverage that contains no more than one-half per cent by volume, and that such beverages do not come within the internal revenue laws of the United States, either as to the sale or manufacture. Said sale was not made for scientific or sacramental purposes and was not under a dramshop license nor on a prescription, and defendant is not a physician.

"It is agreed that the foregoing is all of the evidence in the case.

"EDWARD G. ROBISON,

"Prosecuting Attorney.

"W. M. FITCH,

"Attorney for Defendant."

The court rendered a general verdict, finding defendant guilty as charged, and assessed his punishment at a fine of three hundred dollars.

Appellant thereafter filed timely motions for new trial and in arrest of judgment, both of which were overruled. Judgment was rendered in accordance with the finding of the court, and from this judgment defendant prosecutes this appeal, and the record is now before us for consideration.

1. The record in this cause discloses the filing by defendant of what is termed a plea in abatement. This plea is, in fact, not a plea in abatement. The numerous grounds alleged in this so-called plea are directed at ¹⁰ the insufficiency of the indictment. The grounds alleged substantially charge that the respective counts in the indictment are violative of certain provisions (pointing them out) of the constitution of this state, and by reason of the violation of such constitutional provisions charged in the so-called plea in abatement, the defendant says that the indictment should be quashed and the prosecution abated. It manifestly is not a plea in abatement as contemplated by the provisions of section 2563 of Revised Statutes of 1899, wherein it is provided that "no plea in abatement or other dilatory plea to an indictment or information shall be received by any court, unless the party offering such plea shall prove the truth thereof by affidavit or some other evidence."

We have reached the conclusion that this plea cannot be treated by this court as a plea in abatement. If it is to be considered as a demurrer to the indictment, then we are confronted with the question as to whether or not it has been properly preserved by the record before us for consideration. Section 596 of Revised Statutes of 1899, Annotated Statutes of 1906, page 622, recognizes a demurrer as a pleading; hence it follows that it should be made a part of the record proper. As a demurrer, this plea was not made a part of the record proper, and its preservation in the bill of exceptions is insufficient to preserve it for review in the appellate court. This proposition was, in the recent case of *State v. Earll*, 225 Mo. 537, 125 S. W. 467, fully reviewed by Burgess, J., and the conclusion reached, after a clear and exhaustive discussion of the proposition, was as heretofore indicated.

2. At the very inception of the consideration of this cause we are confronted with the suggestion by the learned attorney general that this court has no jurisdiction of this cause, it being a misdemeanor, and that ¹¹ no constitutional question was raised and properly preserved in the trial and disposition of the cause.

It is sufficient to say respecting that suggestion that while, as indicated in the first paragraph of this opinion, the so-called plea in abatement or demurrer which sought to raise certain constitutional questions is not before us for review, yet we have reached the conclusion that as applicable to the questions involved in this cause, and upon the agreed statement of facts upon which this cause was submitted to the court, learned

counsel could preserve for review the constitutional question to which he has directed our attention, in the motion for new trial and in arrest of judgment. Having fully presented this question to the trial court in his motion for new trial and in arrest of judgment, we will assume jurisdiction of the cause in this court and dispose of the legal propositions confronting us.

3. The leading and controlling proposition disclosed by the record in this cause is the one challenging the constitutionality of that portion of section 3032 of Revised Statutes of 1899 which prohibits the sale of any "beverage containing alcohol, in any quantity whatever." It is earnestly insisted by learned counsel for appellant that the provision of section 3032, as above designated, is unconstitutional and void, being violative of, and in contravention of, section 28 of article 4 of the constitution of this state. That constitutional provision, as applicable to the proposition now under consideration, declares that "no bill . . . shall contain more than one subject, which shall be clearly expressed in its title."

That we may fully appreciate the proposition which has been so ably presented in the brief, as well as in oral argument, by learned counsel for appellant, ¹² it is well to keep in mind the enacting clause to which the argument of counsel for appellant is principally directed. The enacting clause of the local option law (Laws 1887, p. 179) is as follows: "An act to provide for the preventing of the evils of intemperance by local option in any county in this state, and in cities of twenty-five hundred inhabitants or more, by submitting the question of prohibiting the sale of intoxicating liquors to the qualified voters of such county or city; to provide penalties for its violation and for other purposes."

In the third and fourth paragraphs of the agreed statement of facts it is admitted that the defendant "did sell one quart of a certain nonintoxicating beverage known as 'temperance beer,' and bearing the following label: 'Temperance Beer. Nonintoxicant,' " and that it was sold as a beverage and that said beverage contained alcohol "at the time of said sale in the following quantities: By weight it contained thirty-two hundredths of one per cent, and by volume it contained forty hundredths of one per cent." Upon these statements embraced in the agreed statement of facts counsel for appellant insists that the prohibition of selling a beverage containing alcohol in any quantity whatever is not embraced in the subject of the title of the act, and is therefore violative of the provisions of section 28 of article 4 of the constitution of this state. In other words, the insistence of appellant is that the local option law was leveled at the sale of intoxicating beverages, and was not intended to prohibit the sale of beverages of the nature and character designated in this proceeding, which

contain less than one-half of one per cent of alcohol, and that the subject as expressed in the title, "submitting the question of prohibiting the sale of intoxicating liquors to the qualified voters of such county or city; to provide penalties for its violation and for other purposes," does not embrace beverages of the nature and character ¹³ in judgment before us, which contain less than one-half of one per cent of alcohol.

At the very threshold of the treatment of this proposition it is highly important that we do not lose sight of the state of the law respecting the sale of intoxicating liquors at the date of the enactment of the local option law in 1887. At the date of the passage of the local option act of 1887 we had in this state, as we now have, a general dramshop law, which made full provision for the obtaining of a license as a dramshop-keeper to dispense intoxicating drinks. No person was permitted, directly or indirectly, to sell intoxicating liquors in any quantity less than three gallons, either at retail or in the original package, without taking out a license as a dramshop-keeper. The lawmakers of this state, to the end that there should be no misunderstanding as to what was meant by "intoxicating liquor," defined the term "intoxicating liquor" in this way: "The term 'intoxicating liquor,' as used in this chapter, shall be construed to mean fermented, vinous and spirituous liquors, or any composition of which fermented, vinous or spirituous liquors is a part, and all the foregoing provisions shall be liberally construed as remedial in their character."

The legislature of this state when approaching the passage of the local option act of 1887 were fully cognizant of the then existing general law providing for the sale of intoxicating liquors by dramshop-keepers; this being true, we see no escape from the conclusion that the intention of the legislature, in the passage of the local option act, was to afford the people in their respective counties and cities an opportunity at an election duly called, of passing upon the question as to whether or not intoxicating liquors should be sold. In other words, it was to furnish an opportunity to the people to say whether or not intoxicating liquors should longer be sold under the provisions of the law in existence at the time of the submission ¹⁴ of the question to the voters in the respective counties and cities.

In oral argument, as well as in the brief, in support of the contention of appellant, it is said that "before the local option law was adopted, one was at liberty to sell any beverage in this state which was not intoxicating, even though such beverage may contain some alcohol. But after the adoption of the local option law, if it is to have the construction placed upon it by the learned trial court in this case, then it becomes a misdemeanor for one to sell a beverage which contains less than

one-half of one per cent of alcohol." Obviously, this is a misconception of the result to be deduced from the holding of the learned trial judge in this cause. The general dramshop law regulating the sale of intoxicating liquors recognized that any composition of which alcohol formed a part was an intoxicating liquor, and this was true regardless of the percentage of alcohol forming the part of the composition; hence, it follows that, under the general dramshop law in existence at the time of the adoption of the local option act involved in this proceeding, any composition of which any amount of alcohol whatever formed a part was treated as an intoxicating liquor and its sale prohibited, except upon the obtaining of a license as a dramshop-keeper for the purpose of making such sale. Therefore, prior to the adoption of the local option law any person selling as a beverage any composition of which any alcohol whatever formed a part was guilty of a misdemeanor, unless it should be made to appear that he was duly licensed as a dramshop-keeper authorized to sell such beverage. Therefore, if the insistence of the learned counsel for appellant is to be maintained, it would result in the following novel application of the law in the respective counties in this state—that is to say, in a county that had not adopted the local option law, any person who should sell a composition of which any ¹⁵ alcohol whatever formed a part would be treated as selling intoxicating liquor and subjected to a penalty for the commission of a misdemeanor (provided, of course, he did not have a license as a dramshop-keeper); in any county that adopted the local option law, persons might sell any sort of a composition as a beverage if it contained less than one-half of one per cent of alcohol.

Directing our attention to the definition of "intoxicating liquor," as contained in the general dramshop law, it is insisted that that definition has no application to the local option act. Responding to this insistence, it is sufficient to say that while that may be true in a sense, for the reason that they are separate and independent acts, but it is conceded in the brief of counsel for appellant that the local option law is supplemental to the dramshop law, and is in *pari materia* with it, and they should be considered together in construing the local option law. Hence, it follows that it is equally true that the law-making power in the adoption of the local option act had in mind the provisions of the general dramshop law which in express terms defined what should be construed to be intoxicating liquor. The definition of "intoxicating liquor" as contained in the statute at this date was first adopted by the General Assembly in the year 1855, and has remained in full force as the law of this state from that date to the present time. In our opinion, the General Assembly in the adoption of the local option act of 1887, in the employment of the terms

"intoxicating liquor," had in contemplation intoxicating liquor as defined by the general dramshop law, and such act was leveled at the evils of intemperance which might result from the sale of intoxicating liquor in the manner provided by the general dramshop law. The provisions of section 3031 of the local option act clearly emphasize the correctness of this conclusion. It in substance provides that if a ¹⁶ majority of the votes cast at such election be for the sale of intoxicating liquors, such intoxicating liquors may be sold under the provisions of existing laws regulating the sale thereof, and if a majority of the votes cast at such election be against the sale of intoxicating liquors, then no license to sell intoxicating liquors shall be granted as provided for by the general dramshop law of this state. In other words, if a majority of the votes are cast in favor of intoxicating liquors, then such intoxicating liquors as defined by the general dramshop law may be sold under the provisions of that law, but, on the other hand, if a majority of the votes cast are against the sale of intoxicating liquors, then such intoxicating liquors as defined by the general dramshop law cannot be sold.

Manifestly, as heretofore stated, the General Assembly in the enactment of the local option law had specially in view the provision authorizing the sale of intoxicating liquors under the general dramshop law.

In arriving at the conclusion upon this proposition, as herein indicated, we have not been unmindful of the authorities to which our attention has been directed by counsel for appellant. In fact, we fully recognize that the proposition confronting us in this case has been presented in its strongest light, and about everything has been said in assailing the constitutionality of the provisions of section 3032 that can be said; however, at last the correct solution of this proposition and the true intention of the legislature enacting the local option law which is assailed must be sought by a consideration of the legislation concerning the subject in hand—that is, the sale of intoxicating liquors.

The provisions of section 3031 of the local option act of 1887 in effect provide that the voters at the local option election pass upon the question as to whether in the county or city where the question is ¹⁷ submitted to the voters the dramshop law shall be continued in force, or whether the right to sell intoxicating liquors under the provisions of the dramshop law should be denied to all persons. Manifestly, the intoxicating liquors mentioned in that section have reference to intoxicating liquors as defined under the general dramshop law, for the reason that the section in plain terms says that if a majority of the votes cast at such election be for the sale of intoxicating liquors, such intoxicating liquors may be sold under the provisions of existing laws regulating the sale thereof and the

procuring of licenses for that purpose. It follows from this, and it must be so held, that the legislature of this state in the adoption of the local option law treated the terms "intoxicating liquor," and so understood such terms, to mean intoxicating liquor as defined by the general dramshop law.

The law of this state having definitely determined as to what the terms "intoxicating liquor" should be construed to mean, it follows that it is not permissible, and there is no necessity for so doing, to examine into the actual intoxicating properties of the composition sold as a beverage which contains any alcohol whatever. This conclusion finds support in *Black on Intoxicating Liquors* (section 2), which states the rule in this language: "The meaning of this term is in some instances prescribed in the statute itself. And when that is the case, there is no room for further inquiry into its scope, nor are the courts called upon to construe it. Neither, in the face of a statutory definition, is it permissible to examine into the actual intoxicating properties of any liquor named or indicated in the law. Thus, if the law provides that the term shall be construed to mean alcohol, wine, beer, spirituous, vinous, and malt liquors, and all intoxicating liquors whatever, a beverage containing alcohol is an intoxicant, regardless of whether the quantity of alcohol ^{is} contained in it is or is not, of itself, intoxicating." A similar rule was announced in *State v. Intoxicating Liquors*, 76 Iowa, 243, 41 N. W. 6, 2 L. R. A. 408. The supreme court of that state in discussing this proposition very clearly stated the rule, and said: "The statute provides that the words 'intoxicating liquors,' as used therein, 'shall be construed to mean alcohol, wine, beer, spirituous, vinous and malt liquors, and all intoxicating liquors whatever.' Alcohol is, therefore, an intoxicating liquor, regardless of the fact that the quantity drunk at any one time would not have that effect. It is immaterial, in a statutory sense, what effect alcohol may have on the human system; it is an intoxicating liquor. However much it may be diluted, it must remain an intoxicant when used as a beverage; that is to say, the statute provides that alcohol is an intoxicant whenever and however used as a beverage; and no matter how it may be diluted or disguised, it so remains, simply because the statute so declares. The liquor in question contained alcohol, and therefore it, as a matter of law, was intoxicating."

Entertaining the views upon this proposition to which we have given expression, our conclusion is that the term "intoxicating liquor" as employed in the title of the act necessarily embraced any beverage containing alcohol in any quantity whatever. Doubtless the central idea in the minds of the lawmakers when defining intoxicating liquor and in avoiding the dealing with any percentages of alcohol in com-

positions in order to make them an intoxicating liquor, and simply making compositions sold as a beverage containing any alcohol whatever an intoxicating liquor, was to prevent the facilities for violating the laws of this state regulating the sale of intoxicating liquors. Manifestly, the legislature deemed it best to definitely state what should be termed and treated as intoxicating liquors, rather than to leave that subject to be determined by experts in the numerous prosecutions by ¹⁹ the state, which would have necessarily arisen had the General Assembly failed to have definitely settled as to what should constitute intoxicating liquors. We are unwilling, in view of the legislation in this state upon the subject of the sale of intoxicating liquors, to hold that there must at least be one-half of one per cent of alcohol in the composition sold as a beverage in order for it to be termed "intoxicating liquor" under the provisions of the local option act. To so hold would give rise to hundreds of prosecutions by the state for the violation of the liquor laws and furnish a field for the display of the knowledge of the expert, both as to the amount of alcohol contained in the composition sold as a beverage and as to whether or not the beverage was in fact intoxicating. The ruling upon this proposition must be adverse to the appellant.

4. It is next insisted by counsel for appellant that the second count of the indictment fails to charge that the "temperance beer" was an intoxicating liquor or beverage. For this reason it is insisted that said second count is insufficient, and states no offense against the laws of this state. We have carefully analyzed the allegations embraced in the second count of the indictment, and we are unable to give our assent to the contention of appellant that it fails to charge any offense. While it is true that the second count does not in terms charge that the "temperance beer" was an intoxicating liquor or beverage, it does charge that said defendant did unlawfully sell a fermented and malt beverage containing alcohol—that is to say, one quart of "temperance beer," a fermented and malt beverage containing alcohol. The legal effect is that he sold an intoxicating beverage or liquor. It was not absolutely essential that the indictment should use the terms "sold intoxicating liquor," or "that the ²⁰ liquor or beverage sold was intoxicating liquor," but if the indictment charged and designated the ingredients the composition sold as a beverage contained, and the component parts made it an intoxicating liquor, this, in our opinion, was a sufficient charge of a sale of an intoxicating beverage or liquor.

5. It is next insisted that there were two counts in the indictment, and the trial court made a general finding of guilty, and that this constitutes such error as would warrant the court in reversing the judgment and remanding the cause. It will be observed that the first count was a plain charge of selling

one quart of beer. In the second count the charge was he sold one quart of "temperance beer," which was a malt or fermented liquor containing alcohol, and upon this indictment the case was submitted to the court upon an agreed statement of facts. It is apparent from the record that the two counts in the indictment have reference to a single transaction, and that counsel both for the state and the defendant, by the agreed statement of facts, treated the charge in the indictment as having reference simply to one offense. In other words, counsel for the defendant and the state, with commendable frankness, stated the facts to the court; reduced them to writing for the express purpose of having the court simply determine whether or not the defendant was guilty of a violation of the local option law which had been adopted in that county. The manner in which this cause was submitted, as indicated by the record, indicates clearly that it was understood that they were submitting for decision to the trial court but one offense. That being true, we are unwilling to reverse the judgment in this cause and remand the case for another trial: *State v. Stewart*, 90 Mo. 507, 2 S. W. 790; *State v. Van Wye*, 136 Mo. 227, 58 Am. St. Rep. 627, 37 S. W. 938; *State v. Schmidt*, 137 ²¹ Mo. 266, 38 S. W. 938; *State v. Noland*, 111 Mo. 473, 19 S. W. 715, and cases cited; *State v. Spurgeon*, 102 Mo. App. 34, 74 S. W. 453.

6. Complaint is made by appellant that the court failed to give any instructions. This was a trial for a misdemeanor before the court; no declarations of law were requested, and there was no necessity for the court of its own motion directing itself as to the law of the case. Had the case been tried before a jury, then of course it would have been the duty of the court in guiding the jury to a correct conclusion to declare the law as applicable to the facts in evidence.

7. Finally, appellant insists that the agreed statement of facts admits that the beverage as sold was nonintoxicating. We confess that the agreed statement of facts is somewhat inconsistent; however, we take it that the statement in which it is said that a nonintoxicating beverage was sold would not be binding upon the court where the parties then in detail recited the component parts of which the beverage was composed, and it is in such statement unqualifiedly admitted that this composition sold as a beverage contained alcohol, and the court was fully justified in finding that that was an intoxicating drink, as we have heretofore pointed out in the discussion of the leading proposition involved in this proceeding.

We have indicated our views upon all the questions disclosed by the record, which results in the conclusion that the judgment of the trial court should be affirmed, and it is so ordered.

All concur.

The Constitutionality of Local Option Laws Respecting Sales of Liquor is discussed in the note to *Chicago etc. R. R. Co. v. Greer*, 114 Am. St. Rep. 324; *People v. McBride*, 234 Ill. 146, 123 Am. St. Rep. 82.

As to What Liquors are, or are not, Spirituous, and What are, or are not, Intoxicating, see the note to *State v. Oliver*, 53 Am. Rep. 86. Wood alcohol is a narcotic poison, and not an intoxicating liquor: *Modern Woodmen of America v. Lawson*, 110 Va. 81, 135 Am. St. Rep. 927. "Intoxicating liquors" are those capable of being used as a beverage which contain alcohol in such per cent that they will produce intoxication when imbibed in such quantities as may practically be drunk. The phrase is not synonymous with "spirituous liquors." All spirituous liquors are intoxicating, but all intoxicating liquors are not spirituous: *Marks v. State*, 159 Ala. 71, 133 Am. St. Rep. 20. The right of the legislature to prohibit the sale of liquor, and to declare certain liquors intoxicating within the meaning of the law, irrespective of their intoxicating character as a matter of fact, has been held to be a legal exercise of the police power: *State v. Frederickson*, 101 Me. 37, 115 Am. St. Rep. 295. A local option law is not invalid on the ground that in defining the term "intoxicating liquors" it does not state how much water may be mingled with them and still leave them intoxicating liquors: *People v. McBride*, 234 Ill. 146, 123 Am. St. Rep. 82.

STATE v. ROACH.

[230 Mo. 408, 130 S. W. 689.]

INITIATIVE AND REFERENDUM—Mandamus to File Petition.—Any citizen and voter has the right to maintain a proceeding in mandamus to compel the filing by the Secretary of State of a petition for submitting an amendment to the constitution under the initiative and referendum law, notwithstanding he has not signed the petition. (pp. 641, 642.)

INITIATIVE AND REFERENDUM—Mandamus to File Petition.—The question as to the duty of the Secretary of State to file a petition for submitting an amendment to the constitution under the initiative and referendum law, raised in a mandamus proceeding, being of vital importance to the people of the state, cannot be said to be a moot question. (p. 642.)

INITIATIVE AND REFERENDUM—Mandamus—Jurisdiction of Supreme Court.—Under article 6, section 3 of the constitution, the supreme court has original jurisdiction in mandamus proceedings to compel administrative state officials to perform administrative and ministerial acts, and the mere fact that the initiative and referendum law provides for an application for such writ to the Cole county circuit court does not deprive the supreme court of jurisdiction. (p. 642.)

INITIATIVE AND REFERENDUM—Repeal of Laws Adopted by.—The adoption of a law by the people under the initiative provision of the constitution does not prevent the repeal thereof by the legislature and the enactment of other measures in substitution for those repealed. (p. 647.)

INITIATIVE AND REFERENDUM.—The Character of a Petition under the initiative and referendum laws, i. e., whether it provides

for a constitutional amendment or the enactment of a statute, must be determined from its nature and contents, irrespective of what it is entitled by the petitioners. (pp. 647, 651, 656.)

INITIATIVE AND REFERENDUM—Division into Senatorial Districts.—A petition under the initiative and referendum laws suggesting what is termed an amendment to the constitution by striking out section 11 of article 4 thereof, providing for the division of the state into senatorial districts prior to the census of 1880, and substituting a provision for such division to exist until 1920, does not in fact call for an amendment to the constitution, but merely for the enactment of a statute. (pp. 647, 650, 651.)

CONSTITUTIONAL LAW—Senatorial Districts—Temporary Provision.—Section 11 of article 4 of the constitution, providing for the division of the state into senatorial districts prior to the census of 1880, was for a temporary purpose, and its existence limited until appropriate provisions could be made for the organization of the state into proper senatorial districts. The section was self-terminating and has had no existence since 1881. (p. 648.)

CONSTITUTIONAL LAW—Change in Senatorial Districts.—Section 7, article 4 of the constitution provides for the division of the state into senatorial districts and for revision and adjustment every ten years, and this section must be amended before any other division than that there provided for can be made by legislative action, whether by the people under the initiative law or otherwise. (p. 648.)

CONSTITUTIONAL AMENDMENT and Legislative Act Distinguished.—The line of demarcation between a constitutional amendment and a purely legislative act is well defined. Constitutional provisions and amendments relate to the fundamental law and certain fixed first principles upon which government is founded; they are permanent, uniform and universal, and can be amended and revised only according to the provisions contained therein. (p. 649.)

INITIATIVE AND REFERENDUM.—The Distinction Between Constitutional provisions and legislative acts is clearly and distinctly recognized by the initiative and referendum amendment to the constitution, by express separate provisions for the adoption of each. (p. 650.)

CONSTITUTIONAL LAW—Change in Senatorial Districts.—The constitutional provisions applicable to redistricting the senatorial districts of the state simply points out a plan or method for such redistricting, and prescribes permanent rules and principles for carrying out such plans or method, while the matter of actually redistricting is a subject of a very temporary character demanding frequent alterations and changes, and it was never contemplated to incorporate as a part of the permanent and fundamental law of the state a provision which must of necessity demand frequent alterations and changes. (p. 650.)

INITIATIVE AND REFERENDUM.—A Petition for the Submission of a constitutional amendment under the initiative and referendum amendment must contain the full text of the amendment. (pp. 651, 652, 653.)

INITIATIVE AND REFERENDUM—Constitutional Amendment.—The rules and principles applicable to the submission of constitutional amendments to the voters are applicable alike to amendments proposed to the constitution under the initiative and referendum amendment and those proposed by the General Assembly of the state. (p. 652.)

INITIATIVE AND REFERENDUM—Constitutional Amendment.—The terms "laws" and "amendments to the constitution" are used in the initiative and referendum amendment to the constitution in their plain and ordinary sense, and there cannot be put into the constitution, by way of amendment, mere legislative acts providing for the exercise of certain powers. (p. 653.)

INITIATIVE AND REFERENDUM—Petitions.—The Secretary of State has the Authority to refuse to file a petition for the submission of a so-called constitutional amendment under the provisions of the initiative and referendum amendment to the constitution which is legally insufficient, or where the measure proposed is not in fact a constitutional amendment, and other provisions of the law are not complied with. If his action be wrong, a remedy is provided by an appeal to the courts. (pp. 654, 655.)

INITIATIVE AND REFERENDUM—Action of Secretary of State Ministerial.—In the matter of the filing of petitions under the provisions of the initiative and referendum amendment to the constitution, the Secretary of State acts as a ministerial administrative officer, and his acts may be controlled by the courts through mandamus proceedings. He does not act as a part of the legislative branch of the government. (pp. 657, 658.)

INITIATIVE AND REFERENDUM—Discretion of Secretary of State.—Although the Secretary of State, in performing the duties cast upon him by the initiative and referendum amendment to the constitution, acts as a ministerial administrative officer, he is vested with power to examine the petitions presented to him to determine their sufficiency, and a discretion, subject to review by the courts, to refuse to accept or file such as are legally insufficient. (p. 661.)

John C. Brown, John Kennish, C. C. Madison and Homer Hall, appearing for the signers of the petition.

Elliott W. Major, attorney general, John M. Dawson, John M. Atkinson, Chas. G. Revelle and James T. Blair, assistant attorneys general, for the respondent.

ON MOTION TO DISMISS.

421 FOX, C. J. On July 11, 1910, Mr. Walter S. Dickey, through his attorneys, asked leave to file a motion to dismiss this proceeding. This leave was granted, and the motion to dismiss was, in accordance with the directions of this court, duly filed by the clerk.

We have given to this motion, as well as the suggestions in support of it, our most careful consideration. In our opinion this court has jurisdiction of this proceeding.

Counsel for Mr. Dickey urge, first, that this is a collusive or moot case, and is not founded upon any real or existing controversy between the relator, John W. Halliburton, and the respondent, Cornelius Roach. It is sufficient upon that proposition to say that Mr. Halliburton is a citizen of this state and a qualified voter, and notwithstanding he may not have signed the petitions as presented by Mr. Dickey to the Secretary of State, yet as a citizen and a voter he has as much interest and the same right to institute this proceeding as any

citizen who may have signed such petitions. As to this proceeding being a moot case, there is nothing upon the face of the proceeding to indicate such fact, and the motion that alleges that it is a moot case has not been sworn to by either Mr. Dickey or ⁴²² his counsel. But aside from all this, it is perfectly manifest that this is a live proceeding—one of vital importance to the people of this state, and should be determined as speedily as possible. If, under the constitution and laws of this state, the petition should be filed and the question of the amendment to the constitution dividing the state into senatorial districts be submitted to the vote of the people of Missouri at the next general election, then this court, upon the hearing of this cause, will unhesitatingly so declare. On the other hand, it necessarily follows that if, under the constitution and laws of this state, there is no authority for submitting such constitutional amendment, this court will so announce such conclusion.

2. As heretofore indicated, in our opinion the relator, Mr. Halliburton, in this proceeding, being a qualified voter, has such an interest as a citizen of this state as to authorize him to maintain this cause.

3. Under the constitution of this state, article 6, section 3, this court has original jurisdiction in mandamus proceedings to compel administrative state officers to perform administrative and ministerial acts, and the mere fact that the statute (Laws 1909, pp. 554-564) provides for an application by any citizen to the Cole county circuit court falls far short of depriving this court of the jurisdiction conferred upon it by the constitution of this state. In fact, it was unnecessary for the legislature to make the provision that any citizen might maintain a suit by mandamus in the Cole county circuit court, for the reason that that could be done in the absence of any statute; the Secretary of State residing here, the Cole county circuit court would have jurisdiction of a proceeding of that character.

Entertaining these views, the motion will be overruled; however, this being a question of such vital importance, we most cheerfully give our consent to counsel for Mr. Dickey to file briefs and make oral argument ⁴²³ in this proceeding at 9 o'clock A. M. on Tuesday, the 19th of July.

Gantt, Burgess, Woodson and Graves, JJ., concur; Valliant and Lamm, JJ., absent.

ON MERITS.

FOX, C. J. This is an original proceeding in this court in which it is sought by the relator, John W. Halliburton, to have this court issue its peremptory writ of mandamus against the Secretary of State, the respondent, compelling him to file

certain petitions presented to him, submitting an amendment to the constitution at the next general election in this state.

The petition alleges that the relator, John W. Halliburton, is a resident taxpaying citizen of Jasper county and a qualified voter in the present twenty-eighth senatorial district of Missouri; and that respondent, Cornelius Roach, is the Secretary of State of the state of Missouri. It is also alleged in the petition that on July 7, 1910, Walter S. Dickey and Rush C. Lake presented a large number of petitions for a proposed amendment to the constitution, to be voted upon at the next general election, in pursuance of the present initiative amendment to the constitution. It is alleged in the petition that there was the necessary number of petitioners from the various portions of the state to authorize the filing of the petitions.

The initiative petitions, as filed by Walter S. Dickey and Rush C. Lake, in part are as follows:

"To the Honorable Cornelius Roach, Secretary of the State of Missouri:

"We, the undersigned, citizens and legal voters of the State of Missouri, and county of ———, respectfully demand that the following proposed amendment to the Constitution of Missouri, shall be submitted to the legal voters of the State of Missouri, for their approval or rejection, at the regular general election to be held on the 8th day of November, A. D. 1910, and each for himself says: I have personally signed this petition; I am a legal voter of the State of Missouri and of the county of ———; my residence and postoffice are correctly written after my name." (Here follow signatures.)

The proposed amendment, leaving out the description and boundaries of the proposed new senatorial districts sought to be created thereby reads:

"Proposed Amendment to the Constitution of Missouri.

"To be submitted to the legal voters of the State of Missouri for their approval or rejection at the regular general election to be held on the Tuesday next following the first Monday in November, A. D. 1910, providing for striking out and annulling section 11 of article 4 of the Constitution of Missouri, and enacting and adopting a new section, to be known as section 11 of article 4, which is in words and figures as follows:

"Section 11, Article 4. The senatorial districts of the State shall hereafter be constituted and numbered as follows: . . .

"This division of the State into senatorial districts shall continue until the United States census of 1920 shall have been taken and the result thereof as to this State ascertained, when the districts shall, by a law enacted by the people or passed by the General Assembly, be revised and adjusted on the basis of that census, and every ten years thereafter, upon the basis of the United States census, the districts shall be revised and

adjusted by a law enacted by the people or passed by the General Assembly."

By appropriate averments it is charged in the petition by the relator that the petitions as presented by Mr. Dickey and Mr. Lake, as herein indicated, were presented to the Secretary of State with the request that they be filed in accordance with the statute authorizing the filing, and that the Secretary of State refused to file the same.

⁴²⁵ This court, upon the petition as presented by the relator, issued its alternative writ of mandamus returnable on the nineteenth day of July, 1910. In the interim between the issuance of the alternative writ and the return day of such writ, Mr. Walter S. Dickey, through his counsel, asked leave to file a motion to dismiss this proceeding. This motion, upon the direction of the court, was filed by the clerk, and, after due consideration, was overruled, for the reasons as indicated in the opinion filed, which is officially reported in connection with this opinion.

Respondent, Cornelius Roach, through the attorney general, has filed a return to the alternative writ awarded by this court, in which return numerous grounds are assigned in support of the action of the Secretary of State why said petitions by the initiative tendered by Mr. Dickey and Mr. Lake should not be filed. We do not deem it essential to encumber this statement by setting out in detail the different reasons assigned by the respondent in support of his action in declining to file the petitions. The grounds assigned in the return of the respondent will be given such attention during the course of the opinion as their importance demands and merits.

Upon the invitation of the relator, and with the consent given by this court, counsel for Messrs. Dickey and Lake have joined with the relator in the presentation of the questions involved in this proceeding, and have filed a motion for judgment upon the pleadings.

This sufficiently indicates the nature and character of this controversy to enable us to determine the legal propositions disclosed by the record before us.

OPINION.

The record before us in this proceeding instituted by the relator discloses two controlling propositions which are submitted to us for consideration.

⁴²⁶ 1. Were the petitions as presented to the respondent, Secretary of State, legally sufficient to authorize the submission to the voters of this state of an amendment to or change in the organic law (the constitution) of this state? Or, in other words, do the petitions embrace in fact a demand for the submission of a constitutional amendment within the contemplation and purview of the initiative amendment adopted

in this state in November, 1908, as well as the legislation approved June 12, 1909, providing for the carrying out of such initiative amendment to the constitution?

2. Under the provisions of the initiative amendment to the constitution and the legislation enacted by the General Assembly of this state, approved June 12, 1909, can the respondent, the Secretary of State, if the subject matter as embraced in the petitions does not fall within the purview of the initiative and referendum amendment to the constitution, as well as the legislation enacted for the purpose of carrying out the provisions of such constitutional amendment, decline to accept and file the petitions as presented by Messrs. Dickey and Lake? In other words, has the Secretary of State a discretion where the subject matter of the petitions is foreign to what was contemplated by the initiative and referendum amendment to decline to file such petitions?

These are the propositions with which this court is confronted. The questions presented are purely questions of law, and the rules applicable to the interpretation of constitutional and statutory provisions should not, and will not, be extended or relaxed for the purpose of reaching a conclusion either making the writ peremptory or absolutely denying it; but the correct solution of the important propositions which are presented for our consideration must be sought alone by the fair, impartial and reasonable interpretation of the initiative provisions of the constitution and the ⁴²⁷ legislation duly passed by the General Assembly in reference to carrying out its provisions.

1. Directing our attention to the first proposition in reference to the nature and character of the petitions as presented to the Secretary of State for acceptance and filing by Messrs. Dickey and Lake, and as to whether or not, upon the face of such petitions, an amendment to the constitution of this state is sought to be voted upon by the people at the next general election, it is well to keep in mind the initiative and referendum provision of the constitution adopted by the people in 1908, as well as the legislation passed by the General Assembly by an act approved June 12, 1909, providing for the carrying out of the provisions of such initiative amendment.

Again, in the correct solution of this proposition the constitution and law of this state as it exists now must not be overlooked, for the reason that it is the changing of the constitution and law as it now exists applicable to the division of this state into senatorial districts that was uppermost in the minds of those who presented for acceptance and filing the petitions to the respondent.

Section 7 of article 4 of the constitution, which is now in force, provides: "Senators and representatives shall be chosen according to the rule of apportionment established in this con-

stitution, until the next decennial census by the United States shall have been taken, and the result thereof as to this state ascertained, when the apportionment shall be revised and adjusted on the basis of that census, and every ten years thereafter upon the basis of the United States census; or if such census be not taken, or is delayed, then on the basis of a state census; such apportionment to be made at the first session of the General Assembly after each such census: Provided, that if ⁴²⁸ at any time, or from any cause, the General Assembly shall fail or refuse to district the state for senators, as required in this section, it shall be the duty of the governor, Secretary of State and attorney general, within thirty days after the adjournment of the General Assembly on which such duty devolved, to perform said duty, and to file in the office of the Secretary of State a full statement of the districts formed by them, including the names of the counties embraced in each district, and the numbers thereof; said statement to be signed by them, and attested by the great seal of the state, and upon the proclamation of the governor, the same shall be as binding and effectual as if done by the General Assembly."

It is now the settled law of this state that the senatorial districts have been divided and their boundaries specifically defined in accordance with the provisions of the constitution last above cited, and the people of this state fully recognized the validity of such law, and in the election of their senators conformed to its provisions.

This leads to the inquiry as to the course to be pursued in order to change the manner and method of dividing the senatorial districts of this state. Directing our attention to the initiative amendment to the constitution adopted at the election held November 3, 1908, we find that the people of this state ratified an amendment to the constitution which provided a different method by which amendments to the constitution might be voted upon and by which laws might be enacted. This amendment to the constitution substantially provides that the legislative authority of the state shall be vested in a legislative assembly, consisting of a Senate and House of Representatives, but the people reserve to themselves power to propose any measure, either laws or amendments to the constitution, and to enact or reject the same at the polls, independent of the legislative assembly, and ⁴²⁹ the power was also reserved to the people to approve or reject at the polls any act of the legislative assembly. This amendment also provided for a certain per cent of the legal voters in each of at least two-thirds of the congressional districts in the state to sign petitions for the submission of amendments to the constitution or laws that were desired to be enacted. It will be observed that this constitutional amendment expressly required that the petitions should include the full text of the

measure so proposed. In other words, the initiative amendment adopted in 1908 requires that if an amendment to the constitution is desired, the full text of that amendment shall be embraced in the petition; or if a law is to be enacted by the initiative, the full text of the measure shall also be incorporated in the petition. It will also be observed that the initiative amendment to the constitution of 1908 expressly provides that "this section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure." In other words, if by the initiative a law was adopted by a vote of the people, this would not prevent any member of the legislature from introducing a measure and having it passed, if he could secure the sufficient number of votes, to repeal such law and enact certain other measures in substitution for those repealed.

This brings us to the consideration of the petitions as presented for acceptance and filing to the Secretary of State. While these petitions are named and called a "proposed amendment to the constitution of Missouri," yet we take it that the allegations of the petitions and what is shown upon the face of them must finally determine their nature and character—that is, whether or not it is in fact an amendment to the constitution or is purely a legislative act. The petitions in substance suggest a proposed amendment to the constitution of Missouri "to be submitted to the legal voters of the state of Missouri for their approval or rejection, ⁴³⁰ at the regular general election to be held on Tuesday next following the first Monday in November, A. D. 1910, providing for striking out and annulling section 11 of article 4 of the constitution of Missouri, and enacting and adopting a new section, to be known as section 11 of article 4, which is in words and figures as follows." Then follows the new section of the constitution, styled section 11 of article 4, that "the senatorial districts of this state shall hereafter be constituted and numbered as follows." Following this is a designation of the counties which shall constitute the new division of the senatorial districts, and following this the proposed constitutional amendment says that "this division of the state into senatorial districts shall continue until the United States census of 1920 shall have been taken and the result thereof as to this state ascertained, when the districts shall, by a law enacted by the people, or passed by the General Assembly, be revised and adjusted on the basis of that census, and every ten years thereafter upon the basis of the United States census, the districts shall be revised and adjusted by a law enacted by the people or passed by the General Assembly."

That this proposed constitutional amendment is but a purely legislative enactment, in our opinion, is too plain for argument, and will only require a moment's consideration to

convince the most skeptical upon that subject. In the first place these petitions contain the remarkable provision "providing for striking out and annulling section 11 of article 4 of the constitution of Missouri." It is but common knowledge that section 11 of article 4 of the constitution of Missouri was self-terminating, and has had no existence since the year 1881. It was embraced in the constitution, as is well known, for a temporary purpose, and its existence was limited until appropriate provisions could be made for the organization of the state into proper senatorial districts. Then follows what is ⁴³¹ termed a proposed constitutional amendment, which consists of a mere division of the state into senatorial districts in a different method from that existing under the constitution and laws of this state. In other words, it is sought by the petitions, as presented to the Secretary of State, to enact a law dividing the senatorial districts in a different way from that in which they are divided under the present existing law. Not one word is suggested in the petitions as to any change or amendment to section 7 of article 4 of the constitution of this state, which fully provides how the senatorial districts shall be divided; hence we have, if the contentions of learned counsel presenting this case for the relator are maintained, the anomalous proposition that while the power to divide the senatorial districts in this state is lodged in section 7 of article 4 of the constitution, yet by a purely legislative enactment such power as is lodged in the constitutional provision might be taken away by a legislative enactment providing for the exercise of power, and absolutely dividing this state into districts without any change whatever or amendment to the constitutional provision.

Manifestly, before the senatorial districts can be divided in the manner as suggested in the so-called proposed constitutional amendment, section 7 of article 4 of the constitution of this state must be amended and so changed as to authorize, by the initiative, the people at the polls to divide the senatorial districts. Section 7 of article 4 of the constitution, in addition to providing how the senatorial districts shall be divided, expressly provides that the apportionment shall be revised and adjusted every ten years upon the basis of the United States census, or if such census be not taken, or is delayed, then on the basis of a state census; such apportionment to be made at the first session of the General Assembly after each such census. Clearly, it will not be seriously contended that the senatorial districts might be altered and changed in the manner ⁴³² suggested by the so-called amendment to the constitution without first submitting to the people of the state an amendment to section 7 of article 4 of the constitution, which expressly provides how the senatorial districts shall be divided. If this can be done, we again have the anomalous

proposition that upon the day of the election we have a constitution (section 7, article 4) in full force, providing how the senatorial and representative districts shall be divided, and without a single change in the constitutional provision, or a single suggestion as to a different method of dividing the senatorial and representative districts, and without any vote by the people under the initiative making any change in the constitutional provision, or any canvass or return of such vote, an absolute exercise of the right to divide the state into senatorial districts. Manifestly, as heretofore stated, the right to alter and change the senatorial districts as suggested in this so-called proposed constitutional amendment could not possibly attach until it was ascertained that section 7 of article 4 of the constitution of this state had been amended, and that such amendment was ratified or adopted upon a proper canvass and return of the votes. In other words, the exercise of the power by the initiative to alter and divide the senatorial districts by a legislative enactment cannot have the force and effect of dislodging the power vested by the constitution under section 7 of article 4, providing for the apportionment of senatorial districts. Before the power to alter and divide the senatorial districts can be exercised, there must be an appropriate amendment to the constitution dislodging the power to so divide and alter such districts under the present constitution and laws of this state.

The line of demarcation between a constitutional amendment and a purely legislative act is well defined. That eminent author, Mr. Story, in his first volume, section 339, thus gives expression to his views as to the meaning of a constitution. It is there said: "A constitution ⁴³³ is in fact a fundamental law or basis of government. . . . It is a rule, as contradistinguished from a temporary or sudden order; permanent, uniform, and universal." The supreme court of the United States, in *Ware v. Hylton*, 3 Dall. 199, 1 L. ed. 568, used this language: "A constitution of a state is a fundamental law of a state." Constitutional provisions and amendments to the constitution relate to the fundamental law and certain fixed first principles upon which government is founded. Constitutions are commonly called the organic law of a state. The purpose of constitutional provisions and amendments to the constitution is to prescribe the permanent framework and a uniform system of government, and to assign to the different departments thereof their respective powers and duties.

In *Livermore v. Waite*, 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 312, the meaning of the term "constitution" was clearly pointed out, and it was there said: "The very term 'constitution' implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indi-

cate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature."

The distinction between constitutional provisions and legislative acts is distinctly and clearly recognized by the initiative and referendum amendment to the constitution, for it is there that we find express provisions for the proposal and adoption of legislative measures as well as amendments to the constitution. The distinction between legislative acts and constitutional provisions or amendments to the constitution is clearly emphasized when we consider their force and effect after being adopted through the initiative, as provided by the constitution. A legislative act, as distinguished from a constitutional amendment which ⁴³⁴ is adopted through the initiative, has only the force and effect of a statute enacted by the legislature, and is subject to, and may be repealed by, the law-making power—the legislature; but when an amendment to the constitution is adopted by the same method, that is, through the initiative, its force and effect is entirely of a different nature and character, for the reason that it is not subject to, and cannot be repealed by, the legislature. A constitutional provision or amendment applicable to redistricting the senatorial districts of this state simply points out a plan or method for such redistricting, and prescribes permanent rules and principles for carrying out such method or plan. On the other hand, the matter of actually redistricting is a subject of a very temporary character. It is well known that population forms the basis of fixing the boundaries of senatorial districts, and these districts must be altered and changed in harmony with the changes that are constantly going on in population, and it was never contemplated under our present constitutional scheme to incorporate as a part of the permanent and fundamental law of the state a provision which must of necessity demand frequent alterations and changes. The petitions themselves as presented to the respondent clearly indicate that the so-called constitutional amendment is nothing more nor less than a temporary legislative act. After pointing out the respective counties that shall constitute the senatorial districts, it expressly avers that "this division of the state into senatorial districts shall continue until the United States census of 1920 shall have been taken and the result thereof as to this state ascertained." Following this is an express allegation that after the result of the United States census of 1920 shall have been ascertained, the districts as divided under this so-called constitutional amendment shall, "by a law enacted by the people, or passed by the General Assembly, be revised and adjusted on the ⁴³⁵ basis of that census, and every ten years thereafter, upon the basis of the United States census, the districts shall be revised and ad-

justed by a law enacted by the people or passed by the General Assembly."

Manifestly, these allegations mark this so-called constitutional amendment as purely a legislative act. The life of this so-called constitutional amendment is limited to a comparatively short period, that is to say, until 1920, and then the power to revise and adjust the districts on the basis of the United States census of 1920 is again restored to the legislature or the people under the initiative amendment. In other words the constitutional provision now in force, section 7 of article 4, delegating the power to divide and define the senatorial districts by this so-called proposed constitutional amendment, is completely repealed and annulled without the faintest suggestion or intimation in this so-called proposed amendment that the present constitution, now in full force, is to be amended in any way or repealed or annulled. This clearly indicates the temporary character of the measure proposed, as well as its purpose to get rid of the present constitutional provision by the enactment of a law, called a constitutional amendment. This cannot be done without a compliance with the initiative amendment which expressly requires the full text of the amendment to the constitution to be included in the petition. We, therefore, repeat that the petitions in this case do not propose, within the purview of the constitution and laws of this state, an amendment to the constitution.

Obviously, in determining the nature and character of the measure proposed in the petitions presented to the respondent, we must look to the subject matter with which they deal. The mere calling it an amendment to the constitution, unless the subject matter verifies the correctness of that name, is not binding either upon the respondent or upon this court. As heretofore indicated, a mere play upon words and the providing for ⁴³⁶ the striking out and annulling of section 11 of article 4 of the constitution of Missouri, a section of the constitution that has had no life or vitality for over a quarter of a century, cannot have the force and effect of making the proposal a constitutional amendment.

As heretofore stated, section 11 of article 4 was inserted in the constitution of 1875 for purely a temporary purpose. It was inserted to meet a temporary necessity and provide a temporary arrangement until the legislative measure provided by the constitution could be placed in operation and make provision for the accomplishment of the purpose especially assigned to it upon the subject of forming the senatorial districts. The fact that section 11 of article 4 was placed in the constitution of 1875 for a temporary purpose and that such purpose was clearly indicated by the makers of the constitution, emphasizes the view that the makers of the

constitution fully recognized the legislative nature of the act of redistricting which from necessity had to be incorporated in the constitution. The life of this legislative section was limited to the time when legislative action could be taken in pursuance of a plan and method for dividing the senatorial districts in pursuance of a permanent provision of the constitution which is in force at the present time.

The rules and principles applicable to the submission of constitutional amendments to the voters of this state are applicable alike to amendments proposed to the constitution under the initiative and referendum amendment or amendments to the constitution proposed by the General Assembly of this state. Whichever course is pursued in submitting the amendment, it must, in fact, be an amendment to the constitution. If submitted through the initiative, manifestly that provision contained in the initiative and referendum amendment that "the petition shall include the full text of the measure so proposed," must be complied with. In other words, if it is truly an ⁴³⁷ amendment to the constitution, the full text of the amendment and what provision of the constitution it undertakes to amend must be embraced in the petition. If submitted by the General Assembly, manifestly the resolution submitting a constitutional amendment must embrace the full text of the amendment sought to be adopted.

As heretofore stated, we have in force at the present time section 7 of article 4 of the constitution of this state, prescribing the plan and method of redistricting the senatorial districts. If the contentions of learned counsel associated with the relator in this proceeding are to be maintained, then the result of the proposed constitutional amendment must be to repeal section 7 of article 4 of the constitution of this state, as well as dislodge the power delegated by such provision of the constitution to the General Assembly to make the division of senatorial districts in this state. This manifestly is the purpose sought, yet we have what is denominated a constitutional amendment that makes no reference whatever to any change or alteration in the provision of the constitution which is in force now, and which specifically treats of the subject with which the so-called proposed constitutional amendment deals. If this is the purpose, and beyond dispute it is, then, in our opinion, it must logically follow that the so-called proposed constitutional amendment is not an amendment to the constitution within the purview of the provisions of the initiative and referendum provision of the constitution, and deals with a subject that is entirely foreign to the subject of an amendment to the provision of the constitution which treats of the matter of dividing the senatorial districts in this state.

If the petitioners or those presenting the petitions to the respondent desire to change the method of redistricting this

state into senatorial districts under and through the provisions of the initiative and referendum ⁴³⁸ amendment to the constitution, the course to be pursued is plainly marked by the initiative provision—as provided by the initiative provision, they must include in such petitions the full text of the measure so proposed. In other words, as applicable to this subject, they must include in the petitions the full text of the amendment that is desired to be made as to section 7 of article 4 of the constitution of this state, changing and altering the method and plan of redistricting the senatorial districts, and instead of delegating the power to the General Assembly, and in the event of its failure to perform the duty to certain designated officials, that such districts shall be divided by a law enacted through the initiative and referendum providing for the division of such senatorial districts. After having amended the constitution in this manner, then the way is perfectly clear to propose through the initiative, not a constitutional amendment, but a legislative act dealing with the subject of dividing and defining the boundaries of the senatorial districts in this state. This course, which is clearly contemplated by the initiative and referendum amendment, was not pursued in the petitions presented to the respondent, but instead of including in their petitions the full text of a constitutional amendment, as heretofore indicated, there are presented to the respondent petitions denominating the subject a proposed constitutional amendment, which, in our opinion, is nothing more nor less than an effort to enact a purely legislative act providing for the exercise of a power which is otherwise delegated under the constitution and laws of this state. As heretofore stated, the measure proposed is entirely foreign to an amendment to the constitution which deals with the subject embraced in the petitions presented. The initiative and referendum amendment to the constitution speaks of laws and amendments to the constitution. Manifestly, those terms are used in their plain and ordinary sense, and, in our opinion, the ⁴³⁹ petitioners have no right to undertake to put in the constitution, which is regarded as the organic and permanent law of the state, mere legislative acts providing for the exercise of certain powers.

We are unwilling to give our assent to the contention that these petitions should have been accepted and filed, whether or not they were applicable to a subject or a matter contemplated by the initiative and referendum.

2. This brings us to the consideration of the second proposition—that is, Can the respondent, the Secretary of State, under the provisions of the initiative amendment to the constitution and the legislation enacted by the General Assembly of this state, approved June 12, 1909, if the subject matter as embraced in the petitions does not fall within the purview

of the initiative and referendum amendment to the constitution, as well as the legislation enacted for the purpose of carrying out the provisions of such constitutional amendment, decline to accept and file the petitions as presented by Messrs. Dickey and Lake? In other words, has the Secretary of State a discretion, where the subject matter of the petitions is foreign to what was contemplated by the initiative and referendum amendment, to decline to file such petitions?

Directing our attention to this proposition, it is sufficient to say that we have fully indicated our views in the first paragraph of this opinion that the petitions as presented to the respondent, Secretary of State, for acceptance and filing, by Mr. Walter S. Dickey, were not in fact the presentation of a petition by and through the initiative amendment to the constitution of a proposed amendment to the constitution, and that such petitions under the guise of presenting a constitutional amendment in fact simply presented a legislative act. Hence, in our opinion, the petitions presented ⁴⁴⁰ to the respondent for acceptance and filing did not present a constitutional amendment within the purview of and as contemplated by the initiative and referendum amendment to the constitution. In other words, the petitions are not legally sufficient, for the reason, not only that the subject dealt with in the petitions is not the proposal of a constitutional amendment, but for the further reason that the petitions do not include, as is expressly provided in the initiative and referendum amendment, the full text of any measure which can be construed to be an amendment to the constitution dealing with the subject of dividing this state into senatorial districts, and in our opinion the respondent was not authorized to file such petitions, and his action finds full support in the reasons herein indicated, and upon the additional ground that the proposed measure is entirely foreign to a constitutional amendment dealing with the subject of dividing this state into senatorial districts.

Our conclusions upon this proposition, to which we have heretofore given expression, are not based upon the idea that has been suggested in this proceeding that the Secretary of State can pass upon the constitutionality or unconstitutionality of certain legislation, but upon the broad ground that the measure as proposed is in fact and in truth not a constitutional amendment, and the full text of a proposed measure which can in any way be construed to be a constitutional amendment is not, as expressly provided by the initiative and referendum amendment, embraced or included in the petitions as presented to the respondent. That the legal sufficiency of the petitions as presented to the Secretary of State is under the supervision of the courts dealing with the subject is fully

recognized by the provisions of section 4 of the act of the General Assembly concerning the filing of petitions, approved June 12, 1909. This section provides: "If the Secretary of State shall refuse to accept and file ⁴⁴¹ any petitions for the initiative or for the referendum, any citizen may apply, within ten days after such refusal, to the circuit court for a writ of mandamus to compel him to do so. If it shall be decided by the court that such petition is legally sufficient, the Secretary of State shall then file it, with a certified copy of the judgment attached thereto, as of the date on which it was originally offered for filing in his office. On showing that any petition filed is not legally sufficient, the court may enjoin the Secretary of State and all other officers from certifying or printing on the official ballot for the ensuing election the ballot title and numbers of such measure. All such suits shall be advanced on the court docket, and heard and decided by the court as quickly as possible. Either party may appeal to the supreme court within ten days after a decision is rendered. The circuit court of Cole county shall have jurisdiction in all such cases": Laws 1909, p. 556.

It does not furnish a satisfactory answer to this proposition to say that the term "legal sufficiency" of the petition, as embraced in section 4, above quoted, is to be limited alone to the sufficiency of the number of signers to the petitions and their qualifications to sign; its legal sufficiency must be determined by the entire petition. In fact, it is manifest that the initiative and referendum amendment expressly requires that the full text of the measure shall be included in the petition, with the view that the signers of the petition may have full knowledge of what they are signing, and that the Secretary of State, upon the presentation of the petition, may determine whether or not the measure embraced in the petition is such a measure as falls within the purview of, and is contemplated by, the initiative and referendum amendment. The provisions of section 4 can only be construed as meaning what the plain terms of the statute indicate. The statute itself in no way undertakes to limit the application ⁴⁴² of the term "legal sufficiency," and the statute making no limitations, that term must be applied in harmony with the fully recognized rule of determining the sufficiency of an instrument—that is, in determining its sufficiency the entire instrument must be looked to.

We have implicit confidence in the intelligence of the people of this state, and are unable to reach the conclusion that, when they adopted the initiative and referendum amendment in 1908 as a part of the organic law of this state, they contemplated that petitions might be presented upon any and all subjects, regardless of whether or not they fall within the class of subjects contemplated by the initiative amendment,

such as in fact would constitute constitutional amendments and laws desired to be enacted through the initiative and referendum.

There is no controversy in this proceeding as to the validity of the initiative and referendum amendment to the constitution, but we are unwilling to say that the office of Secretary of State shall be made the dumping-ground of petitions of every nature and character which in fact do not fall within the purview of the initiative amendment; nor was it ever contemplated by the people that such petitions should be filed when such amendment to the constitution was adopted and ratified.

As stated in the first paragraph of this opinion, it will not answer satisfactorily the requirements of the law to merely name a proposition a constitutional amendment. Its nature and character must be determined by the subject matter with which the petition deals.

We are of the opinion, as is expressly stated by the statute, that the legal sufficiency of the petitions presented are matters subject to review by the courts having jurisdiction of the questions. It was conceded in oral argument by learned counsel presenting this ⁴⁴³ case upon the part of the relator that the opinion of this court in which it was announced that under the constitution this court had jurisdiction of mandamus proceedings of this character was correct, therefore we take it that this court might rightfully assume jurisdiction of the matters involved in this proceeding and determine the propositions presented for our consideration.

In reaching the conclusions upon the propositions as discussed in the first and second paragraphs of this opinion, we are not unmindful of the authorities to which our attention has been directed by learned counsel for relator. We have carefully considered all of the citations, but limiting this opinion within reasonable bounds prevents giving expression to our full review of the authorities cited. It is sufficient to say that, after a full and careful consideration of all the authorities cited by learned counsel which in any way tend to support their contentions, the constitutional provisions and the laws with which the court in the cases cited were dealing, clearly distinguish them from the case at bar; therefore, they furnish no support to the contentions so earnestly urged by the learned counsel upon the propositions involving the interpretation of the initiative and referendum amendment to the constitution of this state and the act of the General Assembly approved June 12, 1909, which was passed in aid of carrying out the provisions of the initiative and referendum amendment. A careful analysis of the authorities cited by counsel for relator clearly demonstrates that they are entirely dissimilar to the propositions with which we are confronted.

If by calling a measure in a petition filed with the Secretary of State a proposal for a constitutional amendment, regardless of whether or not the subject matter proposed is entirely foreign to the subject of an amendment to the constitution, is all that is required to deprive the Secretary of State of the authority of declining ⁴⁴⁴ to file such a petition, then we confess that at this advanced age of our civilization, and with the experience of three-quarters of a century in the administration of the government of this state, we have truly reached an extremely novel and most remarkable position in the administration of the affairs of this great commonwealth.

We have given expression to our views upon the two leading and controlling propositions disclosed by the record in this proceeding, which results in the conclusion that the respondent, for the reasons herein indicated, properly declined to file the petitions as presented by Mr. Dickey, and that the peremptory writ of mandamus should be denied and the alternative writ quashed, and it is so ordered.

Gantt and Burgess, JJ., concur; Graves, J., concurs in separate opinion; Lamm, J., dissents; Woodson, J., dissents in separate opinion; Valliant, J., absent.

SEPARATE CONCURRING OPINION.

GRAVES, J. 1. I fully concur in all that Fox, C. J., has written in this case. The points made by him are unanswerable, but in the argument and in the briefs another point was raised upon which I have well-defined views. With these views I feel that I would be remiss in duty did I not mention them, and this is the reason for a separate concurring opinion. The opinion written by the chief justice is sufficient to dispose of the case, but in my judgment does not fully cover the point I have in mind. By counsel for Mr. Dickey it was contended in brief and argument that under the initiative and referendum provision in our constitution, the Secretary of State was a mere cog-wheel in the legislative department. That under such circumstances this court could not interfere with the acts of a co-ordinate branch of the government. In this the relator argues too much. We think that his position is untenable, and his idea of the status of the ⁴⁴⁵ Secretary of State is wrong. We can better illustrate our individual views by granting, for argument's sake, the position of relator and counsel for Mr. Dickey. They urged in the argument that respondent, in so far as his conduct of filing initiative petitions is concerned, was to be considered as a part of the legislative or law-making power; that the Secretary of State, in such conduct, was but a cog-wheel in and a part of the legislative department; that for such reasons this court could not mandamus him; that the act, being legislative in

character, belonged to another of the three departments of government, and this court was thereby precluded from action. If such be the status of the Secretary of State, the contention is well founded. We recognize that a court cannot compel by mandamus the legislative power to act upon a given proposed law. We recognize that a court cannot enjoin the legislative power from enacting a proposed law, although the proposed measure may be violative of constitutional provisions. Now, if the Secretary of State, in this particular matter, is legislating or acting as a legislative agent, then what have we? The courts cannot mandamus him, nor can they enjoin him. The sweet will of the Secretary of State decides, without redress, the fate of any proposed measure. If he be a cog-wheel of the legislative department, he, like a legislature, may refuse to act, and the courts are powerless. Not only are the courts powerless, but the people, the real legislators under the initiative and referendum, are powerless. The contention that the Secretary of State in the filing of a petition is more than a mere ministerial administrative officer, when thought out, reduces itself to an absurdity. If his acts are beyond the reach of this court through mandamus, they are beyond the reach of a circuit court by either mandamus or injunction. When you place the status of the Secretary of State upon any other basis than that of a ⁴⁴⁶ ministerial, administrative or executive officer, you give him absolute control of what shall and what shall not be submitted to the people. The argument, therefore, that such officer, as a part of the legislative department, cannot be reached by the courts, falls of its own weight. His acts are but ministerial in connection with an election to be held. The election, of course, is one with reference to a proposition, rather than one with reference to a person, but his duties pertaining to such election are ministerial in the one as well as in the other. Because he has been made the officer with whom petitions must be filed does not change the character of his duties from those imposed upon him by the old primary law and other laws. The fallacy of relator's position lies in the fact that he would have the Secretary of State considered, in this matter, as a part of the legislative department. Most ministerial and administrative officers are clothed with more or less discretion, but a wrongful exercise of that discretion may be reached by the courts. The Secretary of State is possessed with discretion: *State v. Lesueur*, 103 Mo. 253, 15 S. W. 539. That the courts will control such discretion under given conditions appears by the following among a dozen other cases: *State v. Public Schools*, 134 Mo. 296, 56 Am. St. Rep. 503, 35 S. W. 617; *State v. Goodier*, 195 Mo. 551, 93 S. W. 928; *State v. Adcock*, 206 Mo. 550, 121 Am. St. Rep. 681, 105 S. W. 270.

If the counsel for Mr. Dickey earnestly believe that Roach, the respondent, is a cog-wheel in the legislative department, then their appearance in this court was uncalled for and detrimental to their own interests. If we conclude that he performed a duty otherwise than the usual duties imposed upon him concerning elections, and as a ministerial officer, then his act in refusing to file the petitions is final in this as well as all future cases. Such was never the intent of the people when they adopted the initiative and referendum amendment in 1908, and such was not the construction ⁴⁴⁷ placed thereon by the legislature in 1909. This we discuss more fully in a succeeding paragraph.

2. The act of 1909, Laws of 1909, page 554, is a clear legislative declaration of the character of the duties of the Secretary of State under the initiative and referendum amendment. The amendment itself sufficiently declares the character of his duties. But take the legislative construction first. The constitutional amendment provides that the petition, both for the initiative and the referendum, shall be filed with the Secretary of State. Section 4 of the act of 1909, carrying out this constitutional mandate, provides that if the Secretary of State shall refuse to accept and file such petitions, "any citizen may apply, within ten days after such refusal, to the circuit court for a writ of mandamus to compel him so to do." This statutory provision, however, as indicated in the opinion on the motion to dismiss, does not deprive this court of its constitutional power to issue writs of mandamus in these cases. Such was conceded by leading counsel for Mr. Dickey. Further on it is provided that if the court shall find "that any petition filed is not legally sufficient, the court may enjoin the Secretary of State and all other officers" from placing the measure upon the official ballot. It thus appears that the legislature never thought that the Secretary of State was beyond the reach of the courts. This act of 1909 very properly recognizes that the acts of the Secretary of State are ministerial, with some discretion to be exercised by him. The legislature clearly had no idea that the Secretary of State was a part of the legislative department of government, and therefore above and beyond the courts. This section also says that if the court decides that the petition "is legally sufficient," then the Secretary of State shall be directed to file the same, but if "not legally sufficient," the court shall enjoin the Secretary of State and all other officers from placing the same upon the official ⁴⁴⁸ ballot. From this it is clear that there is a duty enjoined upon the Secretary of State to examine into the legal sufficiency of these petitions and to file or not file them as his discretion dictates. From his ruling or action redress is left to the courts. In this connection it should also be re-

membered that under the constitution the measure itself is a part of the petition. It says, "every such petition *shall include the full text of the measure so proposed.*" The italics are ours. So that in determining the sufficiency of the petition, both the courts and the Secretary of State have to consider, in a way, the proposed measure. This because it must be included in the petition. We do not mean to say that either the Secretary of State or the courts should hold the petition bad on the sole ground that the measure was unconstitutional, because it is not necessary to pass upon that question for a full determination of this case. Let the evils of the hour be determined during the hour. But this is adrift. Going back to the question as to the status of the Secretary of State in initiative and referendum proceedings, we find that the first lines of section 4 recognize that the Secretary of State, in the exercise of his discretion, might refuse to file some petitions, and throughout this entire section is strong legislative construction adverse to the contention of learned counsel for Mr. Dickey. Not only does the act of 1909 recognize that the Secretary of State is a ministerial officer, rather than a cog-wheel in the legislative department, but the initiative and referendum amendment itself does not look upon him otherwise. As to an election upon referred laws, the election may be ordered in two ways: 1. By the legislature itself; or 2. By the Secretary of State upon the receipt of proper petitions. The constitution reads: "The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety and laws making appropriations for the current expenses ⁴⁴⁹ of the state government, for the maintenance of the state institutions and for the support of public schools) either by the petition signed by five per cent of the legal voters in each of at least two-thirds of the congressional districts in the state, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded."

It is clear that the referendum power may be put in motion by either the Secretary of State or the legislature, but it will be observed that certain kinds of laws cannot be referred. Does not this contemplate that the Secretary of State shall examine the petitions and see that the petition is sufficient under the constitution and laws? Suppose a petition for a reference of the law-making appropriation for the current expenses should be presented to the Secretary of State, is it to be said that he could not refuse to file such a petition? Is there not a power there for him to judge as to the sufficiency

of the petitions under the exceptions in the constitution itself? The same applies to laws as to the public peace, health and public institutions. Are these laws to be suspended until action by the people or has the Secretary of State some discretion? Clearly the latter. The legal sufficiency of the petition is determined from an examination of the petition and the attached measure, which is a part thereof. An examination of the law and the constitution forces me to the conclusion that the functions of the Secretary are those of a ministerial officer, with the usual discretions lodged in such officer, and not those of a cog-wheel in the legislative department. As above stated, and as shown by the cases cited, the abuse of discretion can be reached by the courts. I therefore have no doubt that this court is fully possessed of jurisdiction, and that ⁴⁵⁰ the writ should be denied upon the grounds stated in the opinion of Fox, C. J., and it may be upon other points made.

Fox, C. J., Gantt and Burgess, JJ., concur in these views also; Lamm and Woodson, JJ., dissent; Valliant, J., absent.

DISSENTING OPINION.

WOODSON, J. Entertaining the views I do of this proceeding, in my judgment it would be improper for me, at this time, to express an opinion as to the merits of the case.

I am unable to agree with our learned chief justice and other of my associates as to the powers and duties of the Secretary of State in the premises. In my opinion the design of the legislature, in requiring the petitions of the voters to be filed with the Secretary of State, was simply to make him the custodian of the petitions and other proceedings in initiative and referendum legislation, in the same manner as he is now the custodian of all the proceedings leading up to legislation to be enacted by the General Assembly of the state; and the question of their validity, as well as all laws enacted by the people in pursuance thereof, is no more addressed to the courts, until after their enactment, than are the proposed enactments of the legislature. It is conceded by all that a proposed bill, however offensive it may be to the organic law of the state, pending in the legislature, cannot be controlled by the courts prior to its enactment, for the obvious reasons, first, because the courts have no authority or jurisdiction over the legislature; and, second, because the bill may never receive the sanction of that law-making power. And, in my opinion, the same is true of the initiative and referendum. The courts have no power or jurisdiction to control the action of the sovereign people in the enactment of laws; and they may repudiate ⁴⁵¹ the proposed legislation submitted to them for ratification, which fact would obviate

the necessity of all action on the part of the courts. To hold that the courts cannot control the people themselves in such legislation by a direct proceeding instituted against them, but that they can do so indirectly by controlling the action of the Secretary of State, who is but their representative, is to ignore that legal maxim which prohibits that from being done indirectly which may not be done directly.

The mere fact that the initiative and referendum act provides that, in case the Secretary of State should refuse to file the petitions mentioned therein, etc., is no authority for holding that he possesses a judicial or discretionary power to pass upon their validity. In my opinion, that provision of the act was inserted not for the purpose of vesting that power in him, but for the purpose of making it clear that he had no such power and could be compelled by the courts to file the petitions regardless of his opinion of their validity; otherwise, that provision of the act is meaningless, for the reason the courts already possessed the power, under the general laws of the state, to control the discretionary powers of the Secretary of State whenever he abused or unwisely exercised that discretion.

Since the adoption of the initiative and referendum act there are two law-making powers in this state, namely, the people themselves and the legislature; and the courts have no more power to control the action of the former than they have to control the action of the latter.

In my opinion it would be just as appropriate to pass upon the validity of or to construe a will when presented for probate as it would be to pass upon the validity of a law or any of its preliminary steps prior to its enactment.

I believe this proceeding is premature, and therefore dissent from the conclusion reached by my associates, ⁴⁵² and express no opinion at this time touching the merits of the proceeding.

ON MOTION FOR REHEARING.

PER CURIAM. There is nothing new in the motion for rehearing in this case, with one exception. It goes over the questions argued at length by counsel in oral argument and in brief on file, all of which were fully gone over and considered by the court in the preparation of the opinions herein. The suggestions in support of the motion do urge, contrary to the argument of the distinguished counsel who closed the case for relator, that they never claimed that the Secretary of State was other than a ministerial officer. The argument was public and the opinion properly quoted counsel. In fact, the cases relied upon were along the line that the Secretary of State was a part of the legislature. There is, as above indicated, but one new subject. The suggestions, for what

purpose we know not, urge that if this proposed amendment is in fact not an amendment but a legislative act, then the present proposed prohibition amendment is fatally defective. The proposed prohibition amendment has nothing to do with this case; no one has questioned the validity of that amendment; it is not before the court; however, it may be added that the question of prohibition is a subject matter for amendment to the constitution, as well as a subject matter for the statutes, and we apprehend that possibly those interested have seen to it that the proposed measure was constitutional in character rather than legislative. In other words, the sale of liquor may be regulated permanently or temporarily. Where the sale is prohibited by law, the law passed by one legislature may be repealed by the next. This, in one sense, gives the temporary or legislative character. When prohibited by the constitution or organic law, it has a degree of permanency. It prohibits ⁴⁵³ later legislative action. It remains so until the makers of the organic law again speak.

Not so with the alleged amendment now before us. Its temporary character is written upon its face. In fact, as stated in the opinions, it is not, and cannot be, construed as a constitutional amendment.

This suggestion about the proposed prohibition amendment being the only new matter, the motion for rehearing should be and is overruled.

Fox, C. J., and Gantt, Burgess and Graves, JJ., concur in the foregoing; Lamm, J., dissents; Woodson, J., still adheres to views expressed in the opinion by him filed, and expresses no further opinion; Valliant, J., absent.

As to When Mandamus is the Proper Remedy Against Public Officers, see the note to *State v. Gardner*, 98 Am. St. Rep. 863. The kinds of duties the performance of which may be compelled by mandamus are discussed in the note to *Ward v. Commissioners*, 125 Am. St. Rep. 492.

In a Mandamus Proceeding to Compel the Secretary of State to perform the purely ministerial duty imposed upon him by the statute and the constitution to file initiative petitions for the submission of an amendment to the constitution to a vote of the people, respondent will not be permitted, as a part of his defense, to question the validity of such proposed amendment upon the ground that it is violative of an act of Congress, the terms and conditions of which have been accepted by the state, and for that reason will be void, if adopted: *Threadgill v. Cross*, 26 Okl. 403, 138 Am. St. Rep. 964.

CASES
IN THE
SUPREME COURT
OF
NEW HAMPSHIRE.

KINGSBURY v. BAZELEY.

[75 N. H. 13, 70 Atl. 916.]

LEGACIES—Payment and Interest.—Ordinarily, in the absence of any provision in the will as to the time of payment, pecuniary legacies are payable at the end of the year from the death of the testator, without interest, but if not then paid, they bear interest at the legal rate. (p. 665.)

INHERITANCE TAX—Charity.—A Provision in a Will, making bequests to various individuals, to various charitable institutions, and to individuals in trust for a charitable use, that the executors pay from the estate any and all inheritance and succession taxes upon any legacies given to individuals, has no reference to the legacy given to the individuals in trust for a charitable use. (p. 666.)

INHERITANCE TAX—Deducted from Legacy.—The inheritance tax imposed upon property distributed through the courts of this state is deducted from the legacy, and is not a part of the expenses of administration. (p. 667.)

INHERITANCE TAX—Conflict of Laws—Expense of Administration.—The payment of an inheritance tax by the executors to a foreign state in order to obtain property there situated should, in the absence of a contrary intention expressed in the will, be regarded as an expense of administration, to be paid from the general property of the estate, and not as a charge pro rata upon specific legacies. (p. 669.)

Bill in equity by executors for a construction of a will of a testator and advice as to their duty. The seventh clause of the will referred to in the opinion is as follows: "In memory of my sister, Jennie Evelyn Ball, I give and bequeath to my niece, Margaret Chapin Bazeley, and to Mrs. Louis Derr of Brookline, Massachusetts, the sum of one hundred thousand dollars, to be used by them or the survivor of them, or their successors, for the purpose of establishing and maintaining a summer home for poor children and their mothers, or for poor children alone, or for working girls, as in their judgment may be best calculated to promote the welfare of such children, mothers, or working girls."

The eighty-second clause of the will is as follows: "I give the following directions to my executors: In case my estate should

prove insufficient for the payment of all the pecuniary legacies and bequests herein given, I direct them to apply my estate first to the payment in full of the legacies given to my relations, second to the payment of the legacies given to other individuals, and third to the payment of legacies and devises to institutions and corporations in such proportions as the residue divided pro rata shall suffice for, and this direction is to apply as well to all those legacies given in trust, it being my wish that individuals should be fully paid and that all institutions and corporations named herein should be paid pro rata from my estate in case of an insufficiency. And I further direct that my executors pay from my estate any and all inheritance and succession taxes that may become due upon any legacies given by this will to individuals, so that said legatees may be benefited to the full amount of their respective legacies."

Charles H. Hersey, for the plaintiffs.

Richard D. Ware, pro se, and for Margaret Chapin Bazeley.

John E. Allen, for the town of Winchester.

Cain & Benton, for the Keene Humane Society.

¹⁴ PARSONS, C. J. The questions submitted are: (1) From what time and at what rate is interest payable upon the pecuniary legacies given by the will? (2) Whether any inheritance or succession ¹⁵ taxes payable upon the bequest made by the seventh clause of the will are a charge against the estate or the legacy. (3) Whether such taxes imposed upon property by other states should be charged as an expense of administration, or deducted pro rata from all legacies, as to which such taxes are not expressly by the will charged upon the estate.

Ordinarily, in the absence of any provision in the will as to the time of payment, pecuniary legacies are payable at the end of the year from the death of the testator, without interest; but if not then paid, they bear interest after the expiration of the year: *Loring v. Woodward*, 41 N. H. 391; *Rice v. Boston etc. Society*, 56 N. H. 191; *Tilton v. American B. Society*, 60 N. H. 377, 49 Am. Rep. 321. Upon grounds apparently satisfactory to all parties, the superior court ruled that interest on the gift contained in the seventh clause should be limited to the income on certain securities. No exception was taken to this ruling, and no question was transferred for consideration. It is not found that the remaining pecuniary legacies are affected in any way by the same facts, or by a like situation to that which appears to be considered sufficient to authorize the ruling as to this legacy. No other reason appearing for excluding them from the ordinary rule, interest

is payable upon them after the expiration of one year after the testator's death, at the legal rate: Pub. Stats., c. 203, sec. 1.

Whether inheritance or succession taxes are a charge against the estate, or are to be deducted from the several legacies, is a question of intention which the will makes clear as to all legacies to individuals by the concluding sentence of the eighty-second clause: "And I further direct that my executors pay from my estate any and all inheritance and succession taxes that may become due upon any legacies given by this will to individuals, so that said legatees may be benefited to the full amount of their respective legacies." This language has no reference to the legacy given by the seventh clause to Margaret Chapin Bazeley and Mrs. Louis Derr, for the purpose of establishing and maintaining a summer home for poor children and their mothers, for it was not the testatrix's intent that the individuals named as trustees to administer the fund bequeathed by this legacy should be benefited by any part of the fund; consequently, the reason given for the payment of the legacy tax upon gifts to individuals, that the "legatees may be benefited to the full amount of their respective legacies," can have no application. In a sense, all the gifts for charitable purposes are gifts for the benefit of individuals; but such gifts are "for the benefit of an indefinite number of persons," and not for particular individuals. Such gifts are not gifts to the individuals, but to the class. The trustees named in the seventh ¹⁶ clause are not within the language of the eighty-second, because the gift is not for their benefit. The individuals for whose benefit the gift is made are also excluded, because the gift is not for individuals, but for a class.

The remaining question, whether succession or inheritance taxes paid in another jurisdiction to get possession of the property for administration by the courts of the state of the testator's domicile are a charge against the estate as expenses of administration, or deductible pro rata from the various legacies, is one of greater difficulty. It seems to be an entirely new question. No case is cited in which it has been considered. None has been found in which the precise question has been raised, though it is understood that, in reliance upon the language of the court in considering questions more or less analogous, it is ruled in New York that such taxes are to be deducted from the legacy, and in Massachusetts that they should not be: *In re Swift's Estate*, 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709; *Hooper v. Shaw*, 176 Mass. 190, 57 N. E. 361; *Leg. & Succ. Tax Mass.* (1906), 7, 8. But since it was perfectly competent for the testatrix to provide by will how these charges should be treated, the question must be one of intention. The varying nature of the property, its situation, the character of the gift (whether specific or otherwise),

and other evidentiary matters competent upon the ascertainment of the expressed intention, may justify different conclusions from almost identical language. From the nature of the question, no rule can be laid down which will solve all cases.

The inheritance tax imposed upon property distributed through the courts of this state is deducted from the legacy, and is not a part of the expenses of administration: Laws 1905, c. 40, sec. 5. A testator is presumed to have made his will having in view the law of his domicile: *Mann v. Carter*, 74 N. H. 345, 68 Atl. 130, 15 L. R. A., N. S., 150; *Harris v. Ingalls*, 74 N. H. 339, 68 Atl. 34. Hence, a testator who makes no provision for the payment of such taxes from his estate must have intended the actual benefit to be received by the subject of his bounty to be as much less than the sum named in his will as he is presumed to have known the state would take for itself in executing his expressed wish for the transmission of his property. In a gift of specific personal property located in a foreign state, the amount demanded by such state as the price of the transfer of the title may naturally be a charge against the subject of the legacy—not because of the testator's presumed familiarity with the law of the jurisdiction where his property is located, but because under that law he has not the power to transfer by will the entire title. The intention apparent from the words of the will is effectuated as near as may be by the transfer of all of the title the testator was capable of transmitting—the title charged with the duty.¹⁷ Whether the distribution is effected by the state of the domicile or by that of the locus of the property, the law of the distribution is that of the state of the domicile: *Mann v. Carter*, 74 N. H. 345, 68 Atl. 130, 15 L. R. A., N. S., 150. A statutory requirement, that unless otherwise provided by the will foreign death duties should be treated as expenses of administration, would as efficiently provide for their payment out of the general estate as an express direction of the will. Similarly, a statute of this state, providing that in the distribution of the estate of a decedent here the same effect should be given to the laws of a foreign state imposing inheritance or succession taxes upon property of the decedent found therein as would be given if the distribution were made under the laws of the state imposing the tax, would also determine the question. In the absence of statutory provisions on the subject, the question seems to be, What force, if any, can be given the foreign law in the distribution under New Hampshire law? This must be the sole question, unless there can be drawn from the terms of the will, expressly or by implication, evidence sufficient to justify a conclusion as to the testator's intention.

In a gift of a pecuniary legacy of a certain amount, the apparent intention is to benefit the legatee to the full amount named. If such will is to be administered by the law of a jurisdiction imposing no inheritance tax, or none upon the class to which the legatee belongs, the purpose to transmit the full amount to such legatee would seem clear when the will is read in the light of the law by which it is to be given effect. The conclusion that a less sum was intended, because at the time of the testator's death some portion of his property happened to be within a jurisdiction imposing a tax upon such a transfer, seems strained and illogical. The sole ground upon which the collection of such tax by the state of the locus of the property, when different from that of the testator's domicile, can be sustained is the jurisdiction over the property which is given by its situs: *Gardiner v. Carter*, 74 N. H. 507, 69 Atl. 939; *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176. To hold that the effect of the foreign law is to reduce the legacy given by the will construed in accordance with the law of the testator's domicile is to permit the foreign law to regulate the testamentary capacity of a citizen of this state. But the foreign law cannot extend beyond the jurisdiction which created it. If the rights in controversy depend upon the foreign law, those rights are determined in accordance with that law: *MacDonald v. Grand Trunk Ry. Co.*, 71 N. H. 448, 93 Am. St. Rep. 550, 52 Atl. 982, 59 L. R. A. 448. But when the right involved depends, not upon the foreign law, but upon that of the forum, the foreign law is immaterial and incompetent upon the question at issue. "It is obvious that the state has no jurisdiction over a right of succession which accrues under the law of ^{is} the foreign state. That is something in which this state has no interest and with which it is not concerned": *In re Bronson*, 150 N. Y. 1, 55 Am. St. Rep. 632, 44 N. E. 707, 34 L. R. A. 238.

As the foreign tax depends upon the jurisdiction over the property, and is not sustainable as a regulation of the exercise of testamentary power by the citizen of another state, it follows that the tax is merely a charge upon the particular property and not upon pecuniary legacies given by the will. That the foreign state may regulate the amount of the imposition made by it, or determine whether it will make any at all by the character of the legacies given by the will, is immaterial. Having jurisdiction over the property, it is for such state alone to determine upon what basis it will exact payment. While in giving effect to a foreign will courts are governed by the law of the testator's domicile, it has never been held that in the administration of an estate the courts of the testator's domicile would be governed by the law of the situs of personal property. The estate within the control of the court is to be administered according to the law of the state. The

property to be administered embraces all that was originally within the state, or which the executor has been able to find elsewhere and bring here. Whatever sums the executor may be obliged to pay to bring the property within the state merely reduce the amount within the control of the court.

No ground can be found, in the absence of a direction either express or implied in the will, for a pro rata distribution among all the pecuniary legacies of the sums paid as foreign death duties. On account of some legacies a charge may be made in some states and not in others. A deduction from a legacy on account of a tax imposed on others in a particular jurisdiction would not be supported by any basis of reason. The only method which could be followed would be the division of the legacies into as many classes as were made by the laws of all the states in which property was found, and a division of the sums paid pro rata among each class. This would plainly be an administration of the estate according to laws which have no force here, and which cannot, in the absence of legislative authority for such course, properly be followed. The executors have in hand, if they are ready to settle, so much property. The will, construed by the law of this state, directs how the distribution shall be made. The fact that the executors have less than they would have had, except for the demands of jurisdictions to which they were obliged to go to get the property and bring it here for distribution, cannot alter the law of the state or the terms of the will. In the absence of evidence from which a contrary direction can be implied from the will, the amounts deducted by other states before permitting the ¹⁹ transfer of property within their limits to the executor for distribution here (*Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372) is not property within this state for distribution. The executors are chargeable only for what has come to their hands—the property less the duties paid. If they charge themselves with the full value of the property, a practical method of accounting would permit them to discharge themselves by accounting for the foreign duties paid as expenses of administration.

In the present case there are no facts showing an intention to charge the pecuniary legacies with foreign duties for the benefit of the residuary legatees. "There is a class of cases where the residuary bequest, by reason of the special circumstances of the case, has been construed as a particular legacy, not liable to fail, except ratably with the other legacies, on account of any unexpected deficiency of the estate, or to be augmented by the unforeseen failure of the other legacies": 2 *Redfield on Wills*, 447; *Dyose v. Dyose*, 1 P. Wms. 305. There is nothing in the present case tending to show that the residuary bequest was intended as anything except the ordinary disposal of a residuum which might be left, while the

first part of the eighty-second clause establishes that the testatrix considered the possibility that the residuary legatees would receive nothing. In the latter part of the same clause the testatrix directs her executors to pay any and all inheritance and succession taxes that may become due upon any legacies given to individuals. This implies a recognition of the possibility of such taxes and, as to legatees other than individuals, a purpose that the duties legally chargeable upon such legacies should be borne by them; but as the foreign duties are not due upon the legacies given by the will, but are a deduction from property which may be used in carrying out the purpose of the will, the language is insufficient to require the court to administer the law of all the states in which property may have been found and taxes paid.

Case discharged.

Young, J., did not sit; the other concurred.

Inheritance Taxation is the subject of a note to *English v. Crenshaw*, 127 Am. St. Rep. 1035; *Neilson v. Russell*, 76 N. J. L. 655, 131 Am. St. Rep. 673.

The Payment of Legacies is discussed in the note to *Brill v. Wright*, 8 Am. St. Rep. 722.

DANFORTH v. FISHER.

[75 N. H. 111, 71 Atl. 535.]

MASTER'S LIABILITY to Stranger for Servant's Acts.—The test to determine whether a master is liable to a stranger for the consequences of his servant's misconduct is to inquire whether the latter was doing what he was employed to do at the time he caused the injury complained of. If he was not acting within the scope of his employment, the master is not liable. (p. 671.)

A MASTER IS NOT LIABLE for an Injury Caused by the negligence of a servant using his property without his knowledge or consent and outside the scope of the servant's duty. (p. 671.)

AUTOMOBILES—Unauthorized Use—Liability of Owner.—There is nothing so inherently dangerous about an automobile as to render the owner thereof liable for injuries inflicted thereby when in the possession of a third person without authority of the owner. (p. 672.)

A MASTER IS NOT LIABLE to a Third Person for injury by a servant, known to him to be unskillful and careless, where the injury was not inflicted in the course of the servant's employment, and such employment was not the cause of the injury. (pp. 672, 673.)

Osgood & Osgood, for the plaintiff.

Branch & Branch, for the defendant.

111 YOUNG, J. 1. However it may be in other jurisdictions, in this state the test to determine whether a master is

liable to a stranger for the consequences of his servant's misconduct is to inquire whether the latter was doing what he was employed to do at the time he caused the injury complained of. If he was, the fact that he was not doing it in the way expected is immaterial: *Rowell v. Boston & M. R. R.*, 68 N. H. 358, 44 Atl. 488. But if at the time he did the act which caused the injury he was not acting within the scope of his employment, the master is not liable: *Cordner v. Boston & M. R. R.*, 72 N. H. 413, 57 Atl. 234; *Turley v. Boston & M. R. R.*, 70 N. H. 348, 47 Atl. 261; *Searle v. Parke*, 68 N. H. 311, 34 Atl. 744; *Page v. Hodge*, 63 N. H. 610, 4 Atl. 805; *Andrews v. Green*, 62 N. H. 436; *Grimes v. Keene*, 52 N. H. 330; *Wilson v. Peverly*, 2 N. H. 548.

At 5 o'clock on the day of the accident, McCauley, who was employed by the defendant as a chauffeur, took the automobile from the place where it was kept, drove to the defendant's store, and awaited orders. He was told to get his supper and to be at the New City Hotel with the automobile at a quarter before 7 o'clock. After he had eaten supper, instead of taking the car to the hotel according to the defendant's order, he drove to West Manchester, a mile or two distant from his boarding place and in an opposite direction from the hotel, for the purpose of calling upon a friend. At the time of the accident he had finished his call and was on his way to the hotel.

¹¹² Although the evidence shows that McCauley was the defendant's servant, and that he drove the automobile against the plaintiff's horse and caused the animal to run away, it also shows that he took the automobile without the defendant's permission and went with it on an errand of his own—that he was acting for himself, and not for the defendant, at that time. As it cannot be found from the evidence that McCauley was doing what he was employed to do at the time the plaintiff was injured, there was no error in the order of nonsuit.

2. The plaintiff contends that the law of this state on the subject is not in harmony with the view which obtains in most common-law jurisdictions. That his contention is not well founded will appear from an examination of the authorities: *Perlstein v. American Exp. Co.*, 177 Mass. 530, 59 N. E. 194, 52 L. R. A. 959; *McCarthy v. Timmins*, 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038; *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635; *Fiske v. Enders*, 73 Conn. 338, 47 Atl. 681; *Doran v. Thomsen*, 74 N. J. L. 445, 66 Atl. 897; *Quigley v. Thompson*, 211 Pa. 107, 60 Atl. 506; *Lotz v. Hanlon*, 217 Pa. 339, 118 Am. St. Rep. 922, 66 Atl. 525, 10 L. R. A., N. S., 339, 10 Ann. Cas. 731; *Thorp v. Minor*, 109 N. C. 152, 13 S. E. 702; *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338; *Reaume v. Newcomb*, 124 Mich. 137, 82 N. W. 806; *Reynolds v. Buck*, 127 Iowa, 601, 103 N. W. 946; *Slater v. Advance T. Co.*, 97 Minn.

305, 107 N. W. 133, 5 L. R. A., N. S., 598; *Evans v. Dyke* A. S. Co., 121 Mo. App. 266, 101 S. W. 1132; *Jones v. Hoge*, 47 Wash. 663, 125 Am. St. Rep. 915, 92 Pac. 433, 14 L. R. A., N. S., 217; *Patterson v. Kates*, 152 Fed. 481; 26 Cyc. 1538; 20 Am. & Eng. Ency. of Law, 163 et seq.; 34 Cent. Dig., tit. "Master and Servant," secs. 1219, 1220.

3. The defendant is not liable merely because he was the owner of the automobile by which the plaintiff was injured. If the legislature can enact that an automobile or its owner shall be liable for any injury the driver may do to others whenever the driver would be, it has not seen fit to do so. Nor is there any force in the plaintiff's contention that the owner of an automobile is liable to strangers in the same way and to the same extent he would be if it were a wild animal. If it were the law of this state that one who has a dangerous element or a wild animal on his premises is liable for all the damage it does after escaping from his control, that rule would have no application to the facts here presented. In this case the automobile did not escape from the defendant's control; it was taken from him by McCauley. There is nothing inherently dangerous about an automobile, any more than about an ax. Both are harmless so long as no one attempts to use them, and both are likely to injure those who come in contact with them when they are used for the purpose for which they were intended.

The case does not stand exactly as it would if the defendant had employed McCauley to care for his horse, and the latter had driven the animal to West Manchester and left it unhitched in ¹¹³ the street while he made a call upon his friend. In such case, if the horse ran away and injured a third person, there would be a basis for the argument that McCauley's wrongful act in driving the horse to West Manchester was the occasion, and his leaving it unhitched was the cause, of the injury: *Hayes v. Wilkins*, 194 Mass. 223, 120 Am. St. Rep. 549, 80 N. E. 449, 9 L. R. A., N. S., 223; *Ritchie v. Waller*, 60 Conn. 155, 38 Am. St. Rep. 361, 28 Atl. 29, 27 L. R. A. 161; *Loomis v. Hollister*, 75 Conn. 275, 53 Atl. 579; *Joel v. Morrison*, 6 Car. & P. 501.

4. If it were conceded that McCauley was a reckless operator and that the defendant was aware of that fact, it could not be found that the continued employment of a careless servant by the defendant was the legal cause of the plaintiff's injury. Knowledge that McCauley was habitually careless in the operation of the automobile has no tendency to prove that the defendant ought to have known or anticipated that he would steal the vehicle, or use it for his own purposes contrary to the owner's explicit order; and unless that fact is found; it cannot be said that the defendant's fault in employ-

ing a chauffeur whom he knew to be reckless was the cause of the plaintiff's injury.

The question whether the plaintiff could recover if the defendant had known McCauley was likely to use the automobile without permission is not in issue, and no opinion is intended to be expressed thereon.

Exception overruled.

All concurred.

A Master is Liable for the Act of His Servant only when the servant acts within the scope of his employment: *Robards v. P. Bannon Sewer Pipe Co.*, 130 Ky. 380, 132 Am. St. Rep. 394; and whether he so acted is, in most cases, a question of fact: *Ritchie v. Waller*, 63 Conn. 155, 38 Am. St. Rep. 361. The rule is that if the act was done without the authority of the master and not for the purpose of executing his orders or doing his work, the master is not answerable; but if it was done in the execution of the authority given by the master and for the purpose of performing what he directed, then he is answerable, whether the act was negligent or willful: *McCarthy v. Timmins*, 178 Mass. 378, 86 Am. St. Rep. 490. For illustrations of this rule, see *Ritchie v. Walker*, 63 Conn. 155, 38 Am. St. Rep. 361; *Hayes v. Wilkins*, 194 Mass. 223, 120 Am. St. Rep. 549. As to the liability of the owner of an automobile for the acts of his chauffeur, see *Lotz v. Hanlon*, 217 Pa. 339, 118 Am. St. Rep. 922; *Jones v. Hoge*, 47 Wash. 663, 125 Am. St. Rep. 915.

DE ROCHEMONT v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD.

[75 N. H. 158, 71 Atl. 868.]

ATTACHMENT—Property of Railroads.—The mere fact that railroads are public service corporations does not render their property exempt from attachment. (p. 674.)

ATTACHMENT—Railroad Cars—Interstate Commerce.—The attachment of a freight-car, owned by a railroad company engaged in interstate commerce, when not in actual use, does not violate the commerce clause of the federal constitution. (p. 676.)

CARRIERS—Right to Engage in Interstate Business.—Section 5258 of the United States Revised Statutes gives railroads, no matter where they are incorporated, the right to engage in interstate business in all parts of the United States, and to become jointly interested with roads in other states, in the interstate business originating on their lines. (p. 676.)

CARRIERS—Doing Business in State.—A railroad company, owning no line within the state, by contracting with another company owning such a line, for the handling by each of the other's cars, paying each other for the use of the cars, with the right to load them on the return journey, constitutes itself a company doing business in the state. (p. 677.)

ATTACHMENT—Railroad Cars—Interstate Commerce.—The attachment of the property of railroads, such as freight-cars, when

not in actual use in interstate commerce, is not forbidden by section 5258 of the United States Revised Statutes, nor is a statute allowing such attachment in conflict with the interstate commerce act. (pp. 677, 678.)

Action for damages to recover the value of a truck alleged to have been lost by the defendant, and at its commencement the plaintiff caused a freight-car owned by the defendant to be attached. The defendant had no road or place of business in New Hampshire, but had a contract with the Boston and Maine Railroad, whereby each corporation sent its cars over the roads of the other, each paying for the use of the car by it, and being entitled to use it under certain conditions. The car in question was loaded in New York, sent to New Hampshire, unloaded, and was attached before it could be returned. Upon a special appearance the defendant moved to dismiss because of its contract mentioned above, and because the car, at the time of the attachment, was in use in interstate commerce.

Samuel W. Emery, Jr., for the plaintiff.

John W. Kelley, for the defendants.

¹⁵⁹ YOUNG, J. 1. The fact that the Boston and Maine Railroad is not party to this proceeding is an answer to the defendants' first position. It will be time enough to consider whether that corporation had an interest in the car which the sheriff was bound to respect; when it sues him for attaching the property: *Southern Ry. Co. v. Brown*, 131 Ga. 245, 62 S. E. 177.

2. It was decided in *Boston etc. R. R. v. Gilmore*, 37 N. H. 410, 72 Am. Dec. 336, that sections 1 and 2, chapter 184, Revised Statutes (Pub. Stats., c. 220, secs. 1, 2), authorized the attachment of freight-cars which were not in actual use, as well as other property belonging to a railroad; that is, the mere fact that railroads are public-service corporations does not render their property exempt from attachment, even though it is needed to enable them to perform their public duty. Although that case holds that freight-cars may be attached when not in actual use, the question whether the attachment of such property is forbidden by the commerce clause of the federal constitution, or by the laws Congress has enacted in pursuance of the power vested in it by that clause, was neither raised nor considered; so, even if the defendants in that action were in fact engaged in interstate commerce, the case is not decisive of the present defendants' contention, that the attachment of the car in question was an illegal interference with it: *Wyatt v. Board of Equalization*, 74 N. H. 552, 70 Atl. 387.

¹⁶⁰ Although the precise question raised by the defendants' motion to dismiss has never been considered by this court, it has been considered by the courts of Georgia, West Virginia,

South Carolina, Illinois, Minnesota, and the eighth judicial circuit of the United States. The Georgia court holds that such an attachment is not an illegal interference with interstate commerce: *Southern etc. Co. v. Northern P. R. R.*, 127 Ga. 626, 119 Am. St. Rep. 356, 56 S. E. 742, 9 L. R. A., N. S., 853, 9 Ann. Cas. 437. The West Virginia, South Carolina, Minnesota, and federal courts hold that it is an illegal interference with interstate commerce: *Wall v. Norfolk & W. Ry. Co.*, 52 W. Va. 485, 94 Am. St. Rep. 948, 44 S. E. 294, 64 L. R. A. 501; *Shore v. Railroad*, 76 S. C. 472, 57 S. E. 526, 11 Ann. Cas. 909; *Connery v. Quincy & O. R. R. Co.*, 92 Minn. 20, 104 Am. St. Rep. 659, 64 L. R. A. 624, 2 Ann. Cas. 347; *Davis v. Cleveland etc. R. R. Co.*, 146 Fed. 403. The Illinois court holds that the statutes of that state do not authorize the attachment of such a car: *Michigan Central R. R. Co. v. Chicago etc. R. R. Co.*, 1 Ill. App. 399. All the courts, therefore, which have considered the question, except those of Georgia and possibly California (*Humphreys v. Hopkins*, 81 Cal. 551, 15 Am. St. Rep. 76, 22 Pac. 892, 6 L. R. A. 792), hold that such attachments are void; but they do not agree as to why they are void, nor lay down any rule to determine what constitutes an interference with interstate commerce, within the meaning of the federal constitution. The reasons the defendants urge for holding the attachment void are that it is forbidden (1) by the commerce clause of the federal constitution, (2) by section 5258 of the Revised Statutes of the United States, and (3) by the interstate commerce act.

1. Is this attachment forbidden by the commerce clause of the federal constitution? Although the supreme court of the United States has not passed upon the precise point involved in this case, it has frequently considered the question of what constitutes an illegal interference with interstate commerce (*Galveston etc. Ry. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. Rep. 638, 52 L. ed. 1031; *The Winnebago*, 206 U. S. 354, 27 Sup. Ct. Rep. 509, 51 L. ed. 836; *Delamater v. South Dakota*, 205 U. S. 93, 27 Sup. Ct. Rep. 447, 51 L. ed. 724, 10 Ann. Cas. 733; *Hatch v. Reardon*, 204 U. S. 152, 27 Sup. Ct. Rep. 188, 51 L. ed. 415, 9 Ann. Cas. 736; *Martin v. Pittsburg etc. R. Co.*, 27 Sup. Ct. Rep. 100, 51 L. ed. 184, 8 Ann. Cas. 87; *Foppiano v. Speed*, 199 U. S. 501, 26 Sup. Ct. Rep. 138, 50 L. ed. 288; *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 25 Sup. Ct. Rep. 686, 49 L. ed. 1059, 3 Ann. Cas. 1100; *Field v. Barber A. Co.*, 194 U. S. 618, 24 Sup. Ct. Rep. 784, 48 L. ed. 1142; *American S. & W. Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. Rep. 365, 48 L. ed. 538; *New Mexico v. Denver & Rio Grande R. Co.*, 203 U. S. 38, 27 Sup. Ct. Rep. 1, 51 L. ed. 78; *Pennsylvania R. Co. v. Knight*, 192 U. S. 21, 24 Sup. Ct. Rep. 202, 48 L. ed. 325; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. Rep. 132, 48 L. ed. 268; *Wisconsin & M. R. Co. v.*

Powers, 191 U. S. 379, 24 Sup. Ct. Rep. 107, 48 L. ed. 229; *Allen v. Pullman's P. C. Co.*, 191 U. S. 171, 24 Sup. Ct. Rep. 39, 48 L. ed. 134; *Louisville & N. R. Co. v. Eubank*, 184 U. S. 27, 22 Sup. Ct. Rep. 277, 46 L. ed. 416; *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. Rep. 154, 39 L. ed. 223; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6, 32 L. ed. 346; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819); and "the argument in each case leads to the conclusion that if the thing itself is in pursuance of a valid state law, its enforcement will not be stayed because it may incidentally affect interstate commerce": *Southern etc. Co. v. Northern P. R. R.*, 127 Ga. 626, 119 Am. St. Rep. 356, 56 N. E. 742, 9 L. R. A., N. S., 853, 9 Ann. Cas. 437.

¹⁶¹ The test, therefore, to determine whether the attachment in this case was forbidden by the commerce clause is to inquire (1) whether the statute which authorized it is a valid state law; and if it is, (2) whether the attachment of the car was a direct interference with interstate commerce. That the statute under which the attachment was made is a valid state law, enacted to enable creditors to collect their debts and for no other or ulterior purpose, is not questioned. Hence the attachment of the car was not forbidden by the commerce clause of the federal constitution; for it is obvious that seizing a car when it is not in use does not directly affect either intrastate or interstate commerce.

2. The next question is as to the effect of section 5258 of the Revised Statutes of the United States on the validity of the attachment. That section provides that "every railroad company in the United States . . . is hereby authorized to carry upon and over its road . . . freight and property on their way from any state to another state, . . . and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination."

As this section has been construed, it gives railroads, no matter where they are incorporated, the right to engage in interstate business in all parts of the United States, and to become jointly interested with roads in other states, in the interstate business originating on their lines: *Cincinnati etc. Ry. v. Interstate C. Commission*, 162 U. S. 184, 16 Sup. Ct. Rep. 700, 40 L. ed. 935. Consequently, when the defendants made their contract with the Boston and Maine Railroad, they became jointly interested with that road in all the interstate business originating on either road, to be delivered to the other for purpose of carriage to its destination. When the defendants delivered the car in question to the Boston and Maine Railroad, they engaged in business in this state by their duly authorized agent—the Boston and Maine Railroad. There is no force, therefore, in their contention that the attachment is a direct interference with interstate commerce, because it com-

pels them to come into a state in which they are not doing business for the purpose of defending this suit; for they were doing business here when the car was attached, and will continue to do business here as long as their contract with the Boston and Maine Railroad remains in force.

If section 5258 compelled the defendants to send cars into this state, there would be force in their contention that it must be assumed Congress did not intend to compel them to follow cars all over the United States, in the defense of actions begun by attaching them. But as has been seen, section 5258 permits, but does not compel, the sending of cars by the defendants over other roads. Consequently, the presumption is that Congress intended, in case ¹⁶² they availed themselves of the provisions of the section and sent their cars into this state, that they should stand as well as they would, and no better than they would, if they were incorporated here, or if they were the owners or lessees of the Boston and Maine Railroad.

Neither does the defendants' contention, that delivering freight to a connecting carrier outside this state to be hauled into it is not doing business here, come to anything. Even if it is sound as an abstract legal proposition, it has no application to the facts of this case. As has been seen, the defendants were jointly interested with the Boston and Maine Railroad in the safe delivery of the contents of the attached car to the consignee at Greenland: 34 U. S. Stats., c. 3591, p. 591. Consequently, they were doing business here in the same way every member of a partnership does business wherever any of his partners carry on the joint enterprise. But if it be conceded that the defendants are not doing business here, it is not a greater hardship to compel them to come here to defend this suit than it would be to send the plaintiff to New York to prosecute her claim against them.

If, therefore, the attachment in this case is forbidden by section 5258, the reason for it is not because the defendants have no place of business in this state, but because they were engaged in interstate commerce and used the car in question in that branch of their business; for, as has been seen, the section permits but does not compel them to engage in that traffic: *Kentucky etc. Co. v. Louisville & N. R. R.*, 37 Fed. 567, 2 L. R. A. 289; *Cincinnati etc. Ry. v. Interstate Commission*, 162 U. S. 184, 16 Sup. Ct. Rep. 700, 40 L. ed. 935. Consequently, there can be no presumption that Congress intended, in case the defendants accepted the provisions of the interstate commerce act, to exempt their cars from the operation of the laws of the states into which they were sent, when they would not be so exempted if they owned the roads over which the cars were sent, or if they hauled the cars over those roads with their own engines: *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. Rep. 961, 31 L. ed. 790; *Ratterman v. Western*

Union Tel. Co., 127 U. S. 411, 8 Sup. Ct. Rep. 1127, 32 L. ed. 229; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380, 32 L. ed. 311; *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 11 Sup. Ct. Rep. 889, 35 L. ed. 628; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. Rep. 876, 35 L. ed. 613; *Western Union Tel. Co. v. Missouri*, 190 U. S. 412, 23 Sup. Ct. Rep. 730, 47 L. ed. 1116; *Central Stock Yards v. Railway*, 192 U. S. 568.

Since this is so, the same test should be applied to determine the validity of the attachment, in so far as section 5258 is concerned, as would be applied if the car were owned by the Boston and Maine Railroad: 20 *Harvard Law Review*, 319, 320. As has already been stated, that test is to inquire whether the interference is direct or merely incidental: *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 12 Sup. Ct. Rep. 121, 35 L. ed. 994. That this is the proper test will be apparent from an examination of ¹⁶³ any one of the different lines of cases which decide when a particular act constitutes an illegal interference with interstate commerce. Take, for example, the decisions relating to taxation. An examination of the cases shows that the test applied to determine the validity of a tax is not to inquire where the owner of the property resides or does business, but whether the tax directly affects interstate commerce; for although states cannot legally tax such commerce (*Galveston etc. Ry. v. Texas*, 210 U. S. 217, 28 Sup. Ct. Rep. 638, 52 L. ed. 1031), they may tax railroads as going concerns: *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 12 Sup. Ct. Rep. 121, 35 L. ed. 994. Cars employed within the borders of a state may be taxed as capital employed there, notwithstanding they are used in interstate traffic and their owners neither reside nor have places of business in the state: *New York v. Miller*, 202 U. S. 584, 26 Sup. Ct. Rep. 714, 50 L. ed. 1155; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. Rep. 876, 35 L. ed. 613.

3. The attachment therefore created a valid lien on the car in favor of the plaintiff unless the making of such an attachment is forbidden by the interstate commerce act: 24 U. S. Stats. 379. Sections 1, 6, 8, 9, and 10 of the act provide that it shall apply to all steam railroads engaged in interstate commerce, either over their own roads or by virtue of the provisions of section 5258 of the Revised Statutes of the United States, that railroads shall make and post rates and not change them without notice, and that one injured by a railroad's failure to comply with the provisions of the act shall have a civil remedy against the offending corporation and also the right to enter a complaint with the interstate commerce commission. Sections 2, 3, 4, 5, and 7 forbid the railroads to which the act applies to make special rates or pooling agreements, to give preferences to either persons or places, to charge

more for a short haul than for a long haul in the same direction, or to combine to prevent the continuous carriage of goods. Sections 11 to 24 create the commission, impose its duties, and prescribe its mode of procedure. It is clear from this synopsis of the act that it was not intended to enable railroads engaged in interstate commerce to avoid payment of their just debts, but to compel them to carry for all on equal terms and for a fair price, without unnecessary delay and without giving undue preference to persons or places, and to prevent railroads which engage in the business under the provisions of section 5258 from transshipping carload lots of freight at connecting points: Cincinnati etc. Ry. v. Interstate C. Commission, 162 U. S. 184, 16 Sup. Ct. Rep. 700, 40 L. ed. 935.

Is the attachment of freight-cars which are not in actual use forbidden by the act? In other words, is a statute which permits their attachment in conflict with the provisions of the act? It seems clear that it is not. Such a statute is not open to the objection that it tends to promote the evils at which the interstate commerce ¹⁰⁴ act is aimed, or that it directly or indirectly tends to defeat any of the purposes Congress had in view when the legislation was enacted. If our statute permitted the attachment of cars in transit, or even when they are in use, there would be some foundation for the contention that it is calculated to produce a direct interference with interstate commerce; but as it does not permit the attachment of cars which are in use, it is not open to that objection.

Case discharged.

All concurred.

An Unloaded Car, Generally Employed by a Railroad Company as part of its equipment in the transportation of freight from one state to another, is not exempt from the process of attachment regularly instituted for the collection of a debt, upon the ground that such impounding of the car is an unlawful interference with interstate commerce: Southern Flour etc. Co. v. Northern Pac. Ry. Co., 127 Ga. 626, 119 Am. St. Rep. 356. For other views, however, see Wall v. Norfolk etc. R. R. Co., 52 W. Va. 485, 94 Am. St. Rep. 948; Connery v. Quincy etc. R. R. Co., 92 Minn. 20, 104 Am. St. Rep. 659.

The Case of Cavanaugh v. Chicago etc. Ry., 75 N. H. 243, 72 Atl. 694, was one of foreign attachment in which it was sought to charge a resident corporation of New Hampshire as trustee upon a transitory cause of action, and it was decided that the trustee was properly chargeable, though the debt due from it to the principal debtor was payable in another jurisdiction; and that an attachment within the state of New Hampshire, of the balance due from a domestic railroad company to a foreign railroad company on account of interstate traffic, was not an unlawful interference with interstate commerce.

LYFORD v. LACONIA.

[75 N. H. 220, 72 Atl. 1085.]

EMINENT DOMAIN—Library Site.—Under Public Statutes, chapter 40, section 6, a town may acquire land for a library lot. (p. 681.)

EMINENT DOMAIN—Who Entitled to Damages.—To be entitled to damages for the land taken one must be an owner thereof within the provisions of the statute; that is, an owner of the fee, remainder, or reversion, or tenant for life or years. (p. 681.)

TRUST FOR PIOUS USE—Conditions and Limitations.—A donation of property for a pious use creates a trust in the donees; and the conditions and limitations upon which the trust is created are to be regarded as regulations to guide the trustees, enforceable in a court of equity. (p. 682.)

ESTATES—Condition Subsequent—Possibility of Reverter.—The only practical distinction between a right of entry for breach of a condition subsequent and a possibility of reverter upon a determinable fee is, that in the former the estate in fee does not terminate until entry by the person having the right, while in the latter the estate reverts at once upon the occurrence of the event by which it is limited. (p. 685.)

EMINENT DOMAIN—Ownership—Damages.—One having a mere possibility of reverter upon a determinable fee or right of entry upon breach of conditions subsequent is not an owner of the land within the provisions of the statute, and not entitled to damages for its taking under the power of eminent domain. (pp. 686, 687.)

In 1837 Stephen G. Lyford executed a deed of a lot in Laconia to the Congregational Society, purporting to convey the property affected by the action to the society, for a consideration of one hundred dollars. The deed contained the following clauses: "Said society to hold said premises so long as they occupy the same with a house of public worship and no longer, and when they cease to occupy said premises then the same shall revert to me and my heirs. To have and to hold the said granted premises, with all the privileges and appurtenances to the same belonging, to the said society and their assigns, to them and their only use and benefit forever." The deed concludes with the ordinary covenants of a warranty deed. The society took possession and held it until the city commenced the present condemnation suit. The appellant, a grandson of the grantor, was awarded one dollar damages for his interest in the condemnation suit and appeals from such award.

Jewell, Owen & Veazey and Walter S. Peaslee, for the plaintiff.

Stephen S. Jewett, for the defendant.

221 PARSONS, C. J. "Whenever any town cannot obtain by contract, for a reasonable price, any land required for

public use, such land may be taken, the damages assessed, and the same remedies and proceedings had as in case of laying out highways": Pub. Stats., c. 40, sec. 6. Under this section a town may acquire land for a library lot: Attorney General v. Nashua, 67 N. H. 478, 32 Atl. 852. Following the procedure for the laying out of highways, the selectmen of towns, or the body in cities having their authority in the matter, are required to notify "the owners of the land" proposed to be taken and all persons whose interests are directly affected, separately notifying "tenants for life or years, and the owners of the remainder or reversion": Pub. Stats., c. 45, sec. 2, c. 67, secs. 3, 6. If the land is taken the damages sustained by each owner of the land must be assessed, those of the tenant and remainderman being assessed separately: Pub. Stats., c. 67, sec. 18. There is no provision for the allowance of damages except to owners of the land taken: Eaton v. Boston etc. R. R., 51 N. H. 504, 12 Am. Rep. 147; Kennett's Petition, 24 N. H. 139.

Acting under the above-cited statutory provisions, the city council of Laconia have taken a tract of land in the city for a park and library lot. The plaintiff, relying upon the statute, has taken an appeal. To sustain his appeal he must bring himself within the provisions of the statute and establish that he was at the time of the taking, within the meaning of the statute, an owner of the land taken, i. e., an owner of the fee, remainder, or reversion, or tenant for life or years. The plaintiff claims as sole heir of Stephen Lyford, under the deed of Stephen to the Meredith ²²² Bridge Congregational Society in 1837. That deed purported to convey the land taken in consideration of one hundred dollars, and is in the ordinary form of a deed of warranty except that it contains, immediately preceding the habendum in the usual form, the following: "Said society to hold said premises as long as they occupy the same with a house of public worship and no longer, and when they cease to so occupy said premises then the same shall revert to me and my heirs." The society took possession at the date of the deed and continued to occupy the land with their house of public worship until after the land was taken by the city.

Discussion has been had as to the value and character of the title of the society under this deed. The value of the interest of the society is entirely immaterial. They are not parties to this appeal. Whether they have been paid more or less than the amount to which they are legally entitled is not in issue in this proceeding, in which the plaintiff must prevail, if at all, in his own right and not in the right of the society. The title conveyed to the society under Stephen's deed is material only as illustrating or defining the title or right, if any, remaining in Stephen. The grant is to the "society, their successors and

assigns forever, to have and to hold to the said society and their assigns, to them and their only proper use and benefit forever." The clause above quoted, upon which the plaintiff relies, in its full and literal meaning is in direct conflict with the grant to the society, their successors and assigns, and the similar terms of the habendum. It might perhaps be argued that the clause conflicting with the grant and the habendum should be rejected, and the deed construed as conveying a fee simple absolute, in which case no right of any description remained in the grantor. However this may be, the deed cannot be construed as conveying a mere right of occupation for church purposes, without rejecting more of the language of the deed. The land, not an easement in it, is conveyed. The society are not restricted in their use of the land. Upon any construction that can be given, the society, so long as they occupied with a house of public worship, might also use the land for any other purpose. They could have devoted it to business or commercial uses in conjunction with their occupation with a house of public worship. But such a construction must be given the instrument as will, if possible, give effect to all its provisions. The clause in question discloses a purpose that the property conveyed should be held for religious or pious use—the maintenance of a house of public worship.

The plaintiff offered evidence and contends that the transaction was a gift and not a sale of the land, from which it would appear that the act of Stephen was a donation of the property for a pious ²²³ use. Such a gift creates a trust in the donees; and the conditions and limitations upon which the trust is created are to be regarded as regulations to guide the trustees, enforceable in a court of equity: *Rolfe and Rumford Asylum v. Lefebvre*, 69 N. H. 238, 45 Atl. 1087. In *Methodist Society v. Harriman*, 54 N. H. 444, there was a bequest to the society of real estate "to have and to hold the same forever for a minister's home." The court, finding that under the circumstances the land could not be used for the purpose, authorized a sale and the investment of the proceeds in a home for a minister. In *Rolfe and Rumford Asylum v. Lefebvre*, 69 N. H. 238, 45 Atl. 1087, land was given to trustees on the express condition that they should hold and apply the said property to a charitable purpose, with no power of sale by them during the term of ninety-nine years. There was also a provision for forfeiture in case of the trustees' failure to faithfully comply with the terms and conditions of the trust, and a gift over to an individual. It was held that a sale of a portion of the land being for the advantage of the trust, a court of equity had power to authorize it, and that the gift over was void. In a recent case, *Ashuelot National Bank v. Keene*, 74 N. H. 148, 65 Atl. 826, 9 L. R. A., N. S., 758, the words imme-

diately preceding the habendum of the deed, "upon the express condition that said premises shall be forever held and used for the purpose of erecting and maintaining a public library building thereon," did not necessarily operate as a condition subsequent rendering the estate liable to forfeiture, but the conveyance was held to be in trust and not upon condition.

In the present case, treating the conveyance as one to the society as trustees in fee simple, and regarding the language immediately preceding the formal habendum as a declaration of the trust upon which the conveyance was made, full effect is given to all the language of the deed. The society as trustees were bound to use the land for the purposes of the trust. Whether, if necessary, a court of equity could have authorized the sale of the land and the investment of the proceeds is not now material. If by lapse of time or for other reasons the trustees could no longer apply the subject of the trust to any purpose within the intention of the donor, their title as trustees would not be defeated, but they would hold the trust property, not for their own benefit, but for the grantor's heirs as a resulting trust: *Easterbrooks v. Tillinghast*, 5 Gray (71 Mass.), 17; *Hopkins v. Grimshaw*, 165 U. S. 342, 17 Sup. Ct. Rep. 401, 41 L. ed. 739; 1 Per. Tr., secs. 159, 160. Upon this construction of the deed, at the time of the taking the possession of the land and the entire legal title were in the society. They were the owners from whom the land was taken. The plaintiff had no possession or ownership of the land. The possibility that at some time a trust might result for his benefit in the subject of the trust did not make him an owner ²²⁴ of the land, or give him any present right to its value or any part of it.

But it is not necessary to decisively determine the effect of Stephen's deed. On either view taken by counsel, the result is the same. The defendants interpret the deed as giving to the society an estate upon condition subsequent that they should occupy the land with their house of public worship, their title being liable to be defeated by breach of the condition and entry by the grantor or his heir. The plaintiff contends that the deed created in the society "what is technically known as a base, qualified, or determinable fee," which determined when the society ceased to occupy the land with a house of public worship. He concedes that if the society held the land upon condition subsequent, the further compliance with the condition being prevented by act of the law, the society would hold the land discharged of the condition, and that he has no interest for which damages could be awarded: *Scovill v. McMahon*, 62 Conn. 378, 36 Am. St. Rep. 350, 26 Atl. 479, 21 L. R. A. 58. This case upon which the concession is based does not, however, require it. In that case there was a con-

veyance of land upon the express condition that it should be used for a burial ground and for no other purpose. Subsequently the legislature forbade its further use for such purpose, and further provided that upon petition of the city the court might order the removal of the bodies and monuments from the cemetery, and that upon payment to the owners of the sums decreed as the value of their interests the same should become a public park. In answer to the claim of the grantor's heirs, it was held that if the plaintiffs' property had been taken by the state, it was taken by the act forbidding the use of the ground as a burial place, which destroyed the condition of the deed and rendered the grantees' title absolute; that the destruction of the plaintiffs' possibility of reverter in the exercise of the police power was not a taking for public use, and that they were not entitled to share in the damages for the subsequent taking of the land for public use because their right had already been extinguished. The case is not in point.

The terms "qualified," "base," and "determinable" have been used "promiscuously" as descriptive of the estate claimed to have been created by this deed, though determinable is perhaps most accurate. Such a fee is an estate limited to a person and his heirs, with a qualification annexed to it by which it is provided that it must determine whenever that qualification is at an end: *Weed v. Woods*, 71 N. H. 581, 53 Atl. 1024; 2 Blackstone's Commentaries, *109; 4 Kent, *9; 1 Cruise's Digest, *73; Gray on Perpetuities, sec. 32. A text-writer of authority takes the position that since the statute *quia emptores*, there can be no possibility of reverter remaining in a grantor other than the ²²⁵ sovereign upon a grant of a fee, and hence an attempt to create a determinable fee by private grant results in a fee simple absolute, unless the grant can be sustained as a gift of conveyance for charitable purposes with a possible resulting trust to the grantor and his heirs upon the accomplishment of the purpose, as has been suggested might be the proper construction of the deed in this case: Gray on Perpetuities, secs. 31 (3), 41 a. The logic in the argument may be unanswerable (17 Harvard Law Review, 297, 299), and it may be demonstrated that in England, at least, the possibility of such limited fee so created is a matter resting upon the authority of text-writers, instead of upon decisions of the courts: *Collier v. Walters*, L. R. 17 Eq. 252; *Collier v. M'Bean*, 34 Beav. 426; *Poole v. Needham*, Yelv. 149; and cases cited in Gray on Perpetuities, sec. 33. But it is clear, and in fact is conceded, that the courts of this country have at least understood determinable fees to be possible estates, and the possibility of reverter dependent thereon a valid interest: *First Univ. Society v. Boland*, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231; Gray on Perpetuities, sec. 40

(2 a). In this state, in addition to *Weed v. Woods*, 71 N. H. 581, 53 Atl. 1024, the existence of such interests are referred to by Judge Ladd in *Reed v. Hatch*, 55 N. H. 327, and by Bell, C. J., in *Worster v. Great Falls M. Co.*, 41 N. H. 16. In *Wood v. Cheshire County*, 32 N. H. 421, it would appear from the statement of facts that a possibility of reverter upon a determinable fee had been upheld in an earlier decision in the case which was never reported. From memoranda in 18 Notes Supreme Court, 407, 456, it is clear there was no consideration of the question raised by Gray.

Since if the contention of Professor Gray is sound, it would dispose of the position upon which the plaintiff has rested his case, the question is presented and in the absence of any discussion in the reports might properly be now examined. But it has not been thought necessary to undertake the discussion; for, conceding the validity of the interest claimed for the plaintiff, such interest is not of a character to entitle him to damages. The proprietor of a determinable fee so long as the estate in fee remains, till the contingency upon which the estate is limited occurs, has all the rights and privileges over it that he would have if tenant in fee simple. After such a grant no right of seisin or possession remains in the grantor; all the estate is in the grantee notwithstanding the qualification. The only practical distinction between a right of entry for breach of a condition subsequent and a possibility of reverter upon a determinable fee is that in the former the estate in fee does not terminate until entry by the person having the right, while in the latter the estate reverts at once upon the occurrence of the event by which it is limited: *Walsingham's Case*, Plow. 557; *Jamaica Pond Corp. v. Chandler*, 9 Allen (91 Mass.), 159; ²²⁶ *First Univ. Society v. Boland*, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231; *State v. Brown*, 27 N. J. L. 13; 2 Blackstone's Commentaries, *109, note; Cruise's Digest, tit. 1, sec. 80; 4 Kent, *10; 1 Washburn on Real Property, 6th ed., secs. 164, 165; Gray on Perpetuities, secs. 31 (3), 32.

Whether the plaintiff's right is a possibility of reverter upon a determinable fee, or a right of entry for breach of a condition subsequent, he had when the land was taken no right to the land and no possession of it. "Wherever the gift is of a fee, there cannot be a remainder, although the fee may be a qualified or determinable one. The fee is the whole estate. When once granted, there is nothing left in the donor but a possibility or right of reverter, which does not constitute an actual estate. . . . All the estate vests in the first grantee, notwithstanding the qualification annexed to it": *Brattle-Square Church v. Grant*, 3 Gray, 142, 62 Am. Dec. 725. Whether the event upon which the plaintiff might come into ownership of the land would ever happen was mere specula-

tion. There was no method by which the value of the interest could be assessed which would rise above the dignity of a guess. The plaintiff did not own the land taken. He was not an owner in fee, in reversion, or in remainder. He had no subsisting title in the land, but only a possibility that it might revert to him by the happening of the event upon which the estate of the society was determinable. "He is not, within the meaning of the act under which these proceedings are instituted, a person or corporation whose land is taken by the respondent. His possibility of interest is too remote and contingent to be the subject of an estimate of damages by a jury": *Chandler v. Jamaica Pond A. Corp.*, 125 Mass. 544. The case quoted from is the only decision found apparently exactly in point. Somewhat analogous, however, are the decisions in this state that a mortgagee not in possession is not entitled to notice or an assessment of damages (*Parish v. Gilman*, 11 N. H. 293; *Rigney v. Lovejoy*, 13 N. H. 247; *Gurnsey v. Edwards*, 26 N. H. 224; *Orr v. Hadley*, 36 N. H. 575), which proceed upon the ground that until the mortgagee has entered under his mortgage, the mortgagor is the owner of the land. It is also held that damages are not assessable for an inchoate right of dower when land is taken by eminent domain, because such inchoate right is not an estate in the land: *Flynn v. Flynn*, 171 Mass. 312, 68 Am. St. Rep. 427, 50 N. E. 650, 42 L. R. A. 98; *Venable v. Wabash etc. Ry.*, 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68. Another reason given is that such an interest is too uncertain to admit of compensation: *Mills on Eminent Domain*, 2d ed., sec. 71.

Reliance has been placed upon the conclusions of the referee in *Re Brick Presbyterian Church*, 4 Brad. 503; and his division between the vault owners in the churchyard and the church of the ²²⁷ damages awarded for land taken for a street has been suggested as proper to be followed as between the plaintiff and the society. But there is no similarity in law or fact between the two cases. As between the vault owners and the church, each owned a fee simple. The fee was determinable, if at all, only as between the church and their grantor. The vault owners owned a perpetual right, as against the church, below the surface of the ground where the burial vaults were situated. The church owned the fee above the surface of the ground. Each party owned a portion of the "aggregation of qualified privileges" which constitutes property in land: *Thompson v. Androscoggin River I. Co.*, 54 N. H. 545. Each had a right to the possession, to the extent of his ownership. If the title of the vault owners was a base fee—a proposition at least open to doubt—so was that of the church: In *re Brick Presbyterian Church*, 3 Edw. Ch. 155. The division of the damages between the two owners of a similar fee was merely the estimation of the value of the quali-

fied privileges belonging to each. The assessment was not an appraisal of the value of a determinable fee and a possibility of reverter, because there was no such division of interest between the parties interested. The case is inapplicable.

In this state, upon a taking for public use under the statutes upon which this proceeding is founded, all that is taken is the right to use for the public purpose. The owner retains the right to use the premises for any purpose not inconsistent with the public right: *Bigelow v. Whitcomb*, 72 N. H. 473, 57 Atl. 680, 65 L. R. A. 676; *Bailey v. Sweeney*, 64 N. H. 296, 9 Atl. 543; *Winchester v. Capron*, 63 N. H. 605, 56 Am. Rep. 554, 4 Atl. 795; *Blake v. Rich*, 34 N. H. 282; *Baker v. Shephard*, 24 N. H. 208. If the legislature has power to authorize the taking of the fee, as has been held elsewhere, the construction of the statute as to highways and railroads in the cases cited is conclusive such power has not been exercised. As the damages are assessed upon the basis of a perpetual easement (*Peirce v. Somersworth*, 10 N. H. 369), in case of the public use for a park or library lot, the practical difference while the use lasts between taking an easement and a fee may be infinitesimal; but since the fee is not taken, a discontinuance of the public use vests the whole estate in the original owner: *Cheshire Turnpike v. Stevens*, 10 N. H. 133; *Hampton v. Coffin*, 4 N. H. 517. That it was understood that the nature of the title acquired by the taking of land for a park was the same as in case of highways is shown by the statutory provisions for the discontinuance of a public cemetery, park or common, and the assessment of damages to any person specially injured thereby in the same manner that special damages are assessed in case of the discontinuance of a highway: Pub. Stats., c. 51, secs. 3, 7; *Page v. Symonds*, 63 N. H. 17, 56 Am. Rep. 481. The state has taken ²²⁸ the use of the land. As the society owned the use, the taking must have been from the society and not from the plaintiff, who had no right to the use. Whether the plaintiff's possibility of reverter dependent upon a cessation of the public use, should the estate then come to him, is more or less valuable than his similar right upon the cessation of the religious use of the society, is plainly a possibility upon a possibility—a matter too indefinite and vague for pecuniary estimation. Whether upon a cessation of the public use the right to use would revert to the society, or the estate (assuming the validity of its determinable character) would at once vest in the plaintiff, is a question upon which discussion would be useless. If the fee of the society has not been taken, the title must revert to them, and the plaintiff's interest, whatever it is, remains absolutely unimpaired. If the title of the society is gone, then upon expiration of the public use the estate would at once revert to the plaintiff, and it is impossible to say whether he has been damnified or benefited by

the taking from the society. Whatever interest the plaintiff may have, or whatever its correct technical definition, he has no interest which entitles him to appeal, and he cannot complain of the judgment allowing him one dollar.

Exception overruled.

All concurred.

In Eminent Domain Proceedings, the Owner of the Land at the date of its taking, or his assignee, is the proper person to be compensated: Note to Currie v. Waverly etc. R. R. Co., 19 Am. St. Rep. 458; but judgment creditors are not owners: Williams v. Hutchinson etc. Ry. Co., 62 Kan. 412, 84 Am. St. Rep. 408; nor is a wife entitled, on account of her inchoate right of dower, to have any portion of the money received for the land either paid to her directly or set aside for her benefit, on the contingency of her surviving her husband: Flynn v. Flynn, 171 Mass. 312, 68 Am. St. Rep. 427. And, though a party had a right of entry for the breach of a condition that lands should be used for a public cemetery, and the land is freed from that condition under a valid act of the legislature forbidding any further interment therein, and requiring the removal therefrom of all bodies and monuments, and authorizing the taking of the property, after such removal, for a public park, upon payment to its owners of the sums decreed by the court, he has no right to any part of the money awarded for such property: Scovill v. McMahon, 62 Conn. 378, 36 Am. St. Rep. 350.

EASTER v. EASTER.

[75 N. H. 270, 73 Atl. 30.]

DIVORCE—Separation During Pendency of Action.—The pendency of an application for a divorce by either spouse against the other might, under some circumstances, compel the inference that the separation during such pendency was consented to, or was with sufficient cause. (p. 689.)

DIVORCE—Abandonment—Effect of Former Action.—The time of the pendency of a prior action of divorce upon the ground of abandonment need not necessarily be deducted in computing the time of abandonment requisite to justify a divorce. (p. 690.)

On February 19, 1905, the libelee abandoned the libelant and refused to live with him, and the parties have not since cohabited. On September 11, 1906, the libelant commenced a proceeding for divorce, but on March 27, 1907, it was dismissed without hearing and without prejudice. A dismissal of the present proceeding was moved upon the ground that, excluding the time the former proceeding was pending, the necessary statutory period of three years' abandonment had not elapsed. The motion was denied.

Bertram Blaisdell, for the plaintiff.

Harrison, Dunham & Son, for the defendant.

270 PARSONS, C. J. "A divorce from the bonds of matrimony shall be decreed in favor of the innocent party when either party, without sufficient cause, and without the consent of the other, has abandoned and refused for three years together to cohabit with the other": Pub. Stats., c. 175, sec. 5. As there was no hearing, the facts involved in the first libel were not litigated, and the form of the judgment of dismissal ("without prejudice") specially reserved to the parties the right to litigate all questions which might have been therein tried and determined: *Brown v. Brown*, 37 N. H. 536, 75 Am. Dec. 154.

271 Whether the defendant, without sufficient cause and without the consent of the plaintiff, abandoned and refused for three years together to cohabit with the plaintiff were questions of fact determinative of the present proceeding: *Kimball v. Kimball*, 13 N. H. 222; *Robinson v. Robinson*, 66 N. H. 600, 49 Am. St. Rep. 632, 23 Atl. 362, 15 L. R. A. 121. The pendency of an application for divorce by either against the other might, under some circumstances, compel the inference that the separation during such pendency was consented to, or was with sufficient cause: *Ford v. Ford*, 143 Mass. 577, 10 N. E. 474; *Marsh v. Marsh*, 14 N. J. Eq. 315, 82 Am. Dec. 251; *Palmer v. Palmer*, 36 Fla. 385, 18 South. 720; *Haltenhof v. Haltenhof*, 44 Ill. App. 135; *Porritt v. Porritt*, 18 Mich. 420; *Hurning v. Hurning*, 80 Minn. 373, 83 N. W. 342; *Doyle v. Doyle*, 26 Mo. 545; *Salorgne v. Salorgne*, 6 Mo. App. 603. It may, however, appear that both elements were present during all the prior litigation: *Weigel v. Weigel*, 63 N. J. Eq. 677, 52 Atl. 1123; *Hitchcock v. Hitchcock*, 15 App. D. C. 81; *Wagner v. Wagner*, 39 Minn. 394, 40 N. W. 360; *Neddo v. Neddo*, 56 Kan. 507, 44 Pac. 1.

It is said: "The parties should live separate during a suit for divorce. While the suit is pending cohabitation would be highly improper, and therefore the time of such separation can form no part of the statutory period": 1 Nelson on Divorce and Separation, sec. 93. Doubtless absence of cohabitation after the filing of the libel is essential to the successful maintenance of a suit for divorce; but the policy of the law promotes the continuance of the marriage relation—not its destruction by divorce. Hence it is not probable this language was intended to be understood as a statement that the law requires the parties to remain separate until the legal adjudication of pending proceedings for divorce, or forbids their reconciliation before judgment, or considers impossible the existence of a purpose or conduct which may in time constitute a cause for divorce, merely because proceedings have been begun. If such were the law, the mere filing of a libel for divorce would be equivalent to a decree of separation,

beyond the control of the parties, irreversible except by a formal dismissal of the libel.

The pendency of a libel for divorce is an evidentiary fact bearing upon the question whether the absence complained of is such an abandonment as the statute makes a cause for divorce, but it is not necessarily decisive of the question. One honestly prosecuting a supposedly sound suit for divorce cannot be found guilty of desertion while so engaged; and one charged with offenses which imply the consent of the other to a separation cannot be charged with desertion within the meaning of the statute for refraining from the matrimonial relation both because the absence is justifiable and consented to. One who has caused a separation by a groundless suit cannot charge the other with desertion. But in ²⁷² this case the separation was not caused by the plaintiff's former suit, nor justified by the plaintiff's conduct, but resulted from the defendant's wrongful act prior to the commencement of that suit. The former application for divorce upon the ground of abandonment did not conclusively establish that the libellant consented to the separation, nor did the pendency of the application necessarily destroy the libelee's abandoning intent—the essence of the charge of desertion in the party offending: 1 Nelson on Divorce and Separation, sec. 93; 2 Bishop on Marriage and Divorce, sec. 506. Nothing appears from which it can be inferred that the trial court drew an unwarranted inference from the facts in evidence before it. The ruling that a single item of evidence was not conclusive on the material issues presented was not erroneous.

Exception overruled.

All concurred.

In Reckoning the Statutory Period on Which an Action for Divorce on the Ground of Desertion is based, the time of separation while another action between the parties has been pending must be excluded: Note to Hudson v. Hudson, 138 Am. St. Rep. 149. See Von Bernuth v. Von Bernuth, 76 N. J. Eq. 487, post, p. 784.

CHALOUX v. INTERNATIONAL PAPER COMPANY.

[75 N. H. 281, 73 Atl. 301.]

PARENT AND CHILD—Damages for Death of Child.—At common law no civil action could be maintained by a parent for the death of his child, and no recovery for loss of the child's services after the death could be had; and that rule is in force in this state. (p. 692.)

PARENT AND CHILD—Right to Child's Earnings.—The parent's right to the services and earnings of his minor child is not absolute, but contingent upon his actually providing support for the child and retaining parental control over him. (p. 694.)

Henry F. Hollis, for the plaintiff.

Rich & Marble and Sullivan & Daley, for the defendants.

²⁸¹ BINGHAM, J. The question here presented is whether the plaintiff, whose son was instantly killed through the negligence of the defendants, can maintain an action for damages for the loss of the son's services from the time of his death until he would have attained his majority. It is conceded that there is no statute giving a right of action in such case. The plaintiff's contention is that recent decisions in this state recognize the existence of a right of action for damages for loss of service between death and majority; that at common law a father has an absolute legal right to the services and earnings of his minor son; that by reason of the defendants' negligence the plaintiff has been deprived of this right; that as the party possessing the right and the one who has infringed upon it are both in existence, the question of the survival of actions, urged as a reason for the conclusion reached in *Wyatt v. Williams*, 43 N. H. 102, does not arise; and that what is there said inconsistent with this contention is obiter dicta and not material to the decision of the case.

The recent cases upon which the plaintiff relies are *Carney v. Concord St. Ry.*, 72 N. H. 364, 57 Atl. 218, and *Warren v. Manchester St. Ry.*, 70 N. H. 352, 47 Atl. 735; but neither of them can be said to support the plaintiff's contention. In the former, the court was considering the question of damages recoverable under our statute (Pub. Stats., c. 191, sec. 12) by an administrator of an estate of a minor child killed through the defendants' negligence; and it was held that the administrator could not recover for the child's "earning capacity" from the time of his death until he attained his majority, although he might from that time on, for the reason that under the statute "damages are to be assessed on the basis of the loss suffered by the deceased party and his estate," and if the son had lived, his earnings during minority, unless emancipated, would have belonged to his father, or in case of the father's death to the mother. It cannot be inferred from this holding that the court understood, or understood to intimate, that the father could have maintained a suit for the loss of the son's services from the time of his death until he reached his majority. In the latter case the death of the child was not shown to have been instantaneous. This appears from the charge of the court to the jury: 209 Briefs and Cases, 609, 611. The statement in the opinion—"had the child survived, the action would have been brought in its own name. The father's cause of action would have been what it is now—case for the loss of the child's services"—must be read with this fact in view; and when so read, it has

reference to the father's right of action for loss of services prior to death.

In *Wyatt v. Williams*, 43 N. H. 102, the court said: "At common law, for the killing of a human being, no civil action could be maintained against the person who caused it, . . . by a person standing in the relation of . . . father or master to the person killed, and the law was the same, whether the act which caused the death was felonious or not." And after discussing the various reasons assigned for the holding, it says that the rule is founded upon public policy, and if the reasons assigned "are various and not altogether consistent, yet the rule has been too long established, and too generally recognized as a settled principle of the common law, to be now shaken by anything short of a legislative act." This case was decided in 1861, and from that day to this no action has been brought in which the parent has been allowed damages for loss of services after the child's death—a fact reasonably conclusive as to the law in this state and of the understanding of the profession upon the subject: *State v. Manchester & L. R. Co.*, 52 N. H. 528; *Bedore v. Newton*, 54 N. H. 117; *Whitaker v. Warren*, 60 N. H. 20, 49 Am. Rep. 302; *Poff v. New England Tel. & Tel. Co.*, 72 N. H. 164, 55 Atl. 891.

But there seem to be other substantial reasons why this action cannot be maintained. In *Campbell v. Cooper*, 34 N. H. 49, ²⁸³ the subject was discussed at length, and it was there said: "At common law, the father is entitled to the services and earnings of his minor children, because he is bound to support and educate them. The right grows out of the obligation and is correlative to it. When one ceases, the other ceases also. The helplessness of the infant, demanding the tutelage and support of the father, in contemplation of law terminates in ordinary cases at twenty-one, and the child becomes emancipated from parental control and entitled to his own earnings. If by reason of continued helplessness, arising from physical or mental infirmity, the emancipation does not then take place, and the burden of the support continues, the corresponding right to the services continues with it. If, anticipating the period of emancipation, fixed by law at the age of twenty-one, the father surrenders to the son the right to his earnings at an earlier age, and permits him to go into the business of life as his own master, while he thus continues independent of parental control the obligation to support him remains suspended. So, too, if the father drives his minor son from his home, and refuses to contribute to his support, the right to his earnings is also suspended so long as this dereliction of duty continues. But this obligation to support the child continues only during the lifetime of the father." He cannot, at common law, bind his infant children "to service

after his decease," for the law "imposes upon the father no obligation to make provision for the support or education of his infant children after his decease. . . . The father is not to be considered as having an absolute right of property in the labor and services of his offspring until twenty-one. Whatever right he has, it is but a qualified and contingent interest, depending on their living with him and being maintained by him, and arising out of the personal trust under which he holds them for their protection and tutelage. While he continues to furnish them support, he may appropriate their earnings to his own use; but he has no present property in their future earnings, except as coupled with the condition that he shall be burdened with their support when the earnings accrue." And it was held that all power on the part of the father over the labor and services of his minor child ceases at the father's death, "except so far as such power may be conferred by statute."

In *Jenness v. Emerson*, 15 N. H. 486, a minor son was allowed to recover wages due for his labor and services, his father being dead and his mother insane and a pauper. It was there said: "As a general rule, . . . parents are under obligation to support their minor children, and in some degree liable for their education and entitled to their earnings"; that the "right to the services arises directly out of the duty and liability for support." And it ²⁸⁴ was held that inasmuch as the plaintiff's mother was a pauper at the time of his employment with the defendants, he was in no sense under her control and could be considered as emancipated; that parents are not entitled to the earnings of their emancipated children, and that they may be emancipated by misfortune as well as by the assent of their parents.

In *Kelly v. Davis*, 49 N. H. 187, 6 Am. Rep. 499, the plaintiffs sought to recover from the defendant for necessities sold to his minor son; and it was held that at common law a father was under no legal obligation to support his minor child, and that under our statute no action could be maintained against him for necessities so furnished, "except by the town, and after notice to the person chargeable."

In *Hammond v. Corbett*, 50 N. H. 501, 9 Am. Rep. 288, the defendant, a widow, was indebted to the plaintiff, and the plaintiff sought to hold in payment of the debt funds in the hands of the trustee and earned by the widow's minor son, who was not shown to have been emancipated or under guardianship. The court said that they "failed to discover any sensible ground for a distinction between the rights of a father and those of a widowed mother" to the earnings of a minor child; that neither of them at common law were under any legal obligation to support such child, but that the court thought, "as a compensation . . . for the support, nurture,

care, protection, and education actually afforded and furnished to the child, the parent has a right to control and appropriate its earnings during minority," and were "inclined to hold that, in whatever principle this right is founded, whether it result from the very nature of maternal duties or from that of authority which, upon the husband's death, devolves upon her by reason of the guardianship for nurture, technically speaking, the mother is entitled to the child's services until her rights are suspended by the appointment of another guardian, or the arrival of the child at years of majority," or he is otherwise emancipated.

In *Aldrich v. Bennett*, 63 N. H. 415, 56 Am. Rep. 529, it was held that "the right of a parent to the earnings of his minor child, upon whatever principle it is founded (*Hammond v. Corbett*, 50 N. H. 501, 9 Am. Rep. 288), is commensurate with the right of custody. . . . Whatever, therefore, operates as a release from parental control necessarily terminates parental right of service; and the emancipation of the minor from legal parental authority, either by the voluntary act of the parent or by operation of law, puts an end to the legal claims of the parent to the minor's earnings"; that the marriage of the daughter, she being above the statutory age of consent, though entered into in defiance of the plaintiff's wishes and authority, was valid, and being inconsistent with the enforcement of parental rights, operated as an emancipation from them.

²⁸⁵ From these decisions it appears that the parent's right to the services and earnings of his minor child are not absolute, but contingent upon his actually providing support for the child and of his retaining parental control over him; and that when he ceases to provide support, or voluntarily or by operation of law releases his parental authority, his right to the child's services and earnings ceases. Because of these reasons, the decision in *Wyatt v. Williams*, 43 N. H. 102, and the fact that no action of this nature has ever been maintained in this state, we are of opinion that the demurrer should be sustained.

Demurrer sustained.

All concurred.

No Right of Action for Wrongfully Causing the Death of a Human Being existed under the common law: *Bates v. Sylvester*, 205 Mo. 493, 120 Am. St. Rep. 761; and none exists at present unless created by statute: *Stewart v. Great Northern Ry. Co.*, 103 Minn. 156, 123 Am. St. Rep. 318. Actions for the death of a human being are discussed in the note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 669. If an infant is injured by the negligence of another, and such injury results in death, one standing in loco parentis may recover from defendant for medical services and for actual loss of service

up to the time of the death: *Whitaker v. Warren*, 60 N. H. 20, 49 Am. Rep. 302. That the proper measure of damages in an action to recover for the death of a minor child is the probable value of the services of the deceased from the time of his death to the time he would have attained his majority, less the expense of his maintenance during the same time, see note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 381.

WHALEN v. PEERLESS CASUALTY COMPANY.

[75 N. H. 297, 73 Atl. 642.]

ACCIDENT INSURANCE.—"Voluntary Exposure to unnecessary danger or obvious risk," as used in a policy of accident insurance, means a conscious or intentional exposure to a known risk, and not a merely inadvertent or accidental one. (p. 697.)

ACCIDENT INSURANCE—Exposure to Danger.—One Who Crosses Railroad tracks by a path generally used, and looks and listens, but sees or hears nothing, before crossing, cannot be said, as matter of law, to voluntarily expose himself to unnecessary danger. (p. 697.)

ACCIDENT INSURANCE—Violation of Law or Rules of Carrier.—One who crosses railroad tracks by a path generally used cannot be said to be guilty of a violation of law or the rules of a public carrier, in the absence of a showing of the posting of notices as required by the statute. (p. 698.)

Action on a policy of accident insurance for the loss of a leg by a railroad accident. The policy contained a provision that if the injury resulted "wholly or in part from voluntary exposure to unnecessary danger or obvious risk of injury," or resulted from or was received "while violating the law, or violating the rules of a public carrier affecting the safety of its passengers or the public," he should be entitled to receive but twenty dollars.

The plaintiff was injured while attempting to cross a railroad track on a stormy day by a path through the railroad yards which was frequently used by many people. About one hundred and fifty feet east of this place a notice printed in English and French, as follows: "Warning. Keep off the railroad track," was posted, and a similar notice was posted about a quarter of a mile westerly of the place. About one hundred and fifty feet northerly was posted a warning to keep off the track, but there was no sign or notice at the place where the plaintiff attempted to cross. He was unable to read either English or French, and testified that he never saw any of the signs. The trial court directed the jury to bring in a verdict for twenty dollars.

Sullivan & Daley and Burritt H. Hinman, for the plaintiff.

John E. Allen and Rich & Marble, for the defendant.

²⁹⁸ BINGHAM, J. At the time the plaintiff received his injury he held a policy in the defendant company insuring him against the loss of a foot by complete severance at or above the ankle joint, in the sum of one hundred dollars, subject to the proviso that if the injury resulted "wholly or in part from voluntary exposure to unnecessary danger or obvious risk of injury," or resulted from or was received "while violating the law, or violating the rules of a public carrier affecting the safety of its passengers or the public," he should be entitled to receive but twenty dollars. The defendant pleaded the exceptions contained in this proviso in defense of the action; and upon the submission of the evidence outlined in the statement of the case, the trial justice directed the jury to return a verdict for the plaintiff for twenty dollars. The parties then agreed that in case the ruling directing the verdict should be held to be erroneous, judgment should be entered for the plaintiff for one hundred dollars, with interest from the date of the writ and taxable costs.

In directing the verdict, the court ruled as a matter of law that the plaintiff's injury resulted from voluntary exposure to unnecessary danger or obvious risk of injury, or resulted from or was received while violating the law, or violating the rules of a public carrier. If any one of these rulings was correct, the verdict should be sustained; otherwise it should be set aside, and a verdict entered in accordance with the agreement of the parties.

The meaning of the clause "voluntary exposure to unnecessary danger," as used in accident policies, has frequently been before the courts. In *Keene v. New England M. A. Assn.*, 161 Mass. 149, 36 Atl. 891, the language of the exception was "any voluntary exposure to unnecessary danger, hazard, or perilous adventure," and it was held that the provision did not contemplate "an involuntary exposure to unnecessary danger"; that "a merely inadvertent or unintentional exposure to a danger of this kind is not voluntary, but involuntary. A voluntary exposure . . . implies a conscious, intentional exposure—something which one is consciously willing to take the risk of."

In *Burkhard v. Travelers' Ins. Co.*, 102 Pa. 262, 48 Am. Rep. 205, it was said: "A clear distinction exists between a voluntary act and a voluntary exposure to danger. Hidden danger may exist; yet the exposure thereto, without any knowledge of the danger, does not constitute ²⁹⁹ a voluntary exposure to it. . . . The result of the act does not necessarily determine the motive which prompted the action. The act may be voluntary, yet the exposure involuntary. The danger being unknown, the injury is accidental." In *Lehman v. Great Eastern Casualty Co.*, 7 App. Div. 424, 39 N. Y. Supp. 912, it was said that "one cannot be said to be guilty of a voluntary

exposure to danger unless he intentionally and consciously assumes the risk of an obvious danger."

In numerous other cases the same conclusion has been reached. It is unnecessary to refer to them at length: See *Badenfeld v. Massachusetts M. A. Assn.*, 154 Mass. 77, 27 N. E. 769, 13 L. R. A. 263; *Anthony v. Mercantile M. A. Assn.*, 162 Mass. 354, 44 Am. St. Rep. 367, 38 N. E. 973, 26 L. R. A. 406; *Williams v. United States M. A. Assn.*, 133 N. Y. 366, 31 N. E. 222; *De Loy v. Travelers' Ins. Co.*, 171 Pa. 1, 50 Am. St. Rep. 787, 32 Atl. 1108; *Equitable etc. Co. v. Osborn*, 90 Ala. 201, 9 South. 869, 13 L. R. A. 267; *Miller v. American M. A. Ins. Co.*, 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765. The case of *Cornish v. Insurance Co.*, 23 Q. B. D. 453, relied upon by the defendant, is not in point. The exception there was of accidents happening "by exposure of the insured to obvious risk of injury"—not by "voluntary exposure": See *Lehman v. Great Eastern Casualty Co.*, 7 App. Div. 424, 39 N. Y. Supp. 912.

It appears, therefore, that a voluntary exposure to unnecessary danger or obvious risk, within the meaning of the policy, is a conscious or intentional exposure to a known risk, and not a merely inadvertent or accidental one.

Now, the evidence upon this branch of the case tended to show that the plaintiff, when he entered upon the tracks of the railroad, was not conscious that he was exposing himself to an unnecessary danger or obvious peril, and that his injury was accidental. He was making use of a path frequented by people in crossing and recrossing the railroad yard. The day was very stormy, with the wind blowing from the northwest. The plaintiff testified that before stepping upon the track he looked and listened, but saw and heard nothing. This evidence was surely not so conclusive that reasonable men must find that the plaintiff consciously and intentionally exposed himself to an unnecessary and obvious danger, and the court erred in withdrawing the question from the jury.

Did the plaintiff's injury result from or was it received while violating the law, or violating the rules of a public carrier? The plaintiff contends that the clause as to "violating the law" is limited in its application to violations of the criminal law (*Cluff v. Mutual B. Ins. Co.*, 13 Allen (95 Mass.), 308; *Lehman v. Great Eastern Casualty Co.*, 7 App. Div. 424, 39 N. Y. Supp. 912; *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 723; 1 Cyc. 266), while the defendant contends that it not thus limited, but extends to and includes infractions of the civil law as well: *Bradley v. Mutual B. L. Ins. Co.*, 45 N. Y. 422, 6 Am. Rep. 115; *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478, 49 Am. Rep. 469.

³⁰⁰ In the view we take of the case it is unnecessary to determine which of these contentions is right; for the evidence

did not warrant the court in ruling that the plaintiff's act in crossing the tracks of the railroad was a violation of either the criminal or civil law. The defendant relies, in support of its contention that the plaintiff's injury was received while violating the criminal law, upon the provisions of section 1, chapter 75, Laws of 1899, and the evidence wherein it appeared that the railroad company had posted notices in its yard in Berlin, distant from one hundred and fifty feet to a quarter of a mile from the path where the plaintiff attempted to cross, warning people to keep off the tracks. To render the plaintiff's entry upon the railroad's right of way punishable as a crime, it should appear that a notice warning people not to enter under penalty of the law was posted at or near the path where the plaintiff and others were accustomed to enter and cross, and was maintained in such condition that those undertaking to enter there could, by the exercise of reasonable care, see and ascertain its contents: *Brown v. Boston & M. R. R.*, 73 N. H. 568, 64 Atl. 194. But in this case it appeared that no notice was posted at the place where the plaintiff and others were accustomed to cross, that the plaintiff had never seen those which were posted, and that the circumstances were such that it was a question of fact for the jury to decide whether he could have seen them by the exercise of reasonable care and learned their contents. It would also seem that some of the notices, at least, were insufficient, in that they did not inform the traveler that entry was forbidden under penalty of the law.

As it might be found that notices were not posted so as to render people crossing where the plaintiff did liable to prosecution and fine, and that the practice of crossing there was such that the railroad knew, or ought to have known, of it, it might also be found that the plaintiff was not a trespasser, and that in entering upon the right of way he violated no rule of law, civil or criminal: *Keene v. New England M. A. Assn.*, 161 Mass. 149, 36 Atl. 891. The provision in section 1, chapter 75, Laws of 1899, where it says, "And no right to enter or be upon any railroad track shall be implied from custom or user, however long continued," is limited to cases where notice has been posted under the statute forbidding such entry. Since it could be found that the plaintiff in entering upon the tracks of the railroad was not a trespasser, and might have entered with their permission, it could not be ruled as a matter of law that in so entering he was violating a rule of the corporation. In accordance with the agreement of the parties, there should be, judgment for the plaintiff for one hundred dollars.

All concurred.

ACCIDENT INSURANCE—VOLUNTARY EXPOSURE TO DANGER.**I. General Principles.**

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I. General Principles.

a. What Constitutes Voluntary Exposure, in General.—One of the leading exemptions from liability commonly found in accident insurance policies is, that the insurance does not cover death or injury occasioned by voluntary exposure to unnecessary danger. The words "voluntary exposure to unnecessary danger," literally interpreted, would embrace every exposure of the assured not actually required by the circumstances of his situation, or enforced by the superior will of others, as well as every danger attending such exposure that might have been avoided by the exercise of care and diligence upon his part; but the same words may be fairly interpreted as referring only to dangers of a real, substantial character, which the insured recognized, but to which he nevertheless purposely and consciously exposed himself, intending at the time to assume all the risks of the situation. The latter interpretation is most favorable to the assured, does no violence to the words used, and is consistent with the object of accident insurance contracts: *Travelers' Ins. Co. v. Randolph*, 78 Fed. 754, 24 C. C. A. 305. The phrase, "voluntary exposure to unnecessary danger," involves the idea of intentionally doing some act which reasonable and ordinary prudence would pronounce danger-

ous: *Equitable Acc. Ins. Co. v. Osborn*, 90 Ala. 201, 9 South. 869, 13 L. R. A. 267.

A voluntary exposure to unnecessary danger implies a conscious intentional exposure; something which one is consciously willing to take the risk of: *Fidelity etc. Co. v. Sittig*, 181 Ill. 111, 54 N. E. 903, 48 L. R. A. 359; *Commercial Travelers' Mut. Acc. Assn. v. Springsteen*, 23 Ind. App. 657, 55 N. E. 973; *Jones v. U. S. Mutual Acc. Assn.*, 92 Iowa, 652, 61 N. W. 485; *Matthes v. Imperial Acc. Assn.*, 110 Iowa, 222, 81 N. W. 484; *Correll v. National Acc. Soc.*, 139 Iowa, 36, 130 Am. St. Rep. 294, 116 N. W. 1046; *Employers' Liability Assur. Corp. v. Anderson*, 5 Kan. App. 18, 47 Pac. 331; *Travelers' Ins. Co. v. Clark*, 109 Ky. 350, 95 Am. St. Rep. 374, 59 S. W. 7; *Johnson v. London Guarantee etc. Co.*, 115 Mich. 86, 69 Am. St. Rep. 549, 72 N. W. 1115, 40 L. R. A. 440; *Hunt v. U. S. Acc. Assn.*, 146 Mich. 521, 117 Am. St. Rep. 655, 109 N. W. 1042, 7 L. R. A., N. S., 938, 10 Ann. Cas. 449; *Jamison v. Continental Casualty Co.*, 104 Mo. App. 306, 78 S. W. 812; *Dillon v. Continental Casualty Co.*, 130 Mo. App. 502, 109 S. W. 89; *Whalen v. Peerless Casualty Co.*, 75 N. H. 297, 73 Atl. 642; *Lehman v. Great Eastern Casualty Co.*, 7 App. Div. 424, 39 N. Y. Supp. 912, affirmed in 158 N. Y. 689, 53 N. E. 1127; *Cornwell v. Fraternal Acc. Assn.*, 6 N. D. 201, 66 Am. St. Rep. 601, 69 N. W. 191, 40 L. R. A. 437; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. 262, 48 Am. Rep. 205; *De Loy v. Travelers' Ins. Co.*, 171 Pa. 1, 50 Am. St. Rep. 787, 32 Atl. 1108; *Union Casualty etc. Co. v. Harroll*, 98 Tenn. 591, 60 Am. St. Rep. 873, 40 S. W. 1080; *Continental Casualty Co. v. Deeg* (Tex. Civ. App.), 125 S. W. 353; *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13, 46 Am. Rep. 618, 16 N. W. 47.

In the leading case of *Keene v. New England Acc. Assn.*, 161 Mass. 149, 36 N. E. 891, the evidence showed the following facts: That the defendant insured the deceased "against personal bodily injuries effected . . . through external, violent, and accidental means, within the intent and meaning of the provisos and conditions" recited in the policy. Among the provisos and conditions in the policy were the following: "No claim shall be valid under this certificate when the death or injury may have . . . happened in consequence . . . of any voluntary exposure to unnecessary danger, hazard or perilous adventure." The assured was killed by being struck by a detached railroad car, which had been kicked by an engine, the sight of which was cut off by his umbrella, while he was crossing railroad tracks at a point where from one thousand to two thousand persons a day had been crossing for years without opposition. Notices were posted by the railroad company to prohibit people from crossing, but no attempt was made to stop the practice. At the defendant's request, the trial court directed the jury to return a verdict for the defendant, on the ground that the action could not be maintained. The supreme court, however, decided that the act of the assured was not necessarily to be deemed a violation of the provisions of the policy, and that the plaintiff was entitled to go to the jury. "Clearly," said the court, "a contract of indemnity against accidents should be construed with more liberality to the assured than the rules of common law, if the same person seeks under them to put the responsibility for his accident upon another. Looking, then, at the policy with reference to the subject of the contract of insurance, the first

provision relied on in defense is against 'any voluntary exposure to unnecessary danger, hazard or perilous adventure.' A voluntary exposure to necessary danger is not forbidden, nor an involuntary exposure to unnecessary danger. The policy recognizes that there are some dangers which it is necessary to encounter; as, for example, where there is a chance to rescue persons in deadly peril: See *Tucker v. Mutual Benefit Co.*, 50 Hun, 50, 4 N. Y. Supp. 505. There are other dangers which one usually need not encounter if he knows of their existence long enough beforehand, as, for example, the danger from a runaway horse or a coming car; and a merely inadvertent and unintentional exposure to a danger of this kind is not voluntary, but involuntary. A voluntary exposure to unnecessary danger implies a conscious, intentional exposure; something which one is consciously willing to take the risk of. By taking a policy of insurance against accidents, one naturally understands that he is to be indemnified against accidents resulting in whole or in part from his own inadvertence."

b. *Negligence of Insured.*—The general rule of law that a person is not entitled to compensation for an injury of which his own negligence or want of due care has been the primary cause does not apply to a contract of insurance. The reason given is that this contract is one of indemnity, and that one object which the assured has in view in effecting an insurance is protection against casualties occurring from his own negligence and want of due care. Hence, in an action upon an accident insurance policy, covering risks while traveling, it was held that the contract insured against an accident which occurred while the insured was attempting to jump on an omnibus, used as a public conveyance for carrying passengers, while the same was in motion: *Champlin v. Railway Passenger Assur. Co.*, 6 Lans. (N. Y.) 71.

In *Travelers' Ins. Co. v. Melick*, 65 Fed. 178, 12 C. C. A. 544, 27 L. R. A. 629, which was an action upon an accident policy, the question was whether the insured died from the effects of a wound in the foot received accidentally, or from the effects of a self-inflicted wound due to a cutting of his throat. "It must be borne in mind," said the court, "that the doctrine of proximate cause has a different relation to an action for negligence from that which it bears to a contract to indemnify for the result of a given cause. In the former it measures the liability, while in the latter the contract fixes the extent of the liability. In an action for negligence the liability extends only to the natural and probable consequences of the negligent act. In the case in hand, the contract is to indemnify the insured against death that shall result within ninety days from accidental bodily injuries alone. The company was undoubtedly liable under this contract for the death of the insured if that death did in fact result from the accidental shot wound alone. The crucial question was whether or not it did in fact so result, and the doctrine of proximate cause was applicable to this case only to aid in finding a just answer to this question, and not to measure the liability which the contract had fixed." In this case the jury found that the proximate cause of the death of the insured was the pistol-shot wound in the foot, received accidentally, and a judgment in favor of plaintiff, the deceased's administrator, was affirmed.

In an action upon a policy of insurance against accident, the question whether or not the injured party was guilty of negligence does not arise: *Schneider v. Provident L. Ins. Co.*, 24 Wis. 28, 1 Am. Rep. 157. In *Providence L. Ins. & Inv. Co. of Chicago v. Martin*, 32 Md. 310, it was decided that in an action on a policy of insurance against accident, the negligence or carelessness of the assured was no defense. But in *Morel v. Mississippi Valley L. Ins. Co.*, 4 Bush (67 Ky.), 535, the court affirmed the judgment sustaining a demurrer to a petition which alleged, among other things, that the defendant insured the plaintiff against accident, in a specified amount, and for a specified time, and while performing a journey, and before the termination of the period for which he was insured, he met with an accident from having "inadvertently" put his arm a short distance out of the window of a car, when his hand came in contact with a post standing near the track of the road, whereby the middle finger of his right hand was so badly injured as to render him wholly unable to practice his profession of surgeon for the period of twenty-six weeks or more. "The injury did not result," said the court, "from any of the dangers common to passengers on that or other railroads, but resulted from the dangerous position in which he had needlessly and negligently placed his arm—an injury which, if not to be expected from the exposed position of the hand, was at least probable. If appellant had kept his arm inside of the car, it is perfectly certain he would have received no injury; and as it was produced by his own fault, he thereby deprived himself of all right to compensation."

In the majority of cases, however, the courts have decided, in effect, that the question of whether the circumstances of a particular accident bring it within one of the exceptions by which the company has guarded itself against an accident resulting from voluntary exposure to unnecessary danger, is not whether the person insured has exercised reasonable care or caution, nor whether he has been guilty of negligence, but whether or not the insurance company has shown—the burden being upon it to do so—that the insured voluntarily exposed himself to unnecessary danger, and that the death or injury resulted in consequence thereof: *De Greayer v. Fidelity & Casualty Co. of N. Y.*, 126 Cal. Mem. xvii, 58 Pac. 390; *Commercial Travelers' Mut. Acc. Assn. v. Springsteen*, 23 Ind. App. 657, 55 N. E. 973; *Payne v. Fraternal Acc. Assn.*, 119 Iowa, 342, 39 N. W. 361; *Keene v. New England Mut. Acc. Assn.*, 161 Mass. 149, 36 N. E. 891; *Anthony v. Mercantile Mut. Acc. Assn.*, 162 Mass. 354, 44 Am. St. Rep. 367, 38 N. E. 973, 26 L. R. A. 406; *Wilson v. Northwestern Mut. Acc. Assn.*, 53 Minn. 470, 55 N. W. 626; *Union Casualty etc. Co. v. Harroll*, 98 Tenn. 591, 60 Am. St. Rep. 873, 40 S. W. 1080; *Fidelity etc. Co. v. Chambers*, 93 Va. 138, 24 S. E. 896, 40 L. R. A. 432; *Diddle v. Continental Casualty Co.*, 65 W. Va. 170, 63 S. E. 962, 22 L. R. A., N. S., 779; *Travelers' Ins. Co. v. Randolph*, 78 Fed. 754, 24 C. C. A. 305.

Voluntary exposure means something more than negligence contributing to the injury. The test seems to be, Did the insured appreciate that, by doing the act, he was putting life and limb in hazard? Thus, voluntary exposure to danger is not proved by evidence tending to show that the insured stood on the steps of a moving train, holding on with both hands, and fell or stepped therefrom in the

belief that he was stepping on a lower step, which in fact did not exist: *Smith v. Aetna L. Ins. Co.*, 115 Iowa, 217, 91 Am. St. Rep. 153, 88 N. W. 368, 56 L. E. A. 271.

Some policies provide that the insured shall be careful for his safety. What amounts to a violation of the condition in an accident insurance policy that the insured shall "use all due diligence for his personal safety and protection" can be deduced only from the facts and circumstances accompanying the accident; and, like other questions involving negligence and due care, is a question for a jury to determine. The court will not undertake to say, as a matter of law, whether a particular act, or series of acts, constitutes a want of such due care and diligence: *Stone's Admrs. v. United States Casualty Co.*, 34 N. J. L. 371. Where a given state of facts is such that reasonable men may fairly differ upon the question as to whether the insured died of injuries resulting from "unnecessary exposure to danger," the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that such a question is ever considered one of law for the court: *Pacific Mut. L. Ins. Co. v. Adams (Okla.)*, 112 Pac. 1026.

In *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 64 S. E. 119, an action on an accident policy which provided that it did not cover any injury occasioned wholly or partly, directly or indirectly, by many things, among them being intoxication, and voluntary or negligent exposure to unnecessary danger, and also provided that no insurance against injury received while the insured was on a railroad bridge or roadbed, except as to railroad employees while on duty incident to the occupation, the evidence showed that the insured was found badly injured, late in the evening, at the foot of a high wall, near the unrailed top of which he had been seen reclining alone on a bench by the side of a railroad telegraph office shortly before. He was an extra locomotive fireman; and the road foreman of engines testified that railroad employees frequently boarded trains at that telegraph office. There was evidence that the insured was before a police judge three days before the accident for intoxication. A policeman testified that he saw the insured near a saloon the evening on which the accident occurred, and "looked like he was intoxicated right smartly when he came through"; but other witnesses testified to the contrary. There was no witness to the accident. The jury rendered a verdict in favor of the plaintiff. The trial court set the verdict aside as contrary to law and the evidence, and granted a new trial. In reversing the action of the trial court and rendering judgment on the verdict, Justice Robinson, speaking for the court of appeals, says: "The evidence does not justify the conclusion, as a matter of law, that the insured voluntarily exposed himself to unnecessary danger, within the meaning of those terms as applied to cases of this character. Whether he did so expose himself, therefore, was a proper question for the determination of the jury from all the facts and reasonable inferences in that regard. Nor can it be justly said that the jury's evident finding that he did not so expose himself to such danger is plainly wrong, amounting to a miscarriage of justice. Really, it was not proved that insured was even guilty of contributory negligence, to say nothing of the degree of negligence required to be shown under such clause as the

one under which exemption from liability is claimed. It does not appear that the insured had knowledge of his surroundings, or of any danger near him, when the accident befell him. Where the danger is unknown, the injury is accidental, not the result of voluntary exposure.

"An insurer against accident must not be relieved from liability because of mere contributory negligence, unless the contract is plain and unequivocal that it should be. Surely we shall not say that the word 'negligent' is to be given a meaning indicating a degree of exposure less than that indicated by the word 'voluntary,' which is used before it in the clause in the policy under consideration. To give it such construction would grant almost limitless scope to the ingenuity of insurance companies in framing contracts of this character so as to make the exceptions in fact destroy the real purpose for which the insurance was obtained. Used, as it is, in connection with the word 'voluntary,' it is fairer to say that it is simply cumulative to that word, meaning no more than that word. Or its use in the clause may fairly be said to be redundant, since in a practical sense every exposure of one's body to an unnecessary danger is a negligent exposure to such danger. In view of the well-established rule of construction in such cases, the true purposes of such contracts, and the connection in which the word 'negligent' is used, we hold that its use is simply cumulative or redundant, and that the clause means no more than 'voluntary exposure to unnecessary danger.'"

c. **Wanton or Reckless Exposure.**—The duty of exercising some degree of care and prudence in view of obvious danger, even though the insured does not at the moment realize it, or is not actually conscious of it, as well as that of avoiding known danger by the exercise of prudence and care, is emphasized by the authorities. Hence reckless or deliberate encountering of known danger, or danger so obvious that a reasonably prudent person ought to have known it at the time of encountering it, is held to be "voluntary exposure to unnecessary danger" within the meaning of an accident insurance policy: *Equitable Acc. Ins. Co. v. Osborn*, 90 Ala. 201, 9 South. 869, 13 L. R. A. 267; *Travelers' Protective Assn. v. Small*, 115 Ga. 455, 41 S. E. 628; *Jones v. United States Mut. Acc. Assn.*, 92 Iowa, 652, 61 N. W. 485; *Matthes v. Imperial Acc. Assn.*, 110 Iowa, 222, 81 N. W. 484; *Garcelon v. Commercial Travelers' East. Acc. Assn.*, 195 Mass. 531, 81 N. E. 201, 10 L. R. A., N. S., 961; *Willard v. Masonic Equit. Acc. Assn.*, 169 Mass. 288, 61 Am. St. Rep. 285, 47 N. E. 1006; *Bean v. Employers' Liability Assur. Corp.*, 50 Mo. App. 459; *Duncan v. Preferred Mut. Acc. Assn.*, 59 N. Y. Super. Ct. 145, 13 N. Y. Supp. 620; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. 262, 48 Am. Rep. 205; *De Loy v. Travelers' Ins. Co.*, 171 Pa. 1, 50 Am. St. Rep. 787, 32 Atl. 1108; *Rebman v. General Acc. Ins. Co.*, 217 Pa. 518, 66 Atl. 859, 10 L. R. A., N. S., 957; *Carpenter v. American Acc. Co.*, 46 S. C. 541, 24 S. E. 500; *Continental Casualty Co. v. Deeg* (Tex. Civ. App.), 125 S. W. 353; *Fidelity etc. Co. v. Chambers*, 93 Va. 138, 24 S. E. 896, 40 L. R. A. 432; *Diddle v. Continental Casualty Co.*, 65 W. Va. 170, 63 S. E. 962, 22 L. R. A., N. S., 779.

The voluntary exposure to unnecessary danger within the meaning of an accident policy is not such exposure as men usually are going

to take, such as is incident to the ordinary habits and customs of life; such an exposure as that does not come within the range of a defense. An exposure, in order to have been a contributing cause and so defeat an insured's right to recovery, must be something beyond the ordinary, or a wanton, a piece of gross, carelessness, as we would term such in our designation of a person's conduct in the usual walks of life: *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620.

d. Knowledge of Danger.—Before a person can voluntarily expose himself to danger he must know of the danger. Under an accident policy exempting the insurer from liability for the death of the insured resulting from "voluntary exposure to unnecessary danger or perilous danger," the insurer, to absolve himself from liability, must not only allege and prove that the insured exposed himself to unnecessary danger, but also that he knew of such danger and voluntarily exposed himself thereto: *Conboy v. Railway O. & E. Acc. Assn.*, 17 Ind. App. 62, 60 Am. St. Rep. 154, 46 N. E. 363; *Collins v. Bankers' Acc. Ins. Co.*, 96 Iowa, 216, 59 Am. St. Rep. 367, 64 N. W. 778. Hence one who lies down to sleep on the top of the boilers of a steamboat, and is there injured by steam escaping from a safety valve, is not guilty of voluntary exposure to unnecessary danger, though warned not to sleep there, unless he was conscious of the danger from escaping steam from the valve: *Travelers' Ins. Co. v. Clark*, 109 Ky. 350, 95 Am. St. Rep. 374, 59 S. W. 7.

Voluntary exposure requires an exercise of the will. The party must intentionally and consciously assume the risk. This necessarily involves knowledge that the danger exists, and that the risk will follow an attempt to brave it. The act done may be voluntary, but it cannot involve "voluntary exposure" unless the exposure is understood. Before one can voluntarily expose himself to danger he must know of its existence. Hence where a traveling salesman is confronted, while in pursuit of his business, with possible danger because of a slough in a public road on his regular line of travel, over which he has passed twice a year for thirteen years, and makes inquiry of other men living in the vicinity as to the existence of danger at the time, and receives opinions, some expressing fears of danger and others to the contrary, and acting on his own judgment, formed from such opinions, from his previous knowledge, and from appearances at the time, in good faith concludes that there is no danger to his life in crossing, and attempts to cross, and is accidentally drowned, such attempt is not "voluntary exposure to unnecessary danger" within the meaning of an accident insurance policy: *United States Mutual Acc. Assn. v. Hubbell*, 56 Ohio, 516, 47 N. E. 544, 40 L. R. A. 453.

e. Obviousness of Danger.—In *Cornish v. Accident Ins. Co.*, L. R. 23 Q. B. D. 453, the policy excepted from the insurance, among other risks, one "happening by exposure of the insured to obvious risk of injury." The evidence showed that the insured, a farmer, while driving a wagon across a railroad track, was killed by a train which he could have seen if he had been paying attention to what he was doing. It was held that the clause excluded from the force of the policy two classes of accidents: First, those arising from the exposure of the insured to a risk obvious to him at the time he exposes himself; second, those arising from exposure to a risk that

would have been obvious to him if he had attended with reasonable care to his surroundings and to what he was doing. "We are not prepared to say," said the court, "that injuries occasioned by the negligence of the insured are in all cases excepted. Such a construction would render the policy little better than a snare to the insured. But there are degrees of negligence, and we are unable to read this policy as protecting a man against the consequences of running risks which would be obvious enough to him if he paid the slightest attention to what he was doing. In the present case the deceased did in fact expose himself to risk of imminent death. . . . If he looked and saw the train coming, the risk to which he exposed himself must have been obvious to him at the time. If the risk to which he exposed himself was not then obvious to him, that circumstance can only be accounted for on the supposition that he was not attending to what he was doing; i. e., not looking to see if a train was coming, and was near. We cannot construe the policy as covering a risk so run, and we agree with the lord chief justice that there was no question of fact to leave to the jury."

Ordinarily, however, in order to show a voluntary exposure to unnecessary danger, the evidence must disclose a design or intention on the part of the insured to expose his life, or a high degree of negligence; something more than mere ordinary negligence: *Williams v. United States Mut. Acc. Assn. of N. Y.*, 82 Hun, 268, 31 N. Y. Supp. 343. In *Johnson v. London Guarantee etc. Co.*, 115 Mich. 86, 69 Am. St. Rep. 549, 72 N. W. 1115, 40 L. R. A. 440, it is held that voluntary exposure to unnecessary danger, within the meaning of an accident insurance policy, is a conscious intentional exposure involving gross or wanton negligence on the part of the insured; also, that if an action on an accident policy is tried upon the theory that the question as to whether the insured voluntarily exposed himself to unnecessary danger belongs exclusively to the jury to decide, the insurer cannot complain on appeal that the trial court erred in not directing a verdict in his favor. In *Rustin v. Standard L. & A. Ins. Co.*, 58 Neb. 792, 76 Am. St. Rep. 136, 79 N. W. 712, 46 L. R. A. 253, the court said: "Accident insurance is not designed to furnish indemnity only in cases where the policy-holder orders his conduct with grave circumspection and provident foresight of consequences. Mere contributory negligence is no answer to an action on a contract of insurance."

1. Voluntary Act and Voluntary Exposure Distinguished.—The authorities make a clear distinction between a voluntary act and a voluntary exposure to danger. An act may be voluntary and the exposure involuntary: *Equitable Acc. Ins. Co. v. Osborn*, 90 Ala. 201, 9 South. 869, 13 L. R. A. 267; *Fidelity & C. Co. v. Sittig*, 181 Ill. 111, 54 N. E. 903, 48 L. R. A. 359; *Commercial Travelers' Mut. Acc. Assn. v. Springsteen*, 23 Ind. App. 657, 55 N. E. 973; *Collins v. Bankers' Acc. Ins. Co.*, 96 Iowa, 216, 59 Am. St. Rep. 367, 64 N. W. 778; *Travelers' Ins. Co. v. Clark*, 109 Ky. 350, 95 Am. St. Rep. 374, 59 S. W. 7; *Johnson v. London etc. Acc. Co.*, 115 Mich. 86, 69 Am. St. Rep. 549, 72 N. W. 1115, 40 L. R. A. 440; *Cornwell v. Fraternal Acc. Assn.*, 6 N. D. 201, 66 Am. St. Rep. 601, 69 N. W. 191, 40 L. R. A. 437; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. 262, 48 Am. Rep. 205; *De Loy v. Travelers' Ins. Co.*, 171 Pa. 1, 50 Am. St. Rep. 787, 32 Atl. 1108; *Miller v. American M. A. Ins. Co.*, 92

Tenn. 167, 21 S. W. 29, 20 L. R. A. 765; Diddle v. Continental Casualty Co., 65 W. Va. 170, 63 S. E. 962, 22 L. R. A., N. S., 779; Beard v. Indemnity Ins. Co., 65 W. Va. 283, 64 S. E. 119.

In *Whalen v. Peerless Casualty Co.*, 75 N. H. 297, ante, p. 695, 73 Atl. 642, the court approved the dictum of Justice Mercur of the supreme court of Pennsylvania in *Burkhard v. Travelers' Ins. Co.*, 102 Pa. 262, 48 Am. Rep. 205, wherein it was said: "A clear distinction exists between a voluntary act and a voluntary exposure to danger. Hidden danger may exist, yet the exposure thereto, without any knowledge of the danger, does not constitute a voluntary exposure to it. . . . The result of the act does not necessarily determine the motive which prompted the action. The act may be voluntary, yet the exposure involuntary. The danger being unknown, the injury is accidental."

II. Playing Ball or Riding Steeple-chase.

a. **Playing Indoor Baseball.**—An insured, under an accident policy exempting the insurer from liability for injuries resulting from "voluntary and unnecessary exposure to danger, is entitled to recover for a broken ankle caused by putting out his foot to prevent his running against a wall while playing indoor baseball: *Hunt v. United States Acc. Assn.*, 146 Mich. 521, 117 Am. St. Rep. 655, 109 N. W. 1042, 7 L. R. A., N. S., 938, 10 Ann. Cas. 449.

b. **Riding Steeple-chase.**—It is voluntary exposure to unnecessary danger to engage in riding a steeple-chase. And the knowledge by an agent of the insurer, before issuing the policy against accident, that the insured occasionally rode steeple-chase races, does not prevent the insurer from avoiding the policy, on the ground that the insured was injured while riding in a steeple-chase, and that such riding was a voluntary exposure to unnecessary danger: *Smith v. Aetna L. Ins. Co.*, 185 Mass. 74, 102 Am. St. Rep. 326, 69 N. E. 1059, 64 L. R. A. 117.

III. Hunting or Fishing.

a. **Fishing on Dark Night.**—Going out in a boat to fish on a dark night in water that is dangerous because of sunken trees or snags unknown to the fisherman is not a voluntary exposure to unnecessary danger within the meaning of that term in a policy of insurance, and does not defeat the right to recover on such policy: *Collins v. Bankers' Acc. Ins. Co.*, 96 Iowa, 216, 59 Am. St. Rep. 367, 64 N. W. 778. As to whether there can be a recovery on a policy where the insured is drowned while seining in violation of law, see *Conboy v. Railway etc. Acc. Assn.*, 17 Ind. App. 62, 60 Am. St. Rep. 154, 46 N. E. 363.

b. **Hunting for Game.**—One who is hunting for game in the ordinary manner is not guilty of voluntary exposure to unnecessary danger, so as to preclude his recovery if injured by the accidental discharge of his gun, brought about by his foot slipping while he is climbing a bank and his drawing himself up by means of a limb: *Cornwell v. Fraternal Acc. Assn.*, 6 N. D. 201, 66 Am. St. Rep. 601, 69 N. W. 191, 40 L. R. A. 437.

IV. Handling Firearms Carelessly.

a. **Placing Arm Over Muzzle of Gun.**—In the absence of circumstances of peril, a person who places his wrist in front of the muzzle

of his gun, loaded and cocked, as he reaches for it to draw it toward him through a fence, "unnecessarily exposes himself to danger," within the meaning of an accident insurance policy excluding from the risk disability arising from such exposure: *Sargent v. Central Acc. Ins. Co.*, 112 Wis. 29, 88 Am. St. Rep. 946, 87 N. W. 796.

b. **Cleaning Loaded Gun.**—But the mere fact of cleaning a gun, not known to be loaded, is not a voluntary exposure to unnecessary danger within the meaning of a clause in an accident policy exempting the insurer from liability, when an accident results from an unknown defect in the gun, whereby it was possible to discharge it by striking its butt upon the floor: *Miller v. American Mut. Acc. Ins. Co.*, 92 Tenn. 167, 21 S. W. 29, 20 L. R. A. 765.

V. Going on or About Railway Tracks and Cars.

a. **Sitting on Railroad Track.**—Where an accident insurance policy contained a provision that its benefits should not extend to death or disability happening directly or indirectly in consequence of voluntary exposure to unnecessary danger, and the insured sat down on the track of a railroad in active operation, and was there run over and killed, it was held that there were conditions on which his removal in plenty of time would absolutely depend, but which could not be foreseen; and that the uncertainty made the insurer's position one of danger, and that the insurance company could not be held liable under the policy: *Taylor v. Metropolitan Acc. Assn.*, 71 Ill. App. 132, affirmed in 172 Ill. 511, 50 N. E. 115.

But in *Fidelity & Casualty Co. v. Chambers*, 93 Va. 138, 24 S. E. 806, 40 L. R. A. 432, an action on an accident policy containing the exception that it did not cover injuries caused by "voluntary exposure to unnecessary danger," the evidence disclosed the following facts: The insured was sitting on a bag and on the railroad track, with his back up the railroad. A train came down around a curve, and a person hailed to him. He started off, and as he reached to get his bag, the engine struck him. In affirming the judgment in favor of plaintiff, the court says: "There is not the slightest evidence to show that the deceased knew that a train would be along at or near that time, nor that he had good reason to know it. The fact that he immediately got off the track when apprised that the train was coming negatives the idea of conscious intentional exposure to danger. The most that can be made of this evidence is that the deceased, in thinking that he had time to get his bag off the railroad track, was simply mistaken. . . . It should be borne in mind that this is not a suit against the railroad company, where the question of contributory negligence would come in. If every negligent or careless act of the insured from which accident results without 'conscious intentional exposure' on his part is to be made to serve as a defense to an action on the policy, policies of this character would become of little utility."

b. **Falling Asleep on Track.**—In *Jamison v. Continental Casualty Co.*, 104 Mo. App. 306, 78 S. W. 812, it appeared that the insured was stationed at a bridge to flag trains. He went there with his lantern on a certain night, and the next morning his body was found a short distance from the track, with wounds on it. Blood stains could be traced from there to the track, and his hat was on the track cut in two. When found, and shortly before his death, while in a semi-con-

scious condition, he stated, in answer to repeated and suggestive questions, that he had been struck by a train while asleep on the track. It was held that such facts did not establish, as a matter of law, that the insured met his death by unnecessary exposure to danger, within the meaning of an accident policy limiting the liability under such circumstances to one hundred dollars instead of one thousand dollars.

In *Bateman v. Travelers' Ins. Co.*, 110 Mo. App. 443, 85 S. W. 128, it is held that for a railroad employee to sit down on a railroad track while waiting to flag a train cannot be pronounced a voluntary exposure to unnecessary danger, under all circumstances. Hence, if while sitting on the track, an employee unconsciously falls asleep, and while in such condition is struck by a train and killed, his conduct does not necessarily constitute voluntary exposure to unnecessary danger within the meaning of that expression in an accident policy.

c. Walking on Track.—Where a policy of insurance against accident provided that there should be no recovery for death or injury in consequence of exposure to obvious or unnecessary danger, and that the assured should use all diligence for personal safety and protection; and the insured was killed by a railway train while he was running on the track in front of it, in the night, to get on a train approaching from the other direction on a parallel track, it was held that there could be no recovery. "To hold," says the court, "that the death of the insured in the present case did not happen in consequence of his exposure to the risk, but from a new force or power which intervened, would be to fritter away the language of the policy by metaphysical distinctions too fine to enter into the understanding or contemplation of parties engaged in the practical business of making a contract of insurance. We must assume that the assured read his policy, and was acquainted with its language and attached some practical meaning to it": *Tuttle v. Travelers' Ins. Co.*, 134 Mass. 175, 45 Am. Rep. 316.

In an action on an accident insurance policy which exempts the insurer from liability for an injury sustained by the insured while on a railway roadbed, the insurer may rest his case when he proves that the insured met his death while on the track of a railroad by being struck by a moving train: *Correll v. National Acc. Soc.*, 139 Iowa, 36, 130 Am. St. Rep. 294, 116 N. W. 1046. So a provision of an accident insurance policy exempting the insurer from liability when the injury is received while the assured is on the roadbed of a railroad company applies where he is injured while walking between the double tracks of a railroad used for running trains in opposite directions, the rails being ten feet apart on the inside of the tracks, and the distance between passing engines being four feet: *McClure v. Great Western Acc. Assn.*, 133 Iowa, 224, 119 Am. St. Rep. 598, 110 N. W. 466, 12 Ann. Cas. 41.

d. Crossing Trestle at Night.—It is "voluntary exposure to unnecessary danger, hazard, or perilous adventure" for a person with two packages in his hands or arms to attempt, by choice, on a dark and stormy night, to walk over a trestle which he knows to be dangerous, other ways of travel being open to him; and this is so although it is his usual way of travel and his usual route to his home, and many others travel that way: *Travelers' Ins. Co. v. Jones*, 80 Ga. 541, 12 Am. St. Rep. 270, 7 S. E. 83. According to *Follis v. United States Mutual Acc. Assn.*, 94 Iowa, 435, 58 Am. St. Rep. 408, 62 N. W. 807,

28 L. R. A. 78, it is voluntary exposure to danger, as a matter of law, for the insured to attempt, on a dark night, to cross a railroad trestle on the ties, and on that side of the trestle having no rail, when the opposite side of the trestle is provided with a rail and plankwalk and is open for use.

e. **Crossing Track Between Cars.**—One who, seeing a track actually occupied by a train in readiness to be moved, undertakes to cross between the cars, because he thinks he has time to do so, but without any inquiry, is guilty of voluntary exposure to unnecessary danger, and if injured cannot recover under an accident policy which declares that the insurance does not cover accidents resulting wholly or partly from voluntary exposure to unnecessary danger: *Willard v. Masonic Equit. Acc. Assn.*, 169 Mass. 288, 61 Am. St. Rep. 285, 47 N. E. 1006.

f. **Climbing on Stationary Cars.**—In *Bean v. Employers' Liability Assur. Corp.*, 50 Mo. App. 459, 461, the action was on an accident policy of insurance for the loss of a foot. By the terms of the policy the defendant was exempted from liability for any injury occasioned by "voluntary exposure to unnecessary danger." The evidence disclosed that the plaintiff, while on his way to work, found a railroad crossing obstructed by a train of freight-cars. This train was on the main line of the railroad, where trains were passing and repassing at all hours of the day and night. Plaintiff waited at the crossing some ten or fifteen minutes, expecting that the train would move on. Some forty or fifty workmen had congregated at the same crossing on their way to work. While plaintiff was waiting he heard someone say that the train had broken in two; he made no inquiry as to the truth of the statement, nor as to where the break was located, if there was one; he made no investigation as to whether there was an engine attached to the train. After waiting some ten or fifteen minutes, he, along with two others, attempted to cross through the train by climbing upon the drawheads of the freight-cars. His two companions passed over in safety; but while he was in the act of crossing, with his feet upon the drawbars, the cars moved, and his foot was caught and crushed. He testified that his act in going through between the cars was purely voluntary on his part. He could have gone around the end of the train, but he stated that it would not have been so handy. The train which obstructed the crossing was a regular freight train, due about the same time every morning, and one which the plaintiff and his fellow-workmen had frequently encountered on their way to work. It was held that the plaintiff "voluntarily exposed himself to unnecessary danger" and could not recover.

g. **Boarding Train in Motion.**—An attempt to board a train of cars running at eight or ten miles an hour, by a young, strong, active man, with experience as a "traveling man" in boarding and alighting from moving cars, is an exposure to "obvious risk of injury," within the meaning of an accident policy which excepts the insurer from liability for injuries received as a result of "voluntary or unnecessary exposure to danger, or to obvious risk or injury"; and, when made merely for the purpose of avoiding the delay incident to missing the train, will prevent a recovery against the insurer for injuries received in consequence thereof: *Small v. Travelers' Protective Assn.*, 118 Ga. 900, 45 S. E. 708, 63 L. R. A. 510.

In *Rebman v. General Acc. Ins. Co. of Philadelphia*, 217 Pa. 518, 66 Atl. 859, 10 L. R. A., N. S., 957, an action on an accident insur-

ance policy which contained, among others, these provisions: "Nor does this contract extend to, nor insure against, death or any kind of disablement resulting wholly or partly, directly or indirectly, from voluntary exposure to unnecessary danger." "The certificate-holder is required to use all due diligence for personal safety and protection." It appeared in the testimony that the insured had frequently taken the afternoon train at a station near his home. Several days before the accident that resulted in his death orders had been given by the railroad officials not to take on passengers at this station, but mail was received and discharged there. The insured did not know of this order. He went to the station expecting the train to stop. He saw it approach the station with steam off and at reduced speed. While the train was running six or eight miles an hour, he took hold of the rail at the front platform of the last car with his left hand, placed his left foot on the lower step, and was in the act of raising his body, when his hold was broken, and he fell backward and was killed. He was nearly sixty-six years of age and weighed one hundred and eighty pounds. He had an umbrella under his left arm. When he seized the hand-rail of the car with his left hand, the train was passing to his right. He did not move with it, but stepped directly on as a person would step on a standing car. The speed of the train was accelerated about the time he took hold of the rail. The contention that he was thrown off by a sudden jerk or jar of the train after he was safely on the step was not sustained by the testimony. He did not succeed in getting on the step, but was in the act of doing so, with his knee bent and his body inclined toward the car, when he fell. In affirming the judgment of nonsuit, the majority of the court said: "An attempt to board a moving train is always dangerous. An attempt by a man of the age and weight of the insured, with an umbrella under his arm, to board a train running six or eight miles an hour, is so obviously dangerous that a prudent person would not make it. It is so universally regarded as dangerous that it must be considered as within the class of risks excepted in the policy. The fact that the insured may have believed that the train would stop at the station does not strengthen the plaintiff's case. If he acted on that belief, he attempted to get on a moving train which he expected would come to a full stop in a few seconds. This was the needless assumption of a manifest risk. If he observed that it was not to be stopped, he intentionally exposed himself to a still greater danger. In either event, there was a 'voluntary exposure to unnecessary danger,' within the meaning of the contract, and a failure to 'use all due diligence for personal safety and protection.' His act was not the less voluntary because it may have been on a sudden impulse without reflection. He intended to do what he did, and the words of the policy admit of no distinction between premeditated acts and impulsive acts, springing from a fully formed intention. The danger cannot be considered as not obvious because he may not at the moment fully have understood and appreciated it. He could have seen it, and would have seen it and comprehended it, if he had given to what he was doing the reasonable attention that ordinary prudence required."

Justices Mestrezat and Stewart dissented from the majority of their colleagues, and it would seem that much could be said in support of their action in so doing. Without entering into a discussion of the question, however, we call attention to the fact that boarding a mov-

ing train is not, under all circumstances, contributory negligence. Whether or not it is depends upon the speed of the train, the physical condition of the passenger, the apparent danger of the course, and other surrounding circumstances: *Chicago etc. R. R. Co. v. Gore*, 202 Ill. 188, 95 Am. St. Rep. 224, 66 N. E. 1063; *Atchison etc. Ry. Co. v. Holloway*, 71 Kan. 1, 114 Am. St. Rep. 462, 80 Pac. 31, 1 L. R. A., N. S., 113. Some authorities, however, take a stricter view: *Boulfrois v. United Traction Co.*, 210 Pa. 263, 105 Am. St. Rep. 809, 59 Atl. 1007, 2 Ann. Cas. 938.

Whether or not a railroad employee, accustomed to board trains in motion, is guilty of voluntary exposure to unnecessary danger in attempting to board a train running at a speed of four or six miles an hour, is a question of fact for the jury: *Cotten v. Fidelity & Casualty Co.*, 41 Fed. 506.

In *Johanns v. National Acc. Soc.*, 16 App. Div. 104, 45 N. Y. Supp. 117, it was held that an attempt to board the front platform of an electric car while moving at a slow rate of speed did not, as a matter of law, amount to a "voluntary exposure to unnecessary danger, or to obvious risk of injury" within the meaning of an accident policy.

h. Boarding Freight-cars by Means of Ladder.—In *Garcelon v. Commercial Travelers' East. Acc. Assn.*, 195 Mass. 531, 81 N. E. 201, 10 L. R. A., N. S., 961, the action was on an accident policy of insurance containing the usual exception that no indemnity was to be paid to anyone for injury caused, wholly or in part, directly or indirectly, by voluntary exposure to unnecessary danger, or for any injury which he might have averted or prevented by the exercise of ordinary care, prudence and foresight, or to which his own negligence should have contributed. It appeared from the evidence that the plaintiff was a commercial traveler and desired to take passage on a freight train. He arrived seasonably at the station, found the freight train there, and put his baggage in the caboose, which was the last car of the train. Seeing that the train was not ready to start, he got off the caboose and went a short distance away, and when he was returning toward the train, it suddenly started. Believing that the train was proceeding on the journey, he ran up to it, and, while it was in motion, started to climb up the iron ladder upon the side of one of the freight-cars, intending to reach the top of that car and, by walking upon the top of it and the following cars, while the train was in motion, to reach the caboose. As he grasped one of the rungs of the ladder the train, which was still in motion, gave a violent jerk, and he was thrown to the ground and a car-wheel passed over his arm, necessitating its amputation. It was held that, as a matter of law, he contributed to the happening of the injury by his own voluntary exposure to unnecessary danger; and that the fact that commercial travelers were accustomed to run hazardous risks in boarding trains when the defendant accepted him as a member did not warrant the inference that the defendant agreed to indemnify him for any injury resulting from such conduct, contrary to the terms of the contract.

1. Cattle Dealer Boarding Train.—In an action on an accident insurance policy to recover for an injury sustained by a cattle dealer while attempting to climb to the top of a car that was under full headway, in order to avoid being left at a way station, it was held competent for the insured to show that it was the customary prac-

tice of men engaged in his business to accompany their stock to market and board freight-cars whenever it becomes necessary to do so in order to get animals upon their feet that have fallen or lain down upon the floor. Said Judge Caldwell: "In the matter of accompanying his cattle to market, and caring for them while in the course of transportation, the plaintiff could rightfully do whatever was customary with other cattle dealers under like circumstances and conditions. The plaintiff had a right, if it was not his duty, to incur all the risk and danger incident to caring for and looking after his cattle in the cars, while en route to their destination, in the time and manner customary among reasonably prudent and careful shippers, and such risks and dangers, no matter how great they are, do not constitute any violation of the provisions of the policy requiring the plaintiff to use due diligence for his personal safety and protection. Nor is the incurring of such risks and dangers a voluntary exposure to unnecessary danger, within the meaning of that clause in the policy. Whether the assured, at the time he received his injury, was engaged in doing something outside of the occupation covered by his policy, or whether, though in the pursuit of an occupation covered by the policy, he exposed himself to unnecessary danger, and did not exhibit due regard for his personal safety, such as an ordinarily prudent man, charged with the same duty, and placed in like circumstances, would have done, were questions of fact for the determination of the jury": *Pacific Mut. L. Ins. Co. v. Snowden*, 12 U. S. App. 704, 58 Fed. 342, 7 C. C. A. 264.

In *Richards v. Travelers' Ins. Co.*, 18 S. D. 287, 100 N. W. 428, 67 L. R. A. 175, an action on an accident policy containing the exception that the insurance shall not cover death or injuries from voluntary exposure to unnecessary danger, the plaintiff was permitted to prove that it was the usual practice and absolutely necessary for "a cattle dealer or broker visiting yards by occupation" to ride upon the top of cars from the chute where livestock was loaded in a certain city to the railway yards where the trains were made up, because on account of the distance from the stockyards to the railway yards, and the great number of the tracks therein, there was no other way to know the location of his cars and get out of the city on the train into which they are taken. The insured was classified in the policy as "a cattle dealer or broker visiting yards by occupation," and was killed while attempting to leave the top of a car. In affirming the judgment in favor of the plaintiff, the court says: "Modern courts very justly hold restrictions in accident policies inoperative, which render the insurance nugatory and valueless by attempting to avoid liability for injuries sustained by the insured while performing necessary acts embraced in his classified occupation."

j. *Leaving or Alighting from Train.*—Where a traveler by railway, while asleep and unconscious, involuntarily arose and walked to the car platform, and fell therefrom and was injured, it was held not a case of "voluntary exposure," "design," or "self-inflicted injuries," within the meaning of an accident insurance policy: *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13, 34 Am. Rep. 618, 16 N. W. 47. And in *Badenfeld v. Massachusetts Mut. Acc. Assn.*, 154 Mass. 77, 27 N. E. 769, 13 L. R. A. 263, it is held that leaving a car while in motion is not necessarily a voluntary exposure to unnecessary danger. The court says: "The real contention of the defendant, expressed in dif-

ferent forms in its prayers for instructions, is that the mere fact that the deceased was in a dangerous place (on the platform east of the track), or, as stated in one prayer for instructions, doing a dangerous act (leaving a car while it was in motion), is, as matter of law, conclusive proof that he did not use all due diligence for personal safety and protection, and that he voluntarily exposed himself to unnecessary danger. . . . The defendant asked for instructions upon the hypothesis that deceased fell while leaving the car when it was in motion. There was no evidence that he so fell, but, if it could be inferred, it would not be conclusive of his negligence. That would depend upon the circumstances, and there would be no presumption that the circumstances were such as to make it negligent. If the jury could surmise that he left the car when it was in motion, under circumstances which rendered the act negligent, they could equally well surmise that he left it under circumstances which would show that the act was not negligent."

In *Shevlin v. American Mut. Acc. Assn.*, 94 Wis. 180, 68 N. W. 866, 36 L. E. A. 52, it is held that if a policy of accident insurance does not cover death or injury resulting from "exposure to unnecessary danger," the act of the insured in jumping from a rapidly moving train without any reasonable cause therefor, in consequence of which he is injured, constitutes gross negligence, and will preclude recovery under the policy. In this case the court says: "The word 'voluntary' does not occur. . . . It does not contain the words 'wantonly and willfully,' or any equivalent words, which led to the decision in *Schneider v. Travelers' Ins. Co.*, 58 Wis. 13, 34 Am. Rep. 618, 16 N. W. 47. The language can hardly be said to admit of two constructions, so as to invoke the application of the rule that the construction should be adopted most favorable to the assured. It plainly includes all cases of exposure to unnecessary danger where such exposure is attributable to negligence on the part of the assured; that is, the exception was intended to hold the insured responsible for the exercise of ordinary care, and to except from the provisions of the policy all cases of injury occurring in whole or in part through a failure to exercise such care."

And in *Smith v. Preferred Mut. Acc. Ins. Assn.*, 104 Mich. 634, 62 N. W. 990, it is held that under an accident policy, providing that it shall be void if the accident occurs "either directly or indirectly, wholly or in part, from . . . either voluntary or unnecessary exposure to danger or to obvious risk or injury," no recovery can be had for the death of the assured caused by his jumping from a moving train, with a bag in each hand, after it had passed a station.

An accident policy was issued to one who was described as "a passenger conductor," and the application was expressly made a part of the contract. In an action on the policy it was held that the insurer could not defeat a recovery, on the ground that the insured was injured while leaving a moving train and the policy excepted the hazard of "attempting to enter or leave moving conveyances using steam as a motive power." The court said: "We are also satisfied from the application and the information which that gave to the defendant company that accidents of this kind are of the risks intended to be insured against. The sole business of the deceased was in running passenger trains, and this was plainly stated in the application. It is common knowledge that conductors of passenger trains on all rail-

roads must, in the very nature of their business, not only enter their trains when in motion, but leave them before they come to a full stop; it is common knowledge that conductors of passenger trains have full charge of their trains. They give the signal to start, and, after the train starts, they get on board. At stations when the train pulls up, and before it stops, the conductor alights upon the platform. This may be a dangerous practice, but it is among the risks which the passenger conductor assumes when he enters upon such employment; and so general is this knowledge that the defendant company, when it took and approved the application, must have had knowledge of it: *Dailey v. Preferred Masonic Mut. Acc. Assn.*, 102 Mich. 289, 57 N. W. 184, 60 N. W. 694, 26 L. R. A. 171.

K. Riding or Standing on Platform of Car.—It is not a voluntary exposure to unnecessary danger for a passenger to leave the interior of a car in order to ride on the platform because he is overcome from heat and suffers from nausea: *Marx v. Travelers' Ins. Co.*, 39 Fed. 321. The court in this case said: "That deceased was in a dangerous position on the platform as distinguished from the body of the car, in which, as a passenger, he was entitled to ride, is clear enough; but whether in going on the platform there was voluntary exposure to unnecessary danger cannot be ascertained except with knowledge of all the circumstances which influenced his conduct. If he was overcome by the heat of the car, or affected with nausea, which impelled him to seek the open air, it cannot be said that there was voluntary exposure or that the danger was unnecessarily incurred."

In *Anthony v. Mercantile Mut. Acc. Assn.*, 162 Mass. 354, 44 Am. St. Rep. 367, 38 N. E. 973, 26 L. R. A. 406, the plaintiff claimed under a policy of insurance whereby the defendant promised to pay her a certain amount on proof of the death of her husband from "bodily injuries effected through external, violent, and accidental means, within the intent and meaning of the conditions" recited therein. Among the numerous conditions in the policy was one providing: "No claim shall be valid under this certificate when the death or injury may have . . . happened in consequence of . . . any voluntary exposure to unnecessary danger, hazard, or perilous adventure. . . . Standing, riding, or being upon the platforms of moving railway coaches other than street-cars, or riding in any other place not provided for the transportation of passengers, or entering, or attempting to enter or leave, any public conveyance using steam as motive power while the same is in motion." The evidence showed that the assured was a passenger on a railroad train; that he was seen in his usual good health in one of the cars late in the evening, just before the train reached a station at which trains were accustomed to stop. That he had a ticket for a station farther on, to which the train was going. The train stopped at the first named station to take the mail. The night was dark, and there was no light on the platform at the station. The train started slowly, and when it had gone not more than fifty feet, the insured was discovered on the ground between the platform and the nearest rail of the track, with his legs crushed by the wheels of one of the trucks which had passed over them. He was unconscious most of the time until he died from the injury. No witness saw the accident, and nothing more was shown in regard to the cause of it. It was held that, although the evidence tended strongly to the inference that the assured, when injured by the acci-

dent, was incurring a risk prohibited by the policy, yet the court would not instruct the jury, as a matter of law, to find for the insurer that death resulted from "voluntary exposure to unnecessary danger."

In *Preferred Acc. Ins. Co. of N. Y. v. Muir*, 126 Fed. 926, 61 C. C. A. 456, the language of the excluding clause of the policy was injury or death resulting "from unnecessary or negligent exposure to obvious danger."

In affirming the judgment in favor of plaintiff, the court says: "Observe, it is not merely exposure to danger, but exposure to 'obvious danger'; that is, manifest, easily discovered, seen or understood danger. Furthermore, the exposure by the insured of himself to obvious danger is not enough to satisfy the clause. It must be 'unnecessary or negligent exposure.' In the present instance, how could the court say, as matter of law, that the insured exposed himself to obvious danger unnecessarily or negligently? Seized with a sudden vomiting spell, and the closet which he sought to enter being closed against him, the insured, acting upon a natural impulse, and obeying the dictates of decency and propriety, stepped across the threshold of the car door, and for a moment or two stood upon the platform in the act of vomiting. It may reasonably be supposed that the insured would grasp with his hands the iron hand-railing of the car. Muir did not choose the platform of the car as a place for riding, but took it temporarily under stress of the predicament in which he suddenly found himself. The occurrence was in daylight. It was, we think, for the jury, and not for the court, to determine whether the insured was fairly chargeable with 'unnecessary or negligent exposure' of himself to 'obvious danger' in the special circumstances. The speed of the train was not the only fact to be regarded, but the jury had the right to take into consideration also the condition of the roadbed as to its solidity, whether the train was running upon a straight track, the equipment of the platform with hand-railing, and all the facts and circumstances of the case."

In *Overbeck v. Travelers' Ins. Co.*, 94 Mo. App. 453, 68 S. W. 236, it is decided that a commercial traveler who, as his train is in motion and approaching his station, steps out on the platform, which is slippery from rain, and falls, voluntarily exposes himself to unnecessary danger.

VI. Doing Other Acts Resulting in Injury or Death.

a. *Attempting to Rescue Persons in Danger.*—The law has so high a regard for human life that it will not impute negligence to one who attempts to save it, unless the attempt is made under such circumstances as to constitute it rashness in the estimation of prudent persons. Hence a miner does not, as a matter of law, expose himself to unnecessary danger so that a recovery cannot be had on his insurance policy where, finding a fellow-workman a few feet from the entrance of the drift overcome by gas, he goes to his rescue and, in dragging him out, is himself overcome: *Da Rin v. Casualty Comp. of America*, 41 Mont. 175, 137 Am. St. Rep. 709, 108 Pac. 649, 27 L. R. A., N. S., 1164.

In *Tucker v. Mutual B. L. Co.*, 50 Hun, 50, 4 N. Y. Supp. 505, affirmed in 121 N. Y. 718, 24 N. E. 1102, it was decided that danger incurred while rescuing persons from a wrecked vessel was not within the clause of a policy exempting from liability in case of voluntary exposure to unnecessary danger. And in *Williams v. United States*

Mutual Acc. Assn., 82 How. 268, 31 N. Y. Supp. 343, affirmed in 147 N. Y. 693, 42 N. E. 726, it was held that the insured did not voluntarily expose himself to unnecessary danger in attempting to prevent a person from being run over by a train, in which attempt he was killed.

b. Sleeping on Top of Steamboat Boilers.—To entitle an insurer to exemption from liability for the death of the insured, on the ground that he voluntarily exposed himself to unnecessary danger, it must appear that he knew of and realized the danger, and with such knowledge voluntarily exposed himself to it. Hence one who lies down to sleep on the top of the boilers of a steamboat, and is there injured by steam escaping from a safety valve, is not guilty of voluntary exposure to unnecessary danger, though warned not to sleep there, unless he was conscious of the danger from the escaping steam from the safety valve: *Travelers' Ins. Co. v. Clark*, 109 Ky. 350, 95 Am. St. Rep. 374, 59 S. W. 7.

c. Falling from Scaffold.—In *Irwin v. Phoenix Acc. etc. Assn.*, 127 Mich. 630, 86 N. W. 1036, an action on an accident insurance policy containing the clause exempting the company from liability for voluntary and unnecessary exposure to danger, it appeared from the testimony that the insured was laying brick on a wall forty feet in height, and the scaffold on which he stood was supported by a "horse" at each end and one in the middle; and without the knowledge of the deceased someone removed the "horse" at one end, and when the insured stepped toward that end of the scaffold the boards tipped and he fell. It was held that there was no evidence of negligence on the part of the insured, and it was proper to direct a verdict in favor of the plaintiff. Said the court: "We think the language of this contract indicates the purpose of limiting the exception to cases of exposure to recognized dangers, and does not exempt the company from mere thoughtlessness on the part of the insured. The words 'unnecessary danger' are coupled with 'voluntary,' and, while the disjunctive is used, we think this is not conclusive of the construction. The word 'exposure,' used in this connection, implies an intentional act."

d. Getting Pigeons from Barn.—It is not an unnecessary exposure to danger where one is injured while attempting to get pigeons from the interior of his barn, to serve as food for himself and family: *Matthes v. Imperial Acc. Assn.*, 110 Iowa, 222, 81 N. E. 484.

e. Provoking Fight.—Though the assured approaches another, applying vulgar and abusive language to him, and the latter retreats, warning the assured not to approach, but he nevertheless continues his threatening demonstrations and is therefore shot and killed, he does not commit a breach of the condition of a policy exempting the insurer from liability for death caused by voluntary exposure to unnecessary danger, unless the assured knew, or had reason to apprehend, that his adversary was armed with a deadly weapon and would use it for the purpose of taking his life or inflicting serious bodily injury: *Union Casualty & S. Co. v. Harroll*, 98 Tenn. 591, 60 Am. St. Rep. 873, 40 S. W. 1080.

HUSKIE v. GRIFFIN.

[75 N. H. 345, 74 Atl. 595.]

CONSTITUTIONAL LAW—Right to Contract.—It is the inherent right of every man to freely deal, or refuse to deal, with his fellow-men, and this right is not to be destroyed or abridged by acts involving the elements of the common-law action for deceit. (p. 719.)

EMPLOYMENT—Liability for Interference.—One who, with intent to deprive another of employment, makes false statements regarding him, is liable for the damage occasioned thereby. (pp. 719, 720.)

EMPLOYMENT—Interference.—A Statement of the Truth, made for the sole purpose of damaging a person by causing a third person to refuse to further deal with or employ him, is actionable if damage ensues. (p. 720.)

EMPLOYMENT.—Malice in Interfering With Another's right to employment and preventing his employment may be inferred from the proved absence of other motive for the act done, and in case there is a sufficient justifiable motive, it may still be proved that in fact malice was the moving force. (p. 720.)

CONSTITUTIONAL LAW—Contracts—Open Market.—As the right to deal or not to deal with others is inherent in the idea of Anglo-Saxon liberty, *prima facie* a man can demand an open market; and one who interferes with this free market must justify his acts or respond in damages. (p. 722.)

EMPLOYMENT.—Justification for Interference With Another's right to employment may, in the absence of the elements of fraud and malice, be placed upon the ground that it was reasonable under all the circumstances of the case, and the issue thereby raised is one of fact. (pp. 723, 724.)

EMPLOYMENT.—A Malicious Wish to Injure a person cannot constitute a justification for an interference with his right to employment. (p. 724.)

The plaintiff was in the employ of the defendant, and upon applying for an increase of wages was told by the defendant's foreman that he might leave at any time if he could better himself. After seeking employment elsewhere he received a note from another firm offering him a position. This he showed to defendant's foreman, who drew his wages for him, and he thereupon left for his new employment. The defendant telephoned the new employer and complained of the way the plaintiff had left him and gone to the new employer, the result of which was the plaintiff did not obtain the position. Upon the trial a nonsuit was granted.

David W. Perkins, for the plaintiff.

Burnham, Brown, Jones & Warren, for the defendant.

347 PEASLEE, J. The parties to this action do not agree as to what facts the evidence tended to prove. The defendant argues that because he asked Trull to retain the plaintiff as an employee, therefore it cannot be found that the defend-

ant sought to cause the plaintiff's discharge by Trull. The plaintiff's claim is that the request to retain him might be found to be a mere cover, well understood by both parties to the conversation. His claim is well founded. A jury might believe that the complaint made by the defendant to Trull was false, and that the defendant, after he had encouraged the plaintiff to seek employment elsewhere, maliciously caused the plaintiff's discharge from such new employment.

The plaintiff's engagement was not for any certain period. Trull might lawfully discharge him at any time. It therefore follows that cases involving recovery for procuring the breach of a binding executory contract (*Bixby v. Dunlap*, 56 N. H. 456. 22 Am. Rep. 475; *South Wales Miners' Fed. v. Coal Co.*, [1905] App. Cas. 239) are not in point here. The issue presented is that of the existence and extent of what has come to be known as the right to an "open market." How far one may lawfully interfere to prevent the making of contracts between third parties is a problem which has been much discussed in other jurisdictions. It is new in this state. Three phases of it are presented by the case at bar: (1) When the interference is by fraud; (2) when it is without fraud or force (actually applied or reasonably apprehended), but prompted by a motive to injure the aggrieved party; (3) when it is unaccompanied by what are ordinarily considered illegal acts or motives, and is induced solely by a desire of the defendant to promote his own welfare.

1. It is well established that the inherent right of every man to freely deal, or refuse to deal, with his fellow-men is not to be destroyed or abridged by acts involving the elements of the common-law action for deceit. This is not denied. On this branch of the case the defendant relies upon the proposition that the facts are not made out. He concedes, as he plainly must concede, that the law is in favor of the plaintiff's position, provided only that there is evidence to support the several necessary findings.

As before stated, there was evidence in this case which, if believed by the jury, would lead to the conclusion that the defendant was guilty of fraud. It could be found that the plaintiff quit ³⁴⁸ the defendant's employ in an honorable manner; that the defendant, with knowledge of the facts, represented that the plaintiff's departure was dishonorable; that this was done with the intent to cause the new employer to act to the plaintiff's damage; and that such damaging action resulted from this cause. The plaintiff was entitled to go to the jury upon the issue of fraud.

2. Whether motive (when falsehood is absent) is a material element in these cases is a question upon which the authorities are not so fully agreed. That it is material, and that where malice, or a purpose to do the plaintiff injury, is the

moving force to the commission of the act, a recovery may be had, is the rule in many jurisdictions: *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339; *Van Horn v. Van Horn*, 56 N. J. L. 318, 28 Atl. 669; *Doremus v. Hennessy*, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802; *Ertz v. Produce Exchange*, 79 Minn. 140, 79 Am. St. Rep. 433, 81 N. E. 737, 48 L. R. A. 90; *Bowen v. Hall*, 6 Q. B. D. 333.

The rule is well stated in a recent case in California. "Any injury to a lawful business, whether the result of a conspiracy or not, is *prima facie* actionable, but may be defended upon the ground that it was merely the result of a lawful effort of the defendants to promote their own welfare. To defeat this plea of justification, the plaintiff may offer evidence that the acts of the defendants were inspired by express malice, and were done for the purpose of injuring the plaintiff and not to benefit themselves. The principle is the same which permits proof of express malice to defeat the plea of privilege in libel, or the defense of probable cause in actions for malicious prosecution or false imprisonment": *J. F. Parkinson Co. v. Trades Council*, 154 Cal. 581, 98 Pac. 1027, 16 Ann. Cas. 1165. The opposite view is taken by high authority: *Macauley v. Tierney*, 19 R. I. 255, 61 Am. St. Rep. 770, 33 Atl. 1, 37 L. R. A. 455; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. 1119, 21 L. R. A. 337; *Judge Jeremiah Smith* in 20 Harvard Law Review, 451 et seq.

For the reason above indicated and others which will be given in the discussion of the next issue in this case, it is held that a statement of the truth, made for the sole purpose of damaging the plaintiff by causing a third party to refuse to further deal with the plaintiff, is actionable if damage ensues.

The state of mind of an offending person may be proved in various ways. It may appear that there was no good reason for doing the act. In that case malice may be inferred from the proved absence of other motive for the act done. In case there be a sufficient justifiable motive, it may still be proved that in fact malice was the moving force. In either case the question is one of fact.

There was in the case at bar sufficient evidence to support a finding that the defendant did what he did for the sole purpose of depriving the plaintiff of the benefit of a contract for employment. ³⁴⁹ The question is not what the defendant now says his purpose was. It is not even what he said his purpose was at the time he made the complaint to Trull. Nor is his motive necessarily to be found in a literal application of the words he used. The conversation as testified to was susceptible of more than one interpretation. It may have meant that the defendant intended to cause the plaintiff to be discharged as a matter of small revenge, and while the defendant

was formally protesting against the act he had intentionally and maliciously caused. It is not, as the defendant claims, a case of guessing. It is one of interpreting the acts and words disclosed by the evidence in the case. Upon this issue the case should have been submitted to the jury, under instructions that if they found the act was done solely for the purpose of injuring the plaintiff, he was entitled to recover. If the damage was done "for its own sake," liability would be made out: *Vegeahn v. Guntner*, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, 35 L. R. A. 722, dis. op. of Holmes, J.

3. Beyond the issues of fraud and malicious injury lies one which has caused much of perplexity and conflicting adjudication. How far advantage may or may not lawfully be gained by appeal, persuasion, or threat of loss of future favor—whether those not involved in the initial contest may be dragged into it by these and kindred means—are questions which courts, jurists, and publicists have not found it easy to answer. Between the early view that a peaceful strike for higher wages was inherently wicked (*King v. Journeymen Tailors of Cambridge*, 8 Mod. 11; *In re Journeymen Cordwainers*, Yates Sel. Cas. 111, 277), and the theory that all honest and peaceful means are permissible (dis. op., *Vegeahn v. Guntner*, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, 35 L. R. A. 722), there is room for every shade of opinion. "It will be seen that in the different courts there is considerable variety and some conflict of opinion": *Berry v. Donovan*, 188 Mass. 353, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738.

Cases where the act complained of was committed by one person alone are comparatively rare, the plain reason being that peaceful and truthful persuasion, or promise of future favor, by a single individual is not likely to produce results of a character so grave as to induce the injured party to seek redress through the courts. But when the act is that of many persons, the result has not infrequently been to drive the injured party out of business or deprive him of an opportunity to labor at his chosen calling. In many cases it has been decided that the common law governing criminal conspiracies offered a sufficient ground for holding the offenders liable civilly: *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 128 Am. St. Rep. 492, 114 S. W. 997, 22 L. R. A., N. S., 607, and authorities there reviewed. It was soon perceived, however, that the argument was unsound; and the theory that acts which might lawfully be done by one or any number ³⁵⁰ of persons, acting singly, were unlawful when done by several acting by a concerted plan, was abandoned in most jurisdictions: *Boutwell v. Marr*, 71 Vt. 1, 76 Am. St. Rep. 746, 42 Atl. 607, 43 L. R. A. 803; *Toledo etc. Ry. v. Pennsylvania Co.*, 54 Fed. 730, 19 L. R. A. 387.

Another ground taken was that there is in the concerted action of the many a coercive element which should be placed on a par with the use of force, or with the undue influence sometimes exercised over persons not fully capable of protecting themselves: *Boutwell v. Marr*, 71 Vt. 1, 76 Am. St. Rep. 746, 42 Atl. 607, 43 L. R. A. 803; *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339; *Curran v. Galen*, 152 N. Y. 33, 57 Am. St. Rep. 496, 46 N. E. 297, 37 L. R. A. 802; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. 1119, 21 L. R. A. 337; *Casey v. Cincinnati T. Union*, 45 Fed. 135, 12 L. R. A. 193. The reasoning by which this view has been supported not infrequently suggests the true solution of the difficulty. The conclusion has been reached by deciding what was or was not reasonable conduct under the circumstances of the case.

The more recent authorities reason that, as the right to deal or not to deal with others is inherent in the idea of Anglo-Saxon liberty, *prima facie* a man can demand an open market; and since this is so, one who interferes with the free market must justify his acts or respond in damages. Thus far these authorities are uniform; but when they proceed to the determination of what amounts to a justification, they differ widely. The cause is not far to seek. The rule which they apply is that of reasonable conduct, yet they discuss and decide each case as though it involved only a question of law. In reality, the issue is largely one of fact, and the result is what would be expected. Judges are men, and their decisions upon complex facts must vary as those of juries might on the same facts. Calling one determination an opinion and the other a verdict does not alter human nature, nor make that uniform and certain which from its nature must remain variable and uncertain. While these cases go too far in what they decide as questions of law, yet the test they constantly declare they are applying is the true one. The standard is reasonable conduct under all the circumstances of the case: *Berry v. Donovan*, 188 Mass. 353, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; *Macauley v. Tierney*, 19 R. I. 255, 61 Am. St. Rep. 770, 33 Atl. 1, 37 L. R. A. 455; *Doremus v. Hennessy*, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802.

"What is the measure or test by which the conduct of a combination of persons must be judged in order to determine whether or not it is an unlawful interference with freedom of employment in the labor market, and as such injurious to an employer of labor in respect of his 'probable expectancies,' has not as yet been clearly defined. Perhaps no better definition could be suggested than that which may be framed by conveniently using that important legal fictitious person who has taken such a large part in the development of our law

during the last fifty years—the reasonably prudent, ³⁵¹ reasonably courageous, and not unreasonably sensitive man. Precisely this same standard is employed throughout the law of nuisance in determining what degree of annoyance . . . one must submit to”: *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230.

Occasionally courts have recognized in a degree the principle that the question should be treated as one of fact. “The judge rightly left to the jury the question whether, in view of all the circumstances, the interference was or was not for a justifiable cause. If the plaintiff’s habits, or conduct, or character had been such as to render him an unfit associate in the shop for ordinary workmen of good character, that would have been a sufficient reason for interference in behalf of his shopmates. We can conceive of other good reasons. But the evidence tended to show that the only reason for procuring his discharge was his refusal to join the union. The question, therefore, is whether the jury might find that such an interference was unlawful”: *Berry v. Donovan*, 188 Mass. 353, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738.

There is no such difficulty in dealing with the question here as has been met with elsewhere, and it is not necessary to attempt to reconcile the conflict which has resulted from the application of a view which does not obtain in this jurisdiction. In this state the question of reasonable conduct, whether in relation to tangible property or to intangible rights, is one of fact: *Ladd v. Granite State Brick Co.*, 68 N. H. 185, 37 Atl. 1041, and cases cited. But while the question to be settled is within the province of the jury, there are still legal propositions involved in the case. It must be determined whether there is anything for the jury to weigh—whether the evidence is not conclusive one way or the other upon the issue of reasonable conduct.

At the present time no one would think of submitting to a jury the question whether a peaceful strike for higher wages was reasonable. They would be told, as matter of law, that such action was within the laborers’ rights. So there may be conduct which is clearly unreasonable, or not justifiable. An illustration of such conduct is presented by the second ground for recovery in this case. One may not interfere with his neighbor’s open market or “reasonable expectancies” solely for the purpose of doing harm. It has been said, however, in several cases that a wrongful motive cannot convert a legal act into an illegal one, and many judges have thought this was the end of the law upon the question. They seem to proceed upon a theory of absolute right in the defendant, which is at variance with the holding in many of the same cases, that the defendant may be called upon to justify his conduct. Indeed, the authorities are practically unanimous to ³⁵² the effect

that the defendant is liable unless he shows a justification. If this is true, it follows, as matter of course, that his right is not absolute. It is a qualified one, and the rightfulness of its exercise depends upon all those elements which go to make up a cause for human action. The reasonableness of the act cannot always be satisfactorily determined until something is known of the state of the actor's mind. The "justification may be found sometimes in the circumstances under which it is done, irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and motive combined": *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339.

Since the defendant is called upon to justify—to show reasonable cause for the interference with his neighbor's right—it seems to clearly follow that where his only reason is his malicious wish to injure the plaintiff, he has no justification. It is a contradiction in terms to say that a desire to do harm for the harm's sake can be called a just motive. In a late case in this state it is said of the use of property that "it cannot be justly contended that a purely malicious use is a reasonable use. The question of reasonableness depends upon all the circumstances—the advantage and profit to one of the use attacked, and the unavoidable injury to the other. Where the only advantage to one is the pleasure of injuring another, there remains no foundation upon which it can be determined that the disturbance of the other in the lawful enjoyment of his estate is reasonable or necessary": *Horan v. Byrnes*, 72 N. H. 93, 101 Am. St. Rep. 670, 54 Atl. 945, 62 L. R. A. 602.

The same reason applies here. If the evidence had been conclusive that the act was done solely from a malicious motive, a verdict would have been directed for the plaintiff. It is not improbable that there are other plain cases—cases where there is nothing for the jury to pass upon. The third issue in this case does not come within that class. It cannot be said that all reasonable men would conclude that every reasonable man would or would not do what the defendant did, even though he acted honestly and from a proper motive. If anyone doubts this assertion, he has but to read the cases where this and kindred questions have been discussed and decided as those of law: *Vegehlahn v. Guntner*, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, 35 L. R. A. 722; *Berry v. Donovan*, 188 Mass. 353, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738, and cases there cited; *L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass. 110, 85 N. E. 897, 23 L. R. A., N. S., 1236; *National Protective Assn. v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 369, 58 L. R. A. 138; *Jacobs v. Cohen*, 183 N. Y. 207, 111 Am. St. Rep. 730, 76 N. E. 5, 2 L. R. A., N. S., 292, 5 Ann. Cas. 280; *Wilson v. Hey*, 232 Ill. 389, 122 Am. St. Rep. 119, 83 N. E. 926, 16 L. R. A., N. S.,

85, 13 Ann. Cas. 82; Barnes v. Chicago T. Union, 232 Ill. 424, 83 N. E. 940, 14 L. R. A., N. S., 1018, 13 Ann. Cas. 54. When eminent judges come to opposite conclusions upon a question, it can hardly be said that jurors might not reasonably do the same.

The plaintiff was entitled to go to the jury upon all three ³⁵³ grounds which have been considered: (1) Fraud, (2) malicious injury, and (3) unreasonable interference with the open market. Whether section 12, chapter 266, Public Statutes, affords a basis for a claim of greater right in the plaintiff is a question which has not been argued and is not considered.

Exception sustained.

All concurred.

An Intentional Interference With One's Right to Labor and to Contract for His Labor, without lawful justification, is malicious in law, even if it is through good motives and without express malice. The right to dispose of one's labor and to have the benefit of one's labor contract is incident to the freedom of the individual, and such a right can lawfully be interfered with only by one who is acting in the exercise of some equal or superior right: *Berry v. Donovan*, 188 Mass. 353, 108 Am. St. Rep. 499.

The Liability of a Person Who Interferes Between Employer and Employees, either to occasion the latter to be discharged or to voluntarily leave their employment, is the subject of a note to *Webber v. Barry*, 11 Am. St. Rep. 474.

ATTORNEY GENERAL v. CROWLEY.

[75 N. H. 393, 74 Atl. 1055.]

CERTIORARI.—That Proceedings are Void and subject to collateral attack is not a valid objection to a direct proceeding to set them aside, and certiorari may be maintained for that purpose. (p. 726.)

OFFICERS—Power of Removal Judicial.—Statutes authorizing the removal of officers for cause confer judicial powers on the body that is to exercise them. (p. 727.)

OFFICERS—Removal for Cause.—The Word "Cause" in a statute authorizing the removal of officers for cause means legal cause, and contemplates a charge, notice, hearing, and judgment of removal upon cause. (p. 728.)

OFFICERS — Removal — Power of Court on Certiorari.—The power of the court upon a certiorari is limited to the correction of errors of law apparent upon the record. On the review of a proceeding removing an officer, the right of a subsequent appointee to the office cannot be determined. (p. 728.)

Hamblett & Spring and Wason & Moran, for Hagerty.

Doyle & Lucier and Burnham, Brown, Jones & Warren, for Shedd and Crowley.

³⁹³ BINGHAM, J. The first proceeding is a petition for a writ of certiorari, directing the mayor and aldermen of the city of Nashua ³⁹⁴ to certify the records of their proceedings in removing Hagerty from membership in the board of public works of the city, and asking that their order removing him from office be decreed null and void. The second is a petition for a writ of quo warranto to oust the defendant Crowley from membership in the board of public works, he having been appointed by the mayor and aldermen of the city to fill the vacancy caused by the removal of Hagerty, and having qualified and entered upon the duties of the office. In the superior court the writ of certiorari was granted and the record and proceedings of the mayor and aldermen in removing Hagerty from office were quashed and adjudged void, and the defendants excepted. In the quo warranto proceeding the trial judge found that the defendant was usurping the office from which Hagerty had been removed, and declined to allow the defendant to show the real cause upon which the mayor and aldermen acted in making the order of removal, and the defendant excepted.

The various contentions of the parties in these cases depend largely upon the decision of the question of the capacity in which the mayor and aldermen acted in removing Hagerty from office. If their powers were administrative and not judicial, there would be no occasion for a writ of certiorari to correct the record or set aside the proceedings: *State v. Richmond*, 26 N. H. 232. In such case the record might be amended to conform to the facts, on motion made for that purpose in any proceeding where it was brought in question. If, however, their powers were judicial, the mayor and aldermen having jurisdiction of the subject matter upon which they acted, there may have been, and probably was, occasion for a writ of certiorari to set the proceedings aside, although they were summary, without preferment of charges, notice, and hearing: *Gibbs v. Manchester*, 73 N. H. 265, 61 Atl. 128. But if the fact that the proceedings were summary would render them subject to attack collaterally, that would not constitute a valid objection to a direct proceeding to set them aside. "Indeed, it may be regarded as settled that though a party has a right to treat the proceedings of an inferior tribunal as nullities in a collateral proceeding, he may, nevertheless, maintain a certiorari to set them aside": *State v. Richmond*, 26 N. H. 232.

It appears that Hagerty's appointment was legal, and that his office carried a fixed salary and was for a term of three years. The statute under which the removal was made reads as follows: "The mayor, with the advice and consent of the majority of the full board of aldermen, may remove any member appointed as aforesaid for cause": *Laws 1901, c. 283, sec.*

2. If the word "cause," as here used, means legal cause and after notice and hearing, the statute confers judicial powers and means the same as ³⁹⁵ though it read "for cause, after notice and hearing": *Gibbs v. Manchester*, 73 N. H. 265, 61 Atl. 128.

In *Shannon v. Portsmouth*, 54 N. H. 183, the action was assumpsit to recover compensation for the services of the plaintiff as a constable and police officer, from July 17 to December 15, 1870. He was duly appointed a constable and police officer of Portsmouth, January 13, 1870, and qualified and served as such down to July 7th of that year. He was then notified to appear before the mayor and aldermen to answer charges verbally preferred against him, appeared, and was heard. Thereupon the mayor and aldermen voted that he be suspended from duty. From that time down to December 15, 1870, when he was reinstated, he was not permitted to perform the duties of his office, although ready and willing at all times to do so. At the trial he offered to prove that there was no sufficient cause for his removal or suspension, but the evidence was excluded and a verdict found for the defendants, subject to exception. The provision of the charter of Portsmouth under which the action was taken reads as follows: "They [the mayor and aldermen] shall have full and exclusive power to appoint a city marshal and assistants, constables, and all other police officers; . . . and to remove the same from office for sufficient cause, the mayor and aldermen each having a negative on the other, both in the appointment and removal of officers": Laws 1849, c. 836, sec. 13. In construing the act it was held: (1) That the power to remove included the power to suspend; (2) that the evidence offered for the purpose of showing that the cause for which the plaintiff was suspended was not a legal cause was properly excluded, for the reason that the suspension proceedings were judicial and could not be attacked collaterally; that "if the validity of the suspension is disputed, the plaintiff's remedy must be sought in a proceeding for that purpose, which will put the legality of the acts of the mayor and aldermen directly in issue."

Although the reasoning in this decision may not be as explicit as could be desired, there can be no doubt as to its meaning, and that it was there decided that the power conferred on the mayor and aldermen by the charter, to remove and suspend police officers and constables for sufficient cause, was judicial. Such being the construction of a legislative act conferring power to remove for cause when chapter 283, Laws of 1901, was enacted, it is to be presumed that the legislature, by making use of the same language or its equivalent in section 2, intended that it should be taken to confer like power: *Green v. Bancroft*, 75 N. H. 204, 72 Atl. 373. Moreover, it is gen-

erally held that statutes authorizing the removal of officers for cause confer judicial powers on the body that is to exercise ³⁹⁶ them, and that the word "cause" means legal cause, and contemplates a charge, notice, hearing, and judgment of removal upon cause: *Ham v. Board of Police*, 142 Mass. 90, 7 N. E. 540; *State v. Hoglan*, 64 Ohio St. 532, 60 N. E. 627; *Dullam v. Wilson*, 53 Mich. 392, 51 Am. Rep. 128, 19 N. W. 112; *People v. Therrien*, 80 Mich. 187, 45 N. W. 78; *Hallgren v. Campell*, 82 Mich. 255, 21 Am. St. Rep. 557, 46 N. W. 381, 9 L. R. A. 408; *State v. Common Council*, 53 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 118; *State v. St. Louis*, 90 Mo. 19, 1 S. W. 757; *State v. Walbridge*, 62 Mo. App. 162, 69 Mo. App. 657; *McCully v. State*, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567; *State v. Smith*, 35 Neb. 13, 52 N. W. 700, 16 L. R. A. 791; *Benson v. People*, 10 Colo. App. 175, 50 Pac. 212; *State v. Hewitt*, 3 S. D. 187, 44 Am. St. Rep. 788, 52 N. W. 875, 16 L. R. A. 413; *Biggs v. McBride*, 17 Or. 640, 21 Pac. 878, 5 L. R. A. 115; *Osgood v. Nelson*, L. R. 5 H. L. 636; 1 *Dillon on Municipal Corporations*, 4th ed., sec. 250; 2 *Abbott on Municipal Corporations*, sec. 636; *Mechem on Public Officers*, sec. 454; 29 Cyc. 1409.

The power of removal conferred upon the mayor and aldermen being judicial, the rejection of the offer to show that the cause for removing the plaintiff was a just and legal one, if erroneous, did not harm the defendants; for the proceedings were irregular and summary, without preferment of charges, notice, and hearing, and would not be cured by a finding that the cause of removal was just and legal.

The position of the defendant Crowley, who was made a party to the certiorari proceedings, that he was entitled, as a matter of law, to prove that he had qualified as a member of the board of public works and entered upon the performance of the duties of his office at the time the petition for a writ of certiorari was served upon him, and to have the question whether he was a usurper determined in that proceeding, cannot be sustained. "The superintending power of the court is limited to the correction of errors of law apparent upon the record, or to requiring the body to act if they refuse to entertain a contest": *Sheehan v. Mayor and Aldermen*, 74 N. H. 445, 68 Atl. 872. Matters outside the record as certified from the inferior tribunal cannot be considered: *Sheehan v. Mayor and Aldermen*, 74 N. H. 445, 68 Atl. 872; *Richardson v. Smith*, 59 N. H. 517; *Hayward v. Bath*, 35 N. H. 514; *Landaff's Petition*, 34 N. H. 163; *Osgood v. Nelson*, L. R. 5 H. L. 636; 3 *Abbott on Municipal Corporations*, sec. 1126.

Exceptions overruled.

All concurred.

The Removal of Officers for Cause and the Use of Certiorari to review the proceedings are discussed in the note to McNiff v. City of Water-

bury, 135 Am. St. Rep. 250, 259. See, also, *State v. City of Duluth*, 53 Minn. 238, 39 Am. St. Rep. 595. The mayor of a city, investigating charges against a marshal, cannot be reached by prohibition, because that writ must be directed to some judicial officer, and the mayor and city council, sitting as a court of impeachment to try charges looking toward the removal of a marshal for misconduct, is not a judicial, but an administrative, body: *State v. Bright*, 224 Mo. 514, 135 Am. St. Rep. 552. That any proceeding initiated to remove a person from a public office, before a person or body having jurisdiction to decide upon the existence of cause for removal, is judicial in its character, and the tribunal to which it is presented is a court for that particular purpose, see the note to *McNiff v. City of Waterbury*, 135 Am. St. Rep. 260.

TAGGART v. JAFFREY.

[75 N. H. 473, 76 Atl. 123.]

WATERS—Artificial Channel.—Riparian Rights may be acquired along the artificial channel of a natural stream, and where such artificial channel was intended to be permanent and has existed for over sixty years, a proprietor on the bank thereof has the same rights as the proprietor on the bank of a natural channel. (p. 731.)

WATERS—Taking for Public Use—Compensation.—The waters of a stream flowing through private lands cannot be taken for public use without compensation to the owners of the land. (p. 732.)

WATERS—Diminution of Flow.—Evidence that a shortage of water was caused by other means than the diversion by the defendant is admissible, but evidence that the plaintiff might have used better methods of conservation is not admissible. (p. 733.)

NEW TRIAL—Accident and Surprise.—Where the ruling on an offer by a party to prove certain facts is misunderstood by counsel and they are thereby prevented from showing certain competent facts, the remedy is by motion for a new trial on the ground of accident and surprise. (p. 734.)

The plaintiff acquired title to, and built a house and out-buildings upon, certain land past which there flowed, and for more than sixty years had flowed, an artificial watercourse, made by diverting the waters from a natural watercourse. The plaintiff used the water for domestic purposes, taking it, at first, by means of pails, but subsequently by a ram. The defendant by taking water from the pond, under chapter 255, Laws of 1901, caused an alleged depletion of the water in the artificial channel, which depletion is the basis of the plaintiff's complaint. The other facts are stated in the opinion.

Doyle & Lucier, for the plaintiff.

Cain & Benton, for the defendants.

⁴⁷⁴ PEASLEE, J. The waters flowing from Bullet pond were diverted from their natural channel more than sixty

years ago, and have since flowed in the channel then prepared for them. The change was evidently intended to be permanent, and the present channel of the stream is now, for all legal purposes, its natural one. "It has often been decided, both in England and America, that watercourses made by the hand of man may have been created under such conditions that, so far as the rules of law and the rights of the public or of individuals are concerned, they are to be treated as if they were of natural origin": *Stimson v. Brookline*, 197 Mass. 568, 125 Am. St. Rep. 382, 83 N. E. 893, 16 L. R. A., N. S., 280, 14 Ann. Cas. 907; *Townsend v. McDonald*, 12 N. Y. 381, 64 Am. Dec. 508; *Magor v. Chadwick*, 11 Ad. & E. 571; *Sutcliffe v. Booth*, 9 Jur., N. S., 1037; 3 *Farnham on Waters*, sec. 827b.

Cases involving the rights of proprietors along artificial streams, as distinguished from natural streams running in artificial courses, are not in point. The distinction between the two has often been recognized: *Murchie v. Gates*, 78 Me. 300, 4 Atl. 698; *Stimson v. Brookline*, 197 Mass. 568, 125 Am. St. Rep. 382, 83 N. E. 893, 16 L. R. A., N. S., 280, 14 Ann. Cas. 907; *Nuttall v. Bracewell*, L. R. 2 Ex. 1; *Wood v. Waud*, 3 Ex. 748.

⁴⁷⁵ Rights in new courses for natural streams have been supported upon various grounds.

"When a stream flowing through a person's land is diverted into a new channel, either artificially or by a sudden flood, affecting the rights of other riparian proprietors favorably, and the owner acquiesces in the new state of the stream for so long a time that new rights accrue, or may be presumed to have accrued, such acquiescence is binding, like a public dedication, and the stream cannot be lawfully returned to its former channel": *Gould on Waters*, sec. 159; *Ford v. Whitlock*, 27 Vt. 265; *Burk v. Simonson*, 104 Ind. 173, 54 Am. Rep. 304, 2 N. E. 309, 3 N. E. 826.

In some cases the mere running of the water for the prescriptive period, under conditions apparently intended to be permanent, has been considered sufficient to warrant a holding that the usual riparian rights along a natural stream have attached: *Murchie v. Gates*, 78 Me. 300, 4 Atl. 698; *Gaved v. Martyn*, 19 Com. B., N. S., 732.

"There is a much more impregnable foundation [than prescription] upon which to put such decisions, and that is upon the ground of estoppel. If the land owner makes a change in the course of the stream which to all appearance is permanent, and holds out to the world the representation that such condition is permanent, he will be bound by his acts; and after other persons have acquired rights by changing their positions upon the faith of such representations, he will not be permitted to deny that they were true, or claim that the

stream is not flowing in its true channel": 3 Farnham on Waters, sec. 827c; Woodbury v. Short, 17 Vt. 387, 44 Am. Dec. 344; Lapman v. Milks, 21 N. Y. 505; Lamott v. Ewers, 106 Ind. 310, 55 Am. Rep. 746, 6 N. E. 636.

"If the land owner, having changed the direction of the natural stream through his land, were to suffer others who are entitled to use the water to expend money in reference to such use, under a belief that the new channel was to be permanent, and this were known to him, he could not afterward change its course so as to injure the party who had expended his money. In these and like cases, whenever one who owns a watercourse in which another is interested, or by the use of which another is affected, does any act, or suffers any act to be done, affecting the rights of other proprietors, whereby a state of things is created which he cannot change without materially injuring another who has been led to act by what he himself had done or permitted, the court applies the doctrine of equitable estoppel": Shepardson v. Perkins, 58 N. H. 354. Whether this case is fairly open to criticism because of an attempt to sustain the conclusion reached by inconsistent lines of reasoning (3 Farnham on Waters, sec. 827), it is not now necessary to inquire.

The rule is universal that riparian rights may be acquired along ⁴⁷⁶ the artificial channel of a natural stream. Upon any of the grounds suggested, this plaintiff could maintain his position. There was a dedication. The stream had been changed in a manner to indicate that the alteration was permanent. There are prescriptive rights. It ran in this way for more than twice the period necessary to the presumption of a grant before the plaintiff purchased his tract of land. There is an estoppel. He relied upon the apparently permanent conditions when he made his purchase; and since that time, and acting upon conditions as they were, he has openly made the improvements which he says are now interfered with. That he has the rights of a riparian proprietor upon a natural watercourse cannot be open to serious question.

The cases relied upon by the defendant (Fox River etc. Co. v. Kelley, 70 Wis. 287, 35 N. W. 744; Lawson v. Mowry, 52 Wis. 219, 9 N. W. 280) are not applicable here. The law of Wisconsin is in harmony with that elsewhere. In a recent case in that state many of the American authorities are quoted with approval, and the court declares the law to be that "the watercourse, though artificial, may have originated under such circumstances as to give rise to all the rights that riparian proprietors have in a natural and permanent stream, or have been so long used as to become a natural watercourse prescriptively": Smith v. Youmans, 96 Wis. 103, 65 Am. St. Rep. 30, 70 N. W. 1115, 37 L. R. A. 285.

While in a case like this the right acquired includes the privilege of taking water for domestic use (*Roberts v. Richards*, 44 L. T. 271), the defendant is in error in basing its argument upon the proposition that the complaint is for the interference with such right. There is no suggestion in the case that there is not at all times sufficient water in the stream to supply the plaintiff's domestic needs. The complaint is for loss of power to drive the plaintiff's hydraulic ram. The depletion of the water-power is the wrong for which compensation is sought.

The defendant also sets up the claim that "the waters in the pond were public waters, and could be used by the state or any particular subdivision of it for any public purpose without compensation to the plaintiff." The law is otherwise. The bed of the pond is the property of the state. "Before the township was granted, the public held not only the basin of the pond, but also the bed, banks and valley of the brook that flows from the pond to the river. In that position of the title, the public owner could divert the entire pond from its outlet without infringing private rights between the pond and the river. If the original title to the valley had remained unchanged, this suit could not be maintained. But the public owner elected to convert into private property the mill site. . . . The grant of the bed of the brook to private proprietors, whose title has come to the plaintiffs, conveyed rights⁴⁷⁷ of air, light, heat and water. . . . If the original owner had desired to retain an unlimited right to divert the pond and destroy the mill privilege, there should have been an express reservation. A right to the natural flow of the brook, not unreasonably diminished or polluted, was inherent in the land, and one of the rights of use and occupation of which the title was composed. . . . By an elementary rule of conveyancing, it passed from grantor to grantee, in the absence of a stipulation to the contrary. The operation of the rule did not depend upon the question whether the water was a natural pond, large or small, before it entered the plaintiff's lot. . . . If the plaintiffs have been injured by an unreasonable use of the pond, or of any other lot of land or water, there is a legal remedy": *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. 718, 18 L. R. A. 679.

2. Exception was taken to the exclusion of certain evidence. The defendant was urging that the plaintiff ought to conserve the surplus waters for use in dry seasons, and was offering evidence as to how this might be done. It was then suggested that it did not appear that the plaintiff had any right to control or repair the structures referred to. The court then caused the following statement to be entered upon the record: "The evidence introduced, whereby it is claimed that the plaintiff could have conserved the water at Rugg

meadow and Grassy pond, is excluded." The defendant then made the following offer of proof: "We offer the evidence excluded and other evidence tending to show that if the plaintiff, or the persons having control of the canal and the dam at Rugg meadow and Grassy pond, maintained the structures for the conservation of water at those places as they stood several years ago, the stream flowing past Taggart's house would be fed at all seasons of the year, so that he would have sufficient water to run his ram. The evidence is offered upon the ground that Taggart's claim to recover is based upon his claim to rights in the canal, and on the further ground that the defendant is entitled to show that the damage of which the plaintiff complains is caused by the acts of the persons having control of the canal, in allowing the same to fall into a lack of repair which did not formerly exist, and is not attributable to the acts of the defendant." The proffered evidence was excluded, subject to exception.

The plaintiff based his case upon evidence that he suffered no shortage until the first drought after the defendant built its waterworks. This was in the fall of 1902. It then became competent for the defendant to show that the shortage at that time was caused by a want of repair in the structures between Bullet pond and the plaintiff's premises. This is manifestly a different proposition from the offer to show that better conservation facilities ⁴⁷⁸ would improve the plaintiff's water supply. The testimony that the structures were out of repair was not excluded. The offer of proof is said by those who tendered it to have been "made with extreme care," and is to be here treated as stating fully what the defendant expected to prove. The presiding justice understood that the offer was merely to show that conservation would have furnished sufficient water to operate the plaintiff's ram. The idea of the defendant seemed to be that the plaintiff's rights were limited to the amount of power he used. His right was to the whole power, less reasonable diminution by the upstream proprietors. There was no offer to show that conservation would have given the plaintiff his full right; and it is no answer for one who has interfered with it to say that if it had not been for other interference by third persons, the plaintiff would still have had as much of his right as he desired to use. Neither is it an answer to say that if the plaintiff took care of what the defendant left for him, he would have no need for what the defendant had wrongfully taken. This is what the offer of proof amounted to. It was an offer to show that he would have "sufficient water to run his ram." The statement now relied upon, that "the defendant is entitled to show that the damage of which the plaintiff complains is caused by the acts of the persons having control of the canal, in allowing the same to fall into a lack of repair which did not

formerly exist, and is not attributable to the acts of the defendant," was not made as an offer to prove these facts. It was stated as a reason why the facts which were offered ought to be received. The record shows that the defendant had been persistently urging the position that because the plaintiff, or those controlling the outlets at Grassy pond and Rugg meadow, did not take care of what water the defendant left in the stream, therefore the defendant was not accountable to the plaintiff for what it took. The offer of proof was the culmination of the discussion of this proposition, and was understood by the presiding justice to have the meaning above indicated. "The court did not exclude, but allowed the defendant to introduce, testimony tending to show that, because of the condition of the dams and canal as they have been since the fall of 1902, the water went to waste and was diverted, as tending to show that the depletion of the water complained of by the plaintiff was not the taking of the water by the town as aforesaid. The evidence excluded was simply evidence tending to show how the water of the canal might be conserved." The offer of proof was made in such a form that it was not unreasonable for the court to understand it as he did. If counsel had a different understanding, the burden was upon them to state it plainly: *Felch v. Weare*, 66 N. H. 582, 27 Atl. 226. If, as they now seem to claim, the ⁴⁷⁹ defendant's counsel understood the ruling to prevent them from introducing other evidence upon the facts as to the comparison between the past and present conditions of the structures at Grassy pond and Rugg meadow, their remedy is to apply to the superior court for a new trial upon the ground of accident or mistake: Pub. Stats., c. 230, sec. 1. The exception is overruled.

Case discharged.

All concurred.

A Watercourse Made by the Hand of Man may have been created under such conditions that, so far as the rules of law and the rights of individuals are concerned, it is to be treated as if it were of natural origin: *Stimson v. Brookline*, 197 Mass. 568, 125 Am. St. Rep. 382. The artificial state or condition of flowing water founded upon prescription becomes a substitute for the natural condition previously existing; and from it arises a right on the part of those interested to have the new condition maintained: *Smith v. Youmans*, 96 Wis. 103, 65 Am. St. Rep. 30. Where the flow of a stream has been diverted from its natural channel, or obstructed by a permanent dam, and this has continued for the time necessary to establish a prescriptive right, the riparian owners along such stream, who have improved their property with reference to the change and in reliance on the continuance thereof, acquire a reciprocal right to have the artificial conditions remain undisturbed: *Kray v. Muggli*, 84 Minn. 90, 87 Am. St. Rep. 332.

BLAISDELL v. DAVIS PAPER COMPANY.

[75 N. H. 497, 77 Atl. 485.]

MASTER AND SERVANT—Unexploded Blast.—Where a servant is injured by the explosion of dynamite, which had failed to explode in a blast, while removing dirt loosened by the blast, the question of the negligence of the master should be left to the jury in the absence of evidence of careful inspection and the use of every precaution human ingenuity could suggest, and of warning to the workmen. (p. 736.)

MASTER AND SERVANT—Warning of Danger.—In addition to using precaution to furnish servants a safe place to work, the master must warn them of secret dangers, and it does not absolve him to show that they could not have avoided the danger had they known of it. (p. 736.)

FRAUD—Motive.—A Less Amount of Evidence of the participation in a fraud of a sole beneficiary thereof is sufficient to support a finding that he was a party thereto than in a case where the party sought to be charged was not interested in the subject matter, or where the visible actor had himself some end of his own to serve. (p. 737.)

The defendant, through a foreman and laborers, was engaged in blasting certain hard-pan by the use of dynamite set in a series of holes and fired by a battery. The blasts would leave the surface of the earth disturbed, but an inspection shortly after the blast and before the ground was trampled over would disclose any charge that had failed to explode. Such an inspection was not made by the defendant or his foreman, but the foreman and the men went back to work on the premises after each blast. Three or four days after a blast the deceased, while working with pick and shovel, was killed by the explosion of a charge that had failed to explode in the blast.

In negotiations for a settlement between the administrator of the deceased, the defendant, and the father of the deceased, representing the widow, the administrator and the defendant made false statements to the father as to the cause of the accident, and the administrator informed the father of the deceased that he had obtained legal advice that no recovery could be had, which he knew to be false, and advised a settlement for a small amount.

Albin & Sawyer, for the plaintiff.

Streeter, Hollis, Demond & Woodworth, for the defendant.

499 PEASLEE, J. It might be found from the evidence that the presence of dynamite at the place of the accident resulted from the failure to explode one of the series of holes loaded on Saturday, and that such an accident might have been anticipated. It might also be found that but little, if

any, inspection was made after any of the series of holes was fired, to learn whether any charges of dynamite had failed to explode. In view of the extreme hazard which would be created by the presence of such an explosive in ground which a gang of men were removing with pick and shovel, it cannot be said, as matter of law, that it was not the master's duty to use every precaution human ingenuity could suggest, or else warn the workmen of the danger: *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. Rep. 464, 39 L. ed. 464. Since it could be found the master did not act up to this standard, the question of its fault was properly submitted to the jury. "There might be a liability on the part of the defendant, . . . even though neither he nor his superintendent knew or had reason to believe that there was an unexploded charge of dynamite there. It was enough to create a liability if they knew, or ought to have known, of such a possibility or probability that some of the dynamite remained unexploded as to make an inspection necessary for the safety of the workmen": *Hooe v. Boston & N. S. Ry. Co.*, 187 Mass. 67, 72 N. E. 341.

But if it were conceded that there was not sufficient evidence of failure to use precautions to discover the danger, the fact that no information was given to Libby may of itself be a ground for recovery. Even when the master has done all that he can to make a work place safe, he may have a further duty to perform. If there are secret dangers, the servant is entitled to be told of them. He may justly say he did not contract to enter upon so hazardous an undertaking, and that putting him to work in such a place was in effect setting a trap for him. It does not absolve ⁵⁰⁰ the master to show that the servant could not have avoided the danger had he known of it. He might have avoided it by not entering upon the work: *Welch v. Bath Iron Works*, 98 Me. 361, 57 Atl. 88.

"The doctrine is well settled and elementary that it is a master's duty to notify his servant of any hidden defect in the place where the latter is expected to work which increases the ordinary risks of the employment, and to advise him of any latent danger which may attend the doing of any work which the servant is called upon to perform, provided the defect or the danger in question is known to the master and is unknown to the servant.

"A master violates his duty and is guilty of culpable negligence whenever, without warning, he exposes his servant to a risk of injury which is not obvious and was not known to the servant, provided the master himself was either acquainted with the risk, or in the exercise of ordinary care ought to have been acquainted with it": *Gowen v. Bush*, 76 Fed. 349, 22 C. C. A. 196. "This is but an application to different circumstances of a rule frequently applied in cases of injuries received by a servant resulting from latent dangers in ma-

chinery; namely, that a servant is not to be exposed without warning to latent dangers of which he knows nothing, and is not chargeable with imputed knowledge, provided the master knew, or ought to have known, of the danger": *Kliegel v. Aitken*, 94 Wis. 432, 59 Am. St. Rep. 901, 69 N. W. 67, 35 L. R. A. 249.

If it cannot be said that all reasonable men would inform a servant of such a peril as this, neither can it be held as matter of law that the rule of reasonable conduct might not be found to embrace such action. Libby had no knowledge of the work of using dynamite, and it is conceded he was free from fault. As a practical proposition of every-day life, it would not be said that the employer who set such an uninformed servant at work in a place of so great possible peril was free from fault. The judgment of men might be that the employer's conduct was not reasonable. As such reasonable conduct was the standard of legal duty toward its servants, the defendant's motion for a nonsuit because there was no evidence of a violation or neglect of any legal duty it owed to the plaintiff's intestate was properly denied.

2. It is not open to serious question that there was abundant evidence of bad faith and double-dealing on the part of the administrator. The question is whether the evidence sufficiently connects the defendant with his conduct. As the defendant would be the sole beneficiary of such a fraud, a less amount of evidence of its participation therein would be sufficient to support a finding that it was a party thereto than in a case where the party sought to be charged was not interested in the subject matter, or where the visible actor had himself some end of his ⁵⁰¹ own to serve. It is common knowledge (*Boucher v. Laroche*, 74 N. H. 433, 68 Atl. 870, 15 L. R. A., N. S., 416) that a man does not systematically pursue a course of deception unless there be some motive for so doing. No motive for such conduct on the part of the administrator is here shown, unless there was a scheme in which the defendant participated; and from the nature of the case there could be no scheme or design wherein the defendant and administrator were arrayed against the beneficiary which would not at least be open to suspicion.

There was evidence that at the first interview between C. M. Libby, Blaisdell, and Davis, Davis falsely represented the cause of the accident to have been a forbidden act of a fellow-servant; that when he made an offer of a settlement for a nominal sum, the administrator suggested that of course the offer was not made as an admission of liability; that Libby stated plainly that they should have substantial damages or nothing; that Davis and Blaisdell remained in consultation after Libby left; that in the subsequent negotiations Davis never spoke to the beneficiary, whom he knew and whose house

he passed frequently; and that when the settlement was made he telephoned to Concord and had the release drawn by his counsel, whereas in other settlements of claims growing out of this accident he drew the releases himself. If this evidence was believed, it showed motive, fraudulent statements, co-operation, concealment, and unusual precautionary measures. There is in these facts enough to warrant the submission of this issue to the jury. "It is not necessary to prove that all came together, and actually agreed in terms to have a common design and pursue it by common means. If it be proved that the defendants pursued by their acts the same common object, often by the same means, one performing one part and another another part of the same plan, so as to complete it with a view to the attainment of the same common result, the jury will be justified in the conclusion that they were engaged in a combination or conspiracy to effect that result": Page v. Parker, 40 N. H. 47, 43 N. H. 363, 80 Am. Dec. 172; Dayton v. Monroe, 47 Mich. 193, 10 N. W. 196; 3 Greenleaf on Evidence, sec. 93.

Exceptions overruled.

All concurred.

It is the Duty of an Employer to Notify Employees of special risks and dangers of the employment, and of all dangerous conditions attendant upon the place of employment of which he has knowledge, or by the exercise of reasonable care would have knowledge, and which are unknown to the employees, and would not be known and appreciated by them in the exercise of reasonable care: Hume v. Fort Halifax Power Co., 106 Me. 78, 138 Am. St. Rep. 332; Adams v. Grand Rapids Refrigerator Co., 160 Mich. 590, 136 Am. St. Rep. 454. But the placing of caps of dynamite in a mine is not negligence as a matter of law, and recovery cannot be had for the death of an employee resulting from an explosion thereof, in the absence of evidence that they were negligently placed where they were: Whitmore v. Alabama etc. Iron Co., 164 Ala. 125, 137 Am. St. Rep. 31. The care required of a master respecting the use of explosives used by workmen is discussed in the note to Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 300. It is a master's duty to warn and instruct his servant employed in a dangerous work: Note to Smith v. Peninsular Car Works, 1 Am. St. Rep. 548. If there are increased perils in a business by reason of the use of defective appliances, or otherwise, known to the master, or for which he is responsible, and unknown to the servant, and the latter is injured thereby, and is free from negligence, the master is liable: Johnson v. First Nat. Bank, 79 Wis. 414, 24 Am. St. Rep. 722.

Conspiracy to Defraud Being Proved, whatever is shown to be done or said by any one of the conspirators in furtherance of the common design is the act or saying of all: Page v. Parker, 43 N. H. 363, 80 Am. Dec. 172. If several conspirators combine to carry out a fraudulent conspiracy to cheat another, each and all are liable to him without reference to the amount of the fruits of the transaction each obtains, or the degree of his activity in the scheme: Fountain Spring Park Co. v. Roberts, 92 Wis. 345, 53 Am. St. Rep. 917. Conspiracy is discussed in the note to Spies v. People, 3 Am. St. Rep. 475.

CHATEL v. SCHONLAND.

[75 N. H. 543, 78 Atl. 128.]

NEGLIGENCE—Driving Horse Close to Car.—The driving, in a wide driveway, of a horse so close to both the side and end of a car that a stop cannot be made in season to avoid a collision with a foot-traveler who might step from behind the car may constitute such negligence as to render the driver liable for injury to the foot passenger. (p. 739.)

NEGLIGENCE—Crossing Street Behind Car.—One who crosses a street behind a car in the customary manner cannot be said, as matter of law, to be guilty of negligence contributing to an injury occasioned by a team being driven so close to the car as to be dangerous to those so crossing or alighting from the car. (p. 739.)

David W. Perkins and Cyprien J. Belanger, for the plaintiff.

Taggart, Tuttle, Burroughs & Wyman, for the defendant.

⁵⁴³ **PEASLEE, J.** The defendant's servant was driving on the left of the right-hand side of Elm street in Manchester, close up to a street-car that had just stopped at the transfer station. It could be found that passengers frequently came around the end of the car toward which the horse was moving, and that they could not see an approaching horse, driven as this one was, until they stepped from behind the car and practically in the path of the moving animal. In this situation it might well be found to be negligent to drive with a sleigh over half bare ground, with the horse straining at a pulling gait, and so close to both the side and end of the car that a stop could not be made in season to avoid a collision with an unsuspecting foot-traveler who might step from behind the car. There were twenty-seven feet of roadway for the horse to travel upon, and due care might well require that when passing these standing cars it should be driven farther to the right.

It might also be found that the plaintiff was careful. She went around the end of the car "just the same as the rest of them." She thought the driver "would go on that side; he was on my side." It cannot be said, as a matter of law, that her reliance upon the proposition was not reasonable conduct under the circumstances. ⁵⁴⁴ While she knew that teams going south usually went on the west side of the street, there is no evidence that she knew or had reason to believe that they would carelessly drive on the easterly edge of this broad driveway, in a manner highly dangerous to alighting street railway passengers: *Gilbert v. Burque*, 72 N. H. 521, 57 Atl. 927.

The principle of *Batchelder v. Boston & M. R. R.*, 72 N. H. 528, 57 Atl. 926, is not involved. There is here no question of subsequent and prior negligence. It is simply a case where

it could be found that there was negligence on one side and none on the other. That the very different conclusions drawn from the evidence by the defendant are properly deduced does not affect the result on these motions: *Gilbert v. Burque*, 72 N. H. 521, 57 Atl. 927.

Exceptions overruled.

All concurred.

Courts can Lay Down No Precise Rule of Action to be observed by a man who, passing behind a street-car, finds himself suddenly confronted, without warning, by a rapidly moving car or other vehicle. If, momentarily paralyzed or confused by the imminent danger, he does nothing, or takes a step or two in the wrong direction, and a collision results, it cannot be said, as a matter of law, that he acted in a manner different from what might have been expected from a man of ordinary prudence. In such a case, ordinary care to ascertain whether the track is clear or a car approaching is all that is required: *Stack v. East St. Louis Ry. Co.*, 245 Ill. 308, 137 Am. St. Rep. 318.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

JOURDAN v. BURSTOW.

[76 N. J. Eq. 55, 74 Atl. 124.]

CONTRACTS—Compounding Felony.—A Contract by which property is conveyed in satisfaction of an embezzlement, with a provision against prosecution, is void, and will not sustain an action either to compel performance or to recover back the property. (p. 741.)

CONTRACTS—Enforcement Against Public Policy.—Courts will not help a plaintiff to recover money where the recovery is sought upon the footing of an agreement contrary to public policy. (p. 742.)

Henry Pomerehne, for the complainant.

Adrian Riker, for the defendants.

55 STEVENS, V. C. I have examined the authorities cited by complainant's counsel and such others as have been accessible, and I cannot find any precedent for a recovery such as is sought in this case. The decided weight of the evidence, so far as the facts are concerned, is with the defendants. It goes to sustain the charge of embezzlement and disproves the duress. The only question is the legal one: Whether a man who has actually conveyed property in satisfaction of an embezzlement, admitted to have been committed, can recover it back simply on the ground that the written agreement which he entered into with his employers to make restitution contains a clause against prosecution. Such an agreement is plainly illegal, and its performance could not be compelled. But if actually performed, the grantor suing to recover back his property stands in the same situation that the grantee would have stood in had he sued on the agreement. He is in *pari delicto*, and the maxim is "*In pari delicto, potior est conditio possidentis.*" In the note to *Collins v. Blantern*, 1 Smith's Lead. Cas., 6th Am. ed., *507, the rule is thus stated: "The law will in general leave all who share in the guilt

of an illegal or immoral transaction where it finds them, and will neither lend its aid to enforce the contract while executory nor to rescind it and recover back the consideration when executed. The maxim 'Nemo allegans suam turpitudinem audiendus,' applies in such cases with full force."

In *Meech v. Lee*, 82 Mich. 274, 46 N. W. 383, the case principally relied upon by complainant's counsel, and in *Williams v. Bayley*, L. R. 1 H. L. 200, as well as in some other like cases, affirmative relief was indeed given, but those cases differ from that in hand in two important respects—first, the transaction was, in a certain sense, in fieri. The security had been given but the money had not been paid; second, the person asking relief was not the wrongdoer, under a legal and moral obligation to make restitution (*Smillie v. Titus*, 32 N. J. Eq. 51), but a third person who had, without any consideration moving to himself, and under an influence that was characterized as undue, undertaken the burden of the demand.

The case of *Haynes v. Rudd*, 83 N. Y. 251, reported again in 102 N. Y. 372, 55 Am. Rep. 815, 7 N. E. 287, is very much in point. In an action to recover back moneys paid by plaintiff in payment of a promissory note given by him to defendant and transferred to a bona fide holder before maturity, the complaint alleged that it was given to compound a claim made by defendant that plaintiff's son had stolen money from him and that it was extorted by threats of public charges against that son. The case coming up on exceptions to the judge's charge, it was held that there could be no recovery if the agreement to compound the felony was part of the contract; that the parties were in *pari delicto*. Here the doctrine of *par delictum* was applied as against a third person. A *fortiori* must it be applied as against the alleged embezzler himself.

Watson v. Murray, 23 N. J. Eq. 257, and *Wilson v. Gregory*, 36 N. J. L. 315, 13 Am. Rep. 448, are cases which, while they differ in their circumstances from the present, illustrate the doctrine that the courts of this state will not help the plaintiff to recover money where the recovery is sought upon the footing of an agreement contrary to public policy. The bill should be dismissed, with costs.

Contracts to Stifle Criminal Prosecutions are Void: *Davis v. Smith*, 68 N. H. 258, 73 Am. St. Rep. 584; *Mack v. Campan*, 69 Vt. 558, 60 Am. St. Rep. 948; *Insurance Co. v. Hull*, 51 Ohio St. 270, 46 Am. St. Rep. 571; notes to *Bowman v. Phillips*, 13 Am. St. Rep. 293; *State v. Wilson*, 117 Am. St. Rep. 523. A mortgage executed for such purpose in settlement for money embezzled is void: *Note to Henderson v. Palmer*, 22 Am. Rep. 121; *Koons v. Vauconsant*, 129 Mich. 260, 95 Am. St. Rep. 438. A contract to compound a felony is void: *Morrill v. Nightingale*, 93 Cal. 452, 27 Am. St. Rep. 207; and a note given for such purpose may be defeated without proof that the alleged crime was in fact committed: *W. T. Joyce Co. v. Bohan*, 134 Iowa, 12, 120 Am. St. Rep. 410.

In *Ball v. Ward*, 76 N. J. Eq. 8, 22, 74 Atl. 158, the precise question was whether deeds made to a creditor by a parent of the debtor, a son, and without consideration from the creditor, will be avoided in equity if made under the influence of such pressure of threats of imprisonment (lawful or supposed to be lawful) as to overcome the free agency of the grantor. The son was threatened with prosecution for obtaining money under false pretenses. The court decided "that it is against equity and good conscience for a creditor to extort from a parent payment of, or security for, the debt of a son for which the parent is not responsible, by threats of criminal prosecution of the son, even if the imprisonment be lawful, or supposed to be lawful, and that contracts of the parent for such payment or security executed under circumstances created by the creditor, which deprive the parent of the freedom and power of deliberation necessary to validate transactions of this description, may be avoided in a court of equity, as made without consent." A decree setting aside the deeds was therefore advised.

Where Both Parties to a Contract are Equally Guilty of a Breach of the Law, a Court will not Aid Either: Note to *Hill v. Freeman*, 49 Am. Rep. 49. Lawbreakers are not entitled to the aid of courts to adjust differences arising out of and requiring an investigation of their illegal transactions: *Leonard v. Poole*, 114 N. Y. 371, 11 Am. St. Rep. 667. See, also, *Wiggins v. Bisso*, 92 Tex. 219, 71 Am. St. Rep. 837; *Camp v. Bruce*, 96 Va. 521, 70 Am. St. Rep. 873; *Bowman v. Phillips*, 41 Kan. 364, 13 Am. St. Rep. 292. The rule where parties are in *pari delicto* is discussed in the note to *Hobbs v. Boatright*, 113 Am. St. Rep. 724. If parties concerned in an illegal contract are in *pari delicto*, neither can obtain any relief: *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203; *Harvey v. Merrill*, 150 Mass. 1, 15 Am. St. Rep. 159. One cannot maintain an action to recover money paid by him upon a note given wholly or partly to compound a felony, although it was procured from him by duress and undue influence: *Haynes v. Rudd*, 102 N. Y. 372, 55 Am. Rep. 815.

FITZGERALD v. STATE MUTUAL BUILDING AND LOAN ASSOCIATION.

[76 N. J. Eq. 137, 79 Atl. 454.]

BUILDING AND LOAN ASSOCIATIONS—Character of Stock.

Where but one kind of stock is contemplated by the charter and by-laws of a building and loan association, provisions of the by-laws for "full paid stock" upon the subscriber paying in cash the par value, and for "advance payment stock" where the subscriber pays installments in advance, the subscriber receiving, in the first instance, interest and in the latter a discount, constitute mere privileges given alike to all stockholders, and do not create a preferred stock, nor do such payments constitute, in any sense, loans to the association. (pp. 745, 746.)

BUILDING AND LOAN ASSOCIATIONS.—Upon the Dissolution and Distribution of assets among the stockholders of a building and loan association, the holders of "full paid stock," that is, stock the par value of which was paid in cash, are not entitled to any preference. (p. 746.)

BUILDING AND LOAN ASSOCIATIONS.—Upon the Dissolution and Distribution of assets among the stockholders of a

building and loan association, the holders of "advance payment stock," that is, stock upon which installments have been paid in advance, are not entitled to any preference. (p. 746.)

BUILDING AND LOAN ASSOCIATIONS—Dissolution—Distribution of Assets.—The fact that certain stockholders have given notice of withdrawal, in accordance with the by-laws of a building and loan association, does not give them a preference upon a dissolution and distribution of the assets of the association. (pp. 746, 751.)

BUILDING AND LOAN ASSOCIATIONS.—The Right of Withdrawal from a building and loan association does not exist except when conferred by a by-law or statute, and when so conferred the right is restricted to the terms of the by-law or statute. (p. 746.)

BUILDING AND LOAN ASSOCIATIONS.—Where upon Dissolution the Assets of a building and loan association are insufficient to pay the stockholders in full, the only equitable plan for distribution is the pro rata division of the assets among all of the stockholders, giving to each share of stock a value, for purposes of distribution, of the amount paid upon it. (p. 750.)

Thomas E. French, Samuel K. Robbins and George J. Bergen, for the receivers pro se.

Harvey F. Carr, for sundry stockholders.

Ralph E. Lum, for sundry stockholders.

¹³⁷ **LEAMING, V. C.** The receivers of defendant building and loan association now desire to make a partial distribution of assets among the stockholders of the insolvent association, and to that end have brought in all parties in interest that it may be determined, among other things, whether certain stockholders are entitled to preferment in the distribution of assets. As the assets of the association will be insufficient to pay the full amount paid in by its members, ¹³⁸ it becomes necessary to ascertain whether certain stock is entitled to priority of payment over other stock. The present contest arises by reason of the claim of preferment made by the owners of stock who gave notice of withdrawal before the suspension of the business of the association, and also a like claim made by owners of certain stock known as "full paid stock" and certain other stock on which "advance payments" have been made. The advance payments are authorized by section 7 of the constitution of the association, which section permits any stockholder to pay in advance money on account of his installments of dues and entitles the person so paying to receive a certain discount for the advance payments. The "full paid stock" is authorized by section 8 of the constitution. That section authorizes a stockholder to pay \$100 per share for his stock, and entitles the person so paying to receive a certain rate of interest on the amount paid until the stock of that series matures. The right of withdrawal is conferred by section 9 of the constitution, and the terms of withdrawal are

set forth in article 4 of the by-laws, and in sections 38 and 39 of an act of the legislature approved April 8, 1903: Pub. Laws 1903, p. 457. Of the full paid stock there are 945 shares; of these, 38 owners of 128 shares have given notice of withdrawal and 226 owners of the remaining 817 shares have not. Of the "advance payment stock" there are 10,141 shares. Of these, 296 owners of 5,305 shares have given notice of withdrawal, and 867 owners of the remaining 4,836 shares have not. Of the remaining stock of the association—that is, stock on which no advance payments have been made—there are 17,015½ shares. Of these, 818 owners of 2,109 shares have given notice of withdrawal, and 2,367 owners of the remaining 14,906½ shares have not. The evidence discloses that some time prior to two years before the suspension of business ¹³⁹ the association began to receive a great number of withdrawal notices, and that the withdrawals continued thereafter in such numbers that during the two years prior to suspension loans on real estate security were practically discontinued. During that period but three loans were made on real estate security—one in April, 1905, for \$1,600; one in July, 1905, for \$1,000, and one in August, 1905, for \$250. The only loans made during that period, except as above stated, were what was known as "stock loans"; these are described as loans to members exercising the right to borrow ninety per cent of the withdrawal value of their stock by pledging their stock as security. Many members borrowed in this manner because they could not procure their money by withdrawal without waiting a long time. During the two years referred to the withdrawal notices accumulated until at the date of suspension the withdrawal notices unpaid amounted in the aggregate to \$232,143.88. Payments on withdrawal notices were made in the order in which the notices were filed, and at the date of suspension applications for withdrawals to the amount of \$172,779.22 had been on file more than six months. At the hearing an examination was also made of the assets and liabilities of the association as of the date of its annual statement about two years before its suspension of business. If the testimony of the receivers as to the value of the real estate can be regarded as reasonably accurate, the value of the assets of the association two years prior to its suspension had become less than the amount at that time paid in by its members.

There appears to be no reasonable ground for the contention that either the "full paid stock" or the "advance payment stock" is entitled to preferment as such. Only one kind of stock is contemplated by the charter act or by-laws. The provisions above referred to touching full paid stock and advance payments of dues are mere privileges given alike to all stockholders. Such payments are payments on stock, and in

no sense loans to the association. The consideration for the advance payments of dues and for the full payments on stock passes at the time of payment to the same extent as all other payments on stock. Nothing in either the statute or by-laws contemplates that the stock so issued shall become preferred stock in the sense that ¹⁴⁰ such stock shall be entitled to preferment in the distribution of assets at dissolution or that its holders shall become general creditors of the association as distinguished from stockholder members. The decisions of the courts appear to be practically uniform in the adoption of this view: *People v. New York B. & L. Assn.*, 110 App. Div. 554, 97 N. Y. Supp. 81; *People v. Metropolitan Mut. B. & L. Assn.*, 103 App. Div. 153, 92 N. Y. Supp. 689; *Forwood v. Eubank*, 106 Ky. 291, 50 S. W. 255; *Solomons v. American B. & L. Assn.*, 116 Fed. 676; *Hohenshell v. Home B. & L. Assn.*, 140 Mo. 566, 41 S. W. 948; *Leahy v. National B. & L. Assn.*, 100 Wis. 555, 69 Am. St. Rep. 945, 76 N. W. 625. Furthermore, the building and loan association act of 1903 (Pub. Laws 1903, p. 457) expressly forbids the issuance of preferred stock. Section 53 of that act provides as follows: "No such association (building and loan association) shall issue preferred stock or other than common stock, and all shareholders shall occupy the same relative status as to debts and losses of the association."

It also seems entirely clear that no claim of preferment upon the part of stockholders who have given notice of withdrawal can be sustained, so far as such claim is based upon the provision of the by-laws touching withdrawals. The by-laws provide that "at no time shall the association be required to pay out on withdrawals more than one-half of the monthly receipts of dues." The evidence discloses that in every month during the last two years of the life of the association more than one-half of the dues were paid for withdrawals, and in almost every month the amount paid for cash withdrawals exceeded the amount received for dues, and this is also true even when advance payments on stock and payments for full paid stock are treated as dues of the month in which such payments were received. The aggregate amount received during the two years named for dues, including advance payments and payments for full paid stock, was \$342,447.72, whereas the amount paid for cash withdrawals during the same period was \$442,368.07. These payments were made on withdrawal notices in the order of their dates. It thus appears that at the time of dissolution no payment was due under the terms of the by-laws on any withdrawal notice. It has, I think, been uniformly held that the right of withdrawal does not exist ¹⁴¹ except as conferred by a by-law or statute, and when so conferred, the right will be restricted to the terms of the by-laws or statute: *Miers v. Columbia Mut. B. & L. Assn.*, 157

Fed. 940; Rabbitt v. Wilcoxon, 103 Iowa, 35, 64 Am. St. Rep. 152, 72 N. W. 306, 38 L. R. A. 183; Heinbokel v. National S. L. & B. Assn., 58 Minn. 340, 49 Am. St. Rep. 519, 59 N. W. 1050, 25 L. R. A. 215.

But in the year 1903 a general act was passed touching building and loan associations: Pub. Laws 1903, p. 457. Sections 38 and 39 of that act relate to the subject of withdrawals. The latter section provides: "Withdrawals shall be paid in the order in which the notices thereof are received, but not more than one-half the receipts of any one month shall be required to be used for payment of withdrawal claims, without the consent of the board of directors, until the oldest of such claims then unpaid shall have been on file for a period of six months; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any shareholder who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal."

As already stated, a part of the withdrawal notices in question had been on file over six months at the time of suspension, while others had not. It is not easy to determine what this statute may contemplate by the use of the word "receipts." The inquiry, however, does not appear to be material, because the statute requires all notices on file six months to be paid irrespective of the amount of receipts, and the notices on file less than six months would not have been reached had one-half of all receipts from all sources, including dues, interest, premiums, fines, advance payments on stock, moneys received for full paid stock and loans repaid to the association been applied to the payment of the withdrawal notices. More than one-half of the moneys received from all sources was, in fact, applied to the payment of withdrawals, although it does not appear that any resolution was adopted by the board of directors consenting thereto. As none of the notices of withdrawals which had been on file less than six months were payable either under the terms of the by-laws or the terms of the statute, it follows, as is shown by the cases last above cited, that they cannot be regarded as preferred claims.

¹⁴² The only doubt which I entertain is touching rights which may have arisen under notices which had been on file over six months at the date of suspension; but independently of the considerations already stated, I am convinced that neither the claim based on notices filed less than six months nor those based on notices filed more than six months can be now properly treated as entitled to preferment in the distribution of assets. There may be some question as to whether the statute of 1903 can be regarded as superseding the by-laws

so far as the rights of stockholders prior to that date are concerned, for rights accruing under the by-laws partake of the nature of contractual rights between the several members; but I think the conclusion just stated must be reached even though the statute be regarded as controlling as to all stockholders. As already stated, the right of a stockholder to "withdraw" by surrendering his shares and withdrawing money in lieu of them, and in that manner to terminate his membership, is derived from the by-laws of an association, or from a statute if the subject is controlled by statute. In either case the rights, privileges and liabilities flowing from the proceeding must be ascertained from the by-law or statute controlling the subject. The question is therefore essentially one of statutory construction. The English decisions construe a by-law or rule which confers the right of withdrawal with peculiar strictness, and while they recognize that the notice of withdrawal does not terminate the membership of the stockholder giving notice nor constitute him a creditor of the society in an unrestricted sense, yet they treat his claim as entitled to preferment at dissolution: See *Walton v. Edge*, 10 App. Cas. 33; *Sibun v. Pearce* (1890), 44 Ch. D. 354; *In re Sunderland Society* (1890), 24 Q. B. D. 394; *In re Ambition Bldg. Soc.* (1896), 1 Ch. 89. The *Sunderland* case, however, gives recognition to the rule of construction that the by-law or statute conferring the right of withdrawal may not contemplate the exercise of the right except while the society "was or was believed to be" still solvent. While the decisions in this country cannot be said to be uniform, the view appears to be generally adopted that upon the distribution by a court of equity of the assets of an insolvent building association among its stockholders, the by-laws or ¹⁴³ statute which confers the right of withdrawal will be understood to have reference to the general mutual and equitable scheme of such association, and to presuppose that at least a relative proportion of the assets will remain for the benefit of those who continue to be active members of the association. In this view it is held that notices of withdrawal which have matured after the association has reached an insolvent condition are not entitled to preferment of payment at dissolution. Some of the decisions go even further, and hold that independently of the fact of insolvency at the time a withdrawal notice is given or matures, the basis of distribution is not the rule of the association expressed in a by-law or statute, standing alone, but the supreme rule of equality and mutuality. The following are among the cases adopting the views stated: *Reddick v. United States Building etc. Assn.*, 106 Ky. 94, 49 S. W. 1075; *Christian's Appeal*, 102 Pa. 184; *Walker v. Terry*, 138 Ala. 428, 35 South. 466; *Rabbitt v. Wilcoxon*, 103 Iowa, 35, 64 Am. St. Rep. 152, 72 N. W. 306, 38 L. R. A. 183; *Hohen-*

shell v. Home Savings Assn., 140 Mo. 566, 41 S. W. 948; Reitz v. Hayward, 100 Mo. App. 216, 73 S. W. 374; Fort Smith Building Assn. v. Cohn, 75 Ark. 497, 87 S. W. 1172; Alexander v. Southern Home Building etc. Assn., 110 Fed. 267; Coltrane v. Baltimore Building etc. Assn., 110 Fed. 272; Colin v. Wellford, 102 Va. 531, 102 Am. St. Rep. 859, 46 S. E. 780; Manheimer v. Henderson Building etc. Assn. (Ky.), 72 S. W. 313. See, also, 6 Cyc. 165; Endlich on Building Associations, 2d ed., secs. 108, 514, 515.

The general building and loan association act of 1903, of which the sections already referred to touching withdrawals form a part, will be found to contemplate throughout its provisions the central idea of co-operation, equality and mutuality upon the part of the members of the association. That part of section 53, already quoted, which provides that "all shareholders shall occupy the same relative status as to debts and losses of the association," is but in harmony with the general plan of the act. The general plan of the act being as stated, I am unable to believe that sections 38 and 39, relating to withdrawals, were intended by the legislature to be applicable to associations which should have reached an insolvent condition. I entertain the view ¹⁴⁴ expressed in the Coltraine case (110 Fed. 272), already cited, that these provisions touching withdrawals, like the other provisions of the act, are obviously intended and are equitably applicable only so long as the association is a going concern from which all the members may ultimately hope and expect to receive approximately equal benefits. In the ascertainment of the legislative intent, I do not think it proper to ignore the obvious fact that if the sections referred to are held to apply to insolvent associations and to entitle its withdrawing members to be paid in the order in which their notices of withdrawal are given, the practical result will inevitably be to afford a means of preferment for those who are in the best position to know the true condition of the association to the exclusion of the poor and ignorant. I do not think that such a plan can be reasonably said to have been within the contemplation of the legislature. It is true that the act gives to a withdrawing member, whose notice of withdrawal has been on file over six months, a right of action for the "withdrawal value of his shares." But the statute does not contemplate that the withdrawal value of shares can in any case exceed the proportionate part of the assets of the association represented by the shares. That amount the receivers are willing to pay when the assets are reduced to cash, first deducting the cost incident to reducing the assets to cash. But the holders of stock on which notices of withdrawal have been given demand full payment in the order in which the notices have been filed. What amount they demand is not by them specified. The testimony touching the assets of the as-

sociation discloses with reasonable certainty that no share of stock now in question would have been entitled, at the date of the notice given for its withdrawal, or at any subsequent date, to receive the full amount paid in on it, had there been applied to the share the full proportionate part of the assets of the association. The statute says: "If the withdrawal be made within the first year, the withdrawal value of the shares withdrawn shall be not less than the sum of the subscriptions or dues paid on such shares, less all unpaid fines and a proportionate share of any loss sustained by the association; after the first year, a reasonable share of the profits shall be included in the withdrawal value and shall be paid to the withdrawing shareholder."

¹⁴⁵ Whether the provision for payment "after the first year" also contemplates deduction of a proportionate share of the losses is not clear, but I apprehend the meaning to be that if stock is withdrawn during its first year, it shall not share in the profits, but may do so if later withdrawn, and that all withdrawn stock shall bear its share of losses. Assuming that to be the meaning of the statute, I doubt whether it is possible to now ascertain the withdrawal value of the several shares of stock of which notice of withdrawal has been given, if they are to be treated as preferred and are to be paid in the amount of their withdrawal value in the order in which notices of withdrawal have been given. As already shown, more than one-third of the entire stock of the association, which is owned by about one-third of its members, is under notices of withdrawal. In my judgment, the only equitable plan for distribution of the assets of the association is the pro rata division of the assets among all of the stockholders, giving to each share of stock a value, for purposes of distribution, of the amount paid upon it.

The status of a withdrawal notice at dissolution appears to be an open question in this state. In *Silvers v. Merchants' Saving Fund etc. Assn.*, 56 Atl. 294 (not officially reported), Vice-Chancellor Grey gave to a withdrawal notice the effect of constituting the owner of the stock a general creditor of the association, and entitling him to preferment at final distribution by a receiver in insolvency. In the later case of *Whitehead v. Commonwealth Building etc. Assn.* (file number, 25-302), Vice-Chancellor Pitney reached the contrary conclusion. No opinion was filed by the learned vice-chancellor in the case last referred to, but I am informed that his decision was reached after full argument and careful review of the adjudicated cases, including the *Silvers* case above referred to. I know of no other case in this state in which the court has been called upon to determine the status of withdrawal notices in the distribution of assets among stockholders.

My conclusion is that the statutory right of a member of a building and loan association to withdraw from membership and to receive the withdrawal value of his shares and the statutory ¹⁴⁶ privilege to sue for the amount if it is not paid within the time named in the statute, is based upon and forms a part of the general plan that each member is entitled to equal participation in the assets, and that the statute does not contemplate that the privileges named shall be exercised to defeat equal participation, and that the spirit of the statute being equal participation, the paramount equity is equal participation at all times; and when the association has reached a condition in which the value of its assets is less than the amount which has been contributed by its members as dues, the equitable right of equal participation cannot be defeated by a course of management which will bestow upon withdrawing members, by an artificial and erroneous assumption of withdrawal values, an unequal share of the assets. As no losses are shown to have been sustained during the period between the date of the oldest withdrawal notice now on file and the date of suspension of business, except such losses as may have arisen by the payment to prior withdrawing members of more than their equal share, the present claimants under withdrawal notices, if now treated the same as other members, will receive, with the exception noted, substantially the same amount that they would have received had the suspension of business occurred at the date of the oldest notice.

I will advise a decree of equal distribution.

No Matter How Many Different Classes of Stock are Issued by a Building and Loan Association, nor in how many ways, nor at what times the members are to be paid, nor whether the stock stipulates that they shall be paid a sum certain or merely their share of the income or profits, nor whether their stock was obtained by payment of monthly installments or by a gross sum at one time, the rights of the members, on insolvency, are the same, and neither can be paid to the exclusion of others, nor exempted from sharing ratably in the losses and liabilities of the association: *Leahy v. National Building etc. Assn.*, 100 Wis. 555, 69 Am. St. Rep. 945.

The Right of a Member of a Building and Loan Association to Withdraw is discussed in the note to *Robertson v. Homestead Assn.*, 69 Am. Dec. 155. As to the effect of withdrawal, see *Heinbokel v. National Sav. & Loan Assn.*, 58 Minn. 340, 49 Am. St. Rep. 519. The insolvency of building and loan associations, as affecting the rights of withdrawing members, is considered in *Rabbitt v. Wilcoxon*, 103 Iowa, 35, 64 Am. St. Rep. 152; *Colin v. Wellford*, 102 Va. 581, 102 Am. St. Rep. 859. The effect of insolvency on the rights and liabilities of members generally is discussed in the note to *Curtis v. Granite State etc. Assn.*, 61 Am. St. Rep. 24.

VON BERNUTH v. VON BERNUTH.

[76 N. J. Eq. 177, 73 Atl. 1049.]

PLEADING—Effect of Supplemental Pleadings.—Events happening after the bringing of the original suit are interjected into it by leave of the court by supplemental bill or supplemental answer, and, when these go in, the adjudication, as to the facts set up therein, will relate to the dates of the happening thereof. (p. 754.)

EQUITY—Vexatious Litigation, What Constitutes.—The bringing of an action in another jurisdiction, after the commencement of an action in this jurisdiction in which the same relief as is prayed in the second action may be had and is sought by cross-bill, will be considered vexatious, although there is no actual intent to vex or embarrass the plaintiff in the first suit. (p. 754.)

DIVORCE—Injunction Against in Foreign Jurisdiction.—Where a wife has commenced an action for divorce in the courts of New Jersey, in which jurisdiction of the defendant has been obtained, the prosecution of an action for divorce by the husband in a foreign jurisdiction will be enjoined, where all the relief sought thereby can be granted and is sought by cross-bill in the New Jersey action, and where such injunction will not impugn the policy of the other state. (pp. 757, 758.)

Thomas L. Raymond, for the motion.

Clinton H. Blake, Jr., and Sommer, Colby & Whiting, contra.

¹⁷⁷ **HOWELL, V. C.** This is a motion for an injunction to restrain the defendant from further prosecuting an action in the supreme court of New York. On October 5, 1908, the petitioner filed her petition in this court praying for a divorce against the defendant upon the ground of desertion. This petition was subsequently amended and citation thereon was issued and returned by the sheriff not served. An attempt was then made to secure the appearance of the defendant, who was residing in the city of New York, by substituted service. The order for publication ¹⁷⁸ of the substituted notice was made on November 25, 1908, and the time for answer appointed thereby expired on January 26, 1909. On January 20, 1909, counsel for the defendant took an order that he have twenty days' additional time in which to file an answer or demurrer to the amended petition. On February 13, 1909, another order was made on motion of defendant's counsel extending the time to answer or demur twenty days further. On February 24th a general appearance was entered for the defendant by one of the solicitors of this court, and on the same day he filed an answer denying the allegations of the amended petition. On March 1, 1909, he again appeared by counsel to oppose a motion for alimony, and on May 5, 1909, he filed an amended answer and a cross-petition for an absolute divorce against the petitioner, alleging as the ground thereof her de-

sertion of him. These are all the proceedings in the New Jersey suit which it is of importance to set out.

On March 17, 1909, the defendant brought an action in the supreme court of New York against the petitioner by the issue of a summons out of that court directed to the petitioner herein and entitled "action for a separation." On March 23, 1909, that court made an order for substituted service on the petitioner; the summons, with notice of the order, was served upon her on March 24, 1909. This required her to file her answer in the New York suit on or before April 23, 1909. The petitioner moves upon petition and affidavits showing these facts to restrain the defendant in the New Jersey action from further prosecuting his action in New York upon the grounds, first, that this court having obtained jurisdiction of the matrimonial status of these parties and of the causes of action between them, is entitled to proceed to a determination of the issue, and second, that the action of the defendant in New York is vexatious, and is designed only to hinder and harass the petitioner in her prior action in New Jersey, and to cause her the expense and labor incident to the trial of one issue in two separate actions.

The suit in this court in favor of the wife, and the defendant's appearance and answer thereto, were prior in date to the beginning of the New York action. The New Jersey suit relates to ¹⁷⁹ the situation as it was at the date of its beginning. The amendment to the petition relates back to that date, and the defense, by way of answer, speaks as of the same date. At the time of the filing of the petition herein the wife claimed that she had a cause of action against her husband for a desertion which began more than two years before. The husband, by his cross-petition, claims to have cause of action against the wife for a desertion which began more than two years before the filing of the cross-petition. The evidence in each case must include all the acts and doings of both parties during the period of desertion alleged. To illustrate, on the issue made on the original petition and answer, it will be competent for the defendant to bring out matrimonial misconduct on the part of the petitioner as a bar to her action, and if the New York suit were to be tried, the petitioner, by way of defense, would be permitted to set up a matrimonial offense committed by the defendant in bar of his New York suit. The fact that the original petition and the cross-petition in this court with their respective answers are heard together makes no difference as to the evidence. The adjudication in the New Jersey suit must be made on these pleadings, and while the decree will settle the rights of the parties as of its date (*Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. 350; *Randel v. Brown*, 2 How. (U. S.) 406, 11 L. ed. 318), no decree at all could be made unless the parties respectively had causes of action which related back to

the earlier dates mentioned. Events happening after the bringing of the original suit are interjected into it by the leave of the court by supplemental bill or by supplemental answer, and when these go in the adjudication as to the facts set up therein will relate to the dates of the happening thereof.

The defendant in his cross-petition in this suit alleges that the petitioner, without any cause or justification whatever, and without any fault on his part, wrongfully, willfully and obstinately abandoned and deserted him, and that for more than two years then last past she had willfully, obstinately and continuously deserted him, and he prays that he may be divorced from his wife and be awarded the custody of his children. In the complaint filed in New York the defendant alleges that the petitioner deserted him without any justification whatever, and ¹⁸⁰ with intent not to return to him, and abandoned him, and that she had been willfully and continuously absent from him for a period of more than one year last past; and he prays for a judgment of separation from the bed and board of the petitioner, and that the court may award to him the custody of his children. The basis of the action in each case is the desertion. The relief prayed for in each case is founded on the allegation of the fact of desertion. This court obtained possession of that cause of action on the day of the filing of the original petition, and the petitioner insists that for this reason this court should continue to hold the cause, and should adjudicate every matter which might by the course and practice of this court be adjudicated between these parties. She likewise claims that the New York action is vexatious, and is intended to hinder and harass her in the prosecution of her suit in this court. The defendant maintains that the cause is one governed by the ordinary rules, and that it is entirely proper for him to have two suits pending for the same cause of action in two different states at the same time, and that the pendency of one cannot be pleaded in bar to the other. While there is nothing in the case to show that the defendant had in his mind any intent to embarrass the petitioner, his New York action has that effect. She is called upon in this court to defend a suit for an absolute divorce on the ground of desertion. She is called upon in New York to defend against a prayer for a limited divorce founded upon the same general cause of action. She is notified in the New Jersey case to defend against a desertion which is alleged to have taken place on March 19, 1907, and in the New York case to defend against a desertion which is alleged to have taken place on July 3, 1906. She is put to the expense and trouble of defending two actions, when the defendant might have all the relief to which he is entitled, and more than he asks for in New York, by litigating the cause pending in this court. This is undoubtedly vexatious and harassing to the petitioner, and if the two causes

are allowed to proceed, will undoubtedly be embarrassing to the courts of both states. If, therefore, there exists in the law any proceeding by which this vexatious action of the defendant may be prevented, such proceeding should be applied to this case.

¹⁸¹ This raises the question of the power of this court to enjoin persons who are under its jurisdiction from prosecuting actions in the courts of foreign states. Almost the final word was said upon the subject by Lord Brougham in *Portarlington v. Soulby*, 3 M. & K. 104, but the point has also received much attention in the courts of this state. In *Home Ins. Co. v. Howell*, 24 N. J. Eq. 238, the facts were these: The Home Insurance Company issued policies of fire insurance to the defendant, Howell, a resident of Illinois, insuring his property in this state. The bill alleged that the defendant had procured the policies by fraud, and prayed that they might be declared void and be delivered up to be canceled, and the defendant enjoined from bringing any action at law upon them. The defendant was actually served with process in this state, and so came within the jurisdiction of this court. He filed his answer, to which the complainant filed a replication. In the meantime the defendant brought a common-law action in a state court in Illinois upon the policies, which action the complainant removed to the United States circuit court upon the ground of diversity of citizenship, and then moved this court for an injunction to prevent the defendant from prosecuting his common-law action in the federal circuit. Chancellor Runyon granted the injunction; the argument on the point was had on a motion to dissolve it. The chancellor held the injunction upon the sole ground that this court had first obtained jurisdiction over the controversy, and was therefore entitled to hold possession of it for final disposition. Speaking of the subsequent suit in Illinois, he says: "If bringing the suit at law was not a contempt of this court under the circumstances, it surely was a proceeding which this court will discountenance." The case was cited subsequently with approval in *New Jersey Zinc Co. v. Franklin Iron Co.*, 29 N. J. Eq. 422. The next reported case is *Kempson v. Kempson*, 58 N. J. Eq. 94, 43 Atl. 97, in which this court enjoined a husband whose residence was in New Jersey from prosecuting a suit for divorce against his wife in a foreign state, upon a satisfactory allegation of fraud, which consisted of the husband's allegation that he was a resident of such foreign state, whereas, as a matter of ¹⁸² fact, he was a resident of New Jersey. In this case the jurisdiction was exercised upon the ground of fraud, and upon the further ground that the wife was put to the trouble and expense of appearing in a foreign state to resist her husband's claim, thus making the foreign proceeding a vexatious one. In the same year occurs the case

of *Hueettinger v. Hueettinger* (N. Y.), 43 Atl. 574, in which Vice-Chancellor Grey, following *Kempson v. Kempson*, enjoined the husband from prosecuting a suit for divorce in a foreign state, the ground being the fraudulent representation by him of his residence in such foreign state. In both these cases this court claimed jurisdiction over the defendant upon the ground that he was a bona fide inhabitant of this state. A similar injunction was ordered in 1899 in *Streitwolf v. Streitwolf*, 58 N. J. Eq. 563, 8 Am. St. Rep. 630, 41 Atl. 876, 43 Atl. 683, 904.

The next case that occupied the attention of this court is *Margarum v. Moon*, 63 N. J. Eq. 586, 53 Atl. 179. In that case the court enjoined a resident of this state from prosecuting an attachment in a foreign state against his debtor, who was also a resident of this state, for the purpose of evading a law of this state and obtaining in the foreign jurisdiction an advantage which he would not have under the New Jersey law. The opinion is by Vice-Chancellor Reed. He cites the leading cases of *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. Rep. 269, 33 L. ed. 538, and *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448, which has since been affirmed and extended by *Miller v. Gittings*, 85 Md. 601, 60 Am. St. Rep. 352, 37 Atl. 372, 37 L. R. A. 654, and places his judgment upon the ground of the unjust advantage gained by the creditor by the prosecution in the foreign state. In *Standard Roller Bearing Co. v. Crucible Steel Co. of America*, 71 N. J. Eq. 61, 63 Atl. 546, Chancellor Magie enjoined a proceeding in the courts of a foreign state upon the ground that such proceeding had the effect of harassing and oppressing the defendant therein. Finally, there is the case of *Bigelow v. Old Dominion Copper Mining etc. Co.*, 74 N. J. Eq. 457, 71 Atl. 153, in which Chancellor Pitney declares that the power of this court to restrain persons within the control of its process from prosecution of suits in other states is clear, but holds that upon grounds of comity it should be sparingly exercised. He denied the injunction in that case upon the ground that there the foreign¹⁸³ court, being a court of general jurisdiction, had full jurisdiction of the case in question, which it had acquired several years before the New Jersey action was begun.

Attention has been called to the foregoing New Jersey cases merely for the purpose of showing the grounds upon which the jurisdiction has been exercised in this state. An examination of the general subject will disclose the fact that the courts have exercised the jurisdiction in cases where the foreign action operates to the substantial detriment of the resident, not only where the claim is equitable, but also where it is legal. In *Harris v. Pullman*, 84 Ill. 20, 25 Am. Rep. 416, the jurisdiction was put upon the ground that it was inconsistent with interstate harmony that after a suit had been commenced in

one of the states, the prosecution thereof should be controlled or interfered with by the courts of another state. In *Sandage v. Studabaker*, 142 Ind. 148, 51 Am. St. Rep. 165, 41 N. E. 380, 34 L. R. A. 363, it was put upon the ground that the foreign suit could not be instituted for the purpose of evading the laws of the state in which the plaintiff lived. In *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448, it was put upon the ground of oppression and vexation. In this case the necessity for the exercise of the jurisdiction is very clear. The facts bring it within that class of cases which permit injunctions to issue to restrain foreign actions on the ground of oppression and vexation, and likewise upon the general ground that the cause of action was within the jurisdiction of the court appealed to before any attempt was made to compel the petitioner to submit to a foreign tribunal. In *Miller v. Gittings*, 85 Md. 601, 60 Am. St. Rep. 352, 37 Atl. 372, 37 L. R. A. 654, an injunction was issued in favor of a resident of Maryland against his creditor, also a resident of that state, to restrain the creditor from pursuing the debtor in the New York courts by process of arrest, a remedy which he could not have in their home state. The case is thoroughly considered, and contains a valuable collection of cases on the subject. In *Dehon v. Foster*, 4 Allen, 545, the supreme court of Massachusetts enjoined a citizen of that state from prosecuting a debtor by attachment in Pennsylvania, because the effect of allowing the attachment suit to go to judgment would be to give the attaching creditor a preference over other creditors and so defeat the operation of the ¹⁸⁴ Massachusetts insolvent law. In *Hawkins v. Ireland*, 64 Minn. 339, 58 Am. St. Rep. 534, 67 N. W. 73, a citizen of Minnesota was restrained from prosecuting an action in a foreign state where it was necessary to prevent one citizen from obtaining an inequitable advantage of another. In Vermont it was declared that the jurisdiction would be exercised in that state only when the ends of justice and not the convenience of parties required it: *Bank of Belkows Falls v. Rutland R. R. Co.*, 28 Vt. 470. In Indiana an injunction issued where the attempt was made to enforce a claim in a foreign jurisdiction in such a manner as would deprive the debtor of his exemption under the laws of Indiana: *Wilson v. Joseph*, 107 Ind. 490, 8 N. E. 616. The same doctrine was held in Ohio in *Snook v. Snetzer*, 25 Ohio St. 516, and in Wisconsin, *Griggs v. Doctor*, 89 Wis. 161, 46 Am. St. Rep. 824, 61 N. W. 761, 30 L. R. A. 360.

The restraint sought for by the petitioner does not impugn the policy of the state of New York, for the reason that the rule which prevails in New Jersey on this subject also prevails there. Indeed, Chancellor Runyon based his opinion in *Home Ins. Co. v. Howell*, 24 N. J. Eq. 238, largely on the early New York case of *Mead v. Merritt*, 2 Paige, 402. The

doctrine has since been applied in numerous cases: *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Stevens v. Central Nat. Bank*, 144 N. Y. 50, 39 N. E. 68. See, also, *Kittle v. Kittle*, 8 Daly (N. Y.), 72. It therefore appears that the power which is invoked actually inheres in this court, that the present case is one in which it should be exercised, and that the exercise will not contravene the public policy of the state of New York.

An injunction will therefore issue against the defendant to restrain him from the further prosecution of his suit in the supreme court of New York against his wife for a separation.

Injunctions Against the Prosecution of Actions in Another State are discussed in the note to *Eingartner v. Illinois Steel Co.*, 59 Am. St. Rep. 879. The general rule is that a court of equity in one state has power, when justice and equity demand, to restrain its citizens from prosecuting an action in a sister state: *Sandage v. Studabaker Bros. Mfg. Co.*, 142 Ind. 148, 51 Am. St. Rep. 165; *Hawkins v. Ireland*, 64 Minn. 339, 58 Am. St. Rep. 534; *Miller v. Gittings*, 85 Md. 601, 60 Am. St. Rep. 352; *Hazen v. Lyndonville Nat. Bank*, 70 Vt. 543, 67 Am. St. Rep. 680. Equity will enjoin one citizen from prosecuting against another citizen of the state an action in a sister state which involves a matter already adjudicated in the courts of the first state: *O'Haire v. Burns*, 45 Colo. 432, 132 Am. St. Rep. 191.

ALLEN v. ALLEN.

[76 N. J. Eq. 245, 74 Atl. 274.]

EQUITY.—A Motion to Dismiss a Bill in equity under rule 213 is equivalent to a demurrer, and admits the facts well pleaded in the bill. (By the editor.) (p. 761.)

EQUITY—Amendment of Bill.—In an Equitable Action the complainant will be permitted, after issue joined and after witnesses have been examined, to amend his bill by adding proper parties, or on final hearing will be allowed to amend, if thereby no right of defense is abridged. (By the editor.) (pp. 761, 762.)

WILL.—Petition for Construction.—An Amendment praying that the executor be directed to perform the directions of the will will be allowed to a petition praying for a construction of the will. (By the editor.) (p. 761.)

WILLS.—Specific Legacy—Gift of Security.—At the time of making his will the testator's estate consisted of certain securities (bonds and mortgages) of which he thereafter died possessed. In the second item of his will he provided as follows: "I do give and bequeath unto my wife Georgia M. Allen, the sum of \$17,000.00, to be paid to her out of the securities which I now hold, instead of cash." Held, that the legacy is a specific one, and is to be paid out of the securities which came to the executor as part of the estate of the testator. (p. 762.)

WILLS.—Specific Legacy Carries Income.—A specific legacy carries with it the income thereof from the death of the testator. (p. 762.)

(Syllabi by the court except when stated to be by the editor.)

George M. Shipman, for the motion.

William H. Morrow, contra.

246 WALKER, V. C. The bill alleges that the complainant is the widow of Elijah P. Allen, who died January 14, 1908, leaving a will in which appears the following item:

"Second—I do give and bequeath unto my wife, Georgia M. Allen, the sum of seventeen thousand dollars to be paid to her out of the securities which I now hold, instead of cash."

The third item is a bequest of \$1,000 to the testator's niece, to be paid in like manner as the bequest to the wife in the second item. Following this bequest the testator gave to certain nephews and nieces, and to another person, legacies of \$100 each. The residue of his estate he gave to his brother, the defendant, whom he constituted his executor, and ordered and directed him not to make or file any inventory or appraisal of his estate, and he, testator, assumed the power to provide that he, the executor, should not be required to file any account as executor in any court or place whatever. The will was executed November 30, 1907, and was admitted to probate January 27, 1908.

The bill further alleges that the testator left him surviving the complainant, his widow, but no child or children, his next of kin being the nephews and nieces mentioned in his will, and his brother, the defendant; that at the time of his death the estate of the testator consisted of bonds secured by mortgages on real estate, all of which were at the time the testator made his will known to him to be good investments, and out of which he intended his executor, immediately after his death, to deliver to the complainant \$17,000, principal sum, and that the executor could have, in that manner, discharged the bequest to the complainant **247** and also the one to his niece, and that there would have been left in his hands more than \$6,000, principal of mortgages, after paying all debts, legacies, expenses of administration, and every other obligation against the estate of the testator at the time of his death—the total amount of bonds and mortgages left by him, principal sum, at the time of his death exceeding the amount of \$26,000; that the will was made during the last illness of the testator, who was about seventy-nine years old, who did not expect to recover, and at a time when he did not contemplate making any change in his investments but fully intended that they should continue in the same securities in which they were; that the complainant had an income from the estate of her former husband, who left her a widow with one daughter, which income amounted to about \$100 a year, and that in making the bequest to the complainant, her husband, the testator, had in mind that her income was insufficient for her support after his death, and that it was his purpose to make provision

for her necessities, and that he designed that the interest on the sum of \$17,000 should begin to accrue for her benefit immediately after his death; that all the other legacies and bequests made by the will, and all debts and funeral expenses, have been paid, and that there remains in the hands of the executor securities belonging to the estate amounting in value, principal sum, to \$24,000 and upward; that the executor has received and holds to his own use all the interest accruing on the securities of the estate at the time of the death of the testator, and all that has accrued since his death, and claims that the complainant is not entitled to the securities to the amount of \$17,000, as they were held by the testator at the time of his death, but only to the sum of \$17,000 in such securities at the end of one year from the death of the testator.

The prayer of the bill, as originally drawn, was that a decree might be made construing the will of the testator, and directing that the complainant is entitled to receive the sum of \$17,000 in the securities of the estate and in the hands of the executor which came to him after the death of the testator, together with the interest accruing thereon from and after his death, and with the interest on so much and such parts of the interest as the ²⁴⁸ executor has received since the death of the testator, now in his hands, and for other and further relief.

A motion is now made to dismiss the bill for the following reasons: First, because the court has no jurisdiction to make the decree prayed for, there being no prayer for any direction to the defendant named as executor or as an individual, the suit being brought, as appears by the allegations of the bill, for the mere purpose of interpreting the provisions of the will, without any further relief, and by the prayer the only relief sought is the counsel and advice of the court in the construction of a portion of the will, there being no prayer for any positive direction to the executor, or to the defendant named in the will as an individual. Second, because the name of the defendant as executor of the deceased is omitted from the prayer to answer, the bill alleging that the defendant has failed in his duty as executor, and the bill seeks a construction of the whole or a portion of the will; and because the prayer for subpoena is that the writ be issued to the defendant commanding him personally, and as executor of the deceased, to appear, there being no prayer that the defendant answer the bill or answer the interrogatories. Third, because there is no equity in the bill, the true construction of the will being that the legacy is not a specific legacy, and that the complainant is not entitled to have and receive from the executor the bequest in specie as it existed at the time of the death of the testator, and to include interest on the same from that time, but that the legacy is general or demonstrative, and

that the widow is entitled to be paid the sum of \$17,000 from the estate of deceased out of the securities that were in existence at the death of the testator, with interest after one year from his death. Fourth, because the bill lacks equity, there being no allegation which entitles the complainant to any relief against the defendant or as executor of the deceased.

Before the hearing the complainant, on motion, and by leave of the court, amended the prayer for relief by inserting a prayer that the defendant, as executor, may be decreed to deliver to her securities of the estate of the testator that came to his hands after testator's death, to the amount, principal sum, of \$17,000, together with interest thereon from his death, or, in case the ²⁴⁹ executor has collected the principal and interest, that he pay the sum or such parts thereof as he may have collected to the complainant in cash.

This motion to strike out the bill is made under rule 213 of this court, and is equivalent to a demurrer: *Grey v. Greenville & H. R. R. Co.*, 59 N. J. Eq. 372, 46 Atl. 638. Like a demurrer, the motion admits the facts well pleaded in the bill. This being so, the admission is that the testator died possessed of securities, being bonds and mortgages, of the value of \$17,000, which were available to pay the legacy to the complainant in specie, which, being assigned to her, would have been interest drawing securities in her hands from the date of the testator's death, but that instead of satisfying her legacy in that way, the executor has refused to make such settlement, and claims the complainant is only entitled to \$17,000 from the estate of the testator in securities, to draw interest from one year after the death of the deceased.

In the face of this declination of the executor, the court has the power, certainly under the amended prayer, to decree that the executor carry out the intention of the testator and deliver to the complainant securities of the estate which came to his hands in the principal sum of \$17,000, so that she may receive interest thereon from the date of the testator's death, or if the executor has received such interest, or any part of it, that he turn that over in addition. In this posture of the case I fail to see that the bill is one merely for a construction of the decedent's will without any direction to the executor to perform a duty. On the contrary, it seems to me, plainly, that the case is one for the direction to perform a duty following and arising out of a construction of the will, if that construction be favorable to the complainant. Besides, under our liberal practice of amendments, in a suit in equity, after issue joined and after witnesses have been examined, the complainant is permitted to amend by adding proper parties, where there is a defect of parties: *Seymour v. Long Dock Co.*, 17 N. J. Eq. 169. Even on final hearing the complainant will be

allowed to amend if thereby no right of defense is abridged: *Ogden v. Thornton*, 30 N. J. Eq. 569.

²⁵⁰ If the complainant had not amended her bill, she would be permitted to do so now, to the end that the substance of the motion could be considered and the cause disposed of on its merits. If there remains any technical defect in the prayers, amendment will be allowed.

This brings me to the consideration of the real question at issue, which is, Is the legacy of the complainant a specific or demonstrative one?

As to whether a legacy is specific or demonstrative, Vice-Chancellor Emery, in *Blair v. Scribner*, 65 N. J. Eq. 498, 57 Atl. 318, quotes from the decision of Chancellor Kent (at page 518), as follows: "The reasoning on this subject is, that if the legacy is meant to consist of the security, it is specific, though the testator begins by giving the sum due upon it. A legacy of a debt, unless there is ground for considering it a legacy of money and that the security is referred to as the best mode of paying it, is as much specific as the legacy of a horse or any movable chattel whatever. If the specific thing is disposed of or extinguished, the legacy is gone. . . . It is essentially a question of intention when we are inquiring into the character of a legacy upon the distinction taken in the civil law between a demonstrative legacy, where the testator gives a general legacy but points out the fund to satisfy it, and where he bequeaths a specific debt."

The learned vice-chancellor continues that courts incline to consider legacies opening with the bequests of sums of money to be general or demonstrative, rather than specific, and that a clear intention must appear in order to make a legacy specific, citing authorities.

This case (*Blair v. Scribner*) was reversed in the court of errors and appeals, because that court held that the true construction of the will there under consideration led to a different conclusion than that reached in this court, but did not in anywise depart from the law concerning specific or demonstrative legacies laid down by the vice-chancellor. In fact, in direct affirmance of what he said, the court of last resort remarked that it is a primary rule in the construction of wills that a clear intention on ²⁵¹ the part of the testator must appear in order to make a legacy specific: *Blair v. Scribner*, 67 N. J. Eq. 583, 60 Atl. 211.

To my mind, the intention of the testator in the case now under consideration to make the legacy to his wife specific and not demonstrative is so clear upon its face that resort does not have to be had to the other parts of the will or the situation of the parties as an aid in interpretation.

My reason for saying that the testator's intention to make the legacy in question a specific one clearly appears is, that

his direction that the legacy shall be paid out of securities "instead of cash" puts the matter in such posture that the payment must be made in the securities mentioned in order to effectuate and carry out his intention. These words "instead of cash" are, in my judgment, absolutely controlling, and are evincive of the clearest intention that the legacy was payable in the very securities which he held at the time of making the will, to the end that his widow should have the income yielded by them from the time of his death.

As is well known, a specific legacy carries with it the income thereof from the death of the testator: Theobald on Wills, 180; Blundell v. Pope (N. J.), 21 Atl. 456.

The motion to strike out the bill must be overruled, with costs.

A Specific Legacy is a Bequest of a Specific Article of the testator's estate, distinguished from all others of the kind; as, for instance, a particular horse, or piece of plate, or money in a certain purse or chest, or a particular stock in the public funds, or a particular bond or other obligation for the payment of money: Note to Brill v. Wright, 8 Am. St. Rep. 720; Rogers v. Rogers, 67 S. C. 168, 100 Am. St. Rep. 721; Snyder's Estate, 217 Pa. 71, 118 Am. St. Rep. 900. What legacies are specific in any individual instance necessarily depends upon the construction of the will: Note to Walton v. Walton, 11 Am. Dec. 468. Courts are not inclined to favor specific legacies. The law leans against them in favor of general legacies: Nusly v. Curtis, 36 Colo. 464, 118 Am. St. Rep. 113; Snyder's Estate, 217 Pa. 71, 118 Am. St. Rep. 900. But if the language of the will is clear, and plainly evinces an intent to create a specific legacy, such effect must be given to the language used: Nusly v. Curtis, 36 Colo. 464, 118 Am. St. Rep. 113.

Concerning the Right to Income from the Death of the Testator, see Succession of Allen, 48 La. Ann. 1036, 55 Am. St. Rep. 295.

CLARK v. BOARD OF EDUCATION OF BAYONNE.

[76 N. J. Eq. 326, 74 Atl. 319.]

EQUITY—Interference With Judgment at Law.—The court of chancery has no jurisdiction to interfere with a judgment of a court of law except where some well-defined independent equitable ground exists for restraining the enforcement thereof. (p. 765.)

EQUITY—Preservation of Status Pending Appeal at Law.—That an unsuccessful litigant in a court of law has appealed therefrom and is meanwhile unable to secure from any law court a restraint against further proceedings under the judgment below, is not an independent equity which gives the court of chancery jurisdiction to interfere, although such proceedings under the judgment may result in such a change in the status of the subject matter of the controversy as may make nugatory a judgment of the court of review when pronounced. Overruling People's Traction Co. v. Central Passenger Ry. Co., 67 N. J. Eq. 370. (p. 765.)

EQUITY—Granting of Stay of Proceedings in Law Action—

An application for a stay is a mere step in procedure to be applied in the exercise of an equitable discretion by the court having control of the law action and by that court only. (p. 766.)

(Syllabi by the court.)

J. Merritt Lane, for the complainants-appellees.

Elmer W. Demarest, for the defendant-appellant.

³²⁶ **DILL, J.** The board of education of the city of Bayonne had taken preliminary steps for the erection of a school building. The contract was about to be awarded when the complainants, taxpayers of Bayonne, applied to a justice of the supreme court for a writ of certiorari to test the legality of the proceedings of the board. The rule was granted with a stay, testimony taken, the proceedings affirmed and judgment entered in the supreme court affirming the proceedings and dismissing the writ.

A writ of error was sued out in this court, removing said judgment here. The prosecutors then filed a bill in chancery, ³²⁷ reciting the proceedings at law, alleging that the judgment was erroneous, that the board was about to prosecute the work by entering into a contract for the school building, and that the court of errors and appeals was not then in session, and hence no application could be made to that court for a stay, and prayed for an injunction restraining the board of education from entering into the contract until the determination of the writ of error in this court.

A rule to show cause was issued by the vice-chancellor, with an interim restraining order, and on its return it was made absolute by a decree reciting that in the proceedings in the supreme court on certiorari judgment was entered against the complainants herein (the prosecutors therein), from which a writ of error was promptly taken out and was being regularly pursued, and that, under the circumstances, it was proper for the court of chancery to maintain the status quo until the complainants should have proper opportunity to make application to the court of errors and appeals for a stay pending the argument upon and determination of the writ of error.

The defendant-appellant herein, having perfected an appeal from the court of chancery to this court, an application was made by the complainants-respondents for a stay against proceedings under the supreme court judgment, which stay this court refused. Thereafter the complainants secured an order in the court of chancery dismissing the bill in that court.

The dismissal by the court of chancery does not, as the respondent argues, affect the appellant's right to proceed in this court, and accordingly this appeal brings up for review two chancery orders; the first denying the motion of the defendant ³²⁸ herein to dismiss the bill of complaint on the

grounds of absence of jurisdiction, want of equity and the insufficiency of the bill; the second restraining the defendant herein from proceeding under the judgment in the supreme court pending an application to this court for stay.

The question is squarely presented as to whether a court of chancery has jurisdiction to interfere in proceedings in a court of law where the case is one within the jurisdiction of that court, and where no independent equity is shown except the claim that the complainant is in good faith seeking to review the judgment of the court of law and has been unable to secure from any law court a stay pending the appeal.

The learned vice-chancellor below was constrained to follow the only equity precedent in this state, where another vice-chancellor allowed an injunction under similar circumstances in order to preserve the status quo of the litigation until the appeal could be heard: *People's Traction Co. v. Central Passenger Ry. Co.*, 67 N. J. Eq. 370, 58 Atl. 597.

That case we decline to approve and overrule it as unsound.

In the *People's Traction Company* case the court rested upon *Hart v. Albany*, 3 Paige, 381; but *Hart v. Albany* does not sustain any such doctrine, for there the original bill was filed in chancery and the injunction staying proceedings issued out of the same court.

The control of a court over its own process is not questioned; but it is quite another proposition to say that a court of chancery may issue a stay in a law action pending an appeal from the decision of the law court to a court of last resort. The question as to the stay and the appellant's right thereto, which is erroneously declared in the *People's Traction Company* case (67 N. J. Eq. 370, 58 Atl. 597), to constitute an independent equity, on the contrary involves but a mere step in procedure in the law action, to be applied in the exercise of an equitable jurisdiction in that court and not in the court of equity.

The court of chancery has no jurisdiction to interfere with a judgment of the supreme court except where some well-defined independent equitable ground exists for restraining the enforcement thereof.

329 That an unsuccessful litigant in a court of law has appealed therefrom and is unable meanwhile to secure from any law court a restraint against further proceedings under the judgment below is not, as declared in *People's Traction Co. v. Central Passenger Ry. Co.*, 67 N. J. Eq. 370, 58 Atl. 597, an independent equity which gives the court of chancery jurisdiction to interfere, although such proceedings under the judgment may result in such a change in the status of the subject matter of the controversy as may make nugatory the judgment of the court of review when pronounced.

This rule dates back to the early days of courts of chancery in England (*Montague v. Dudman*, 2 Ves. 396, decided in 1751), is restated in the English judicature act of 1875, and is sustained by a long line of authoritative decisions as against which the *People's Traction Co. v. Central Passenger Ry. Co.*, 67 N. J. Eq. 370, 58 Atl. 597, stands out as the only decision to the contrary: 2 Daniell's *Chancery Practice*, 6th Am. ed., 1624; *Pomeroy's Equity Jurisprudence*, sec. 1365.

The court of chancery in this state follows the practice of the English courts of chancery as stated in *Southern National Bank v. Darling*, 49 N. J. Eq. 398, 23 Atl. 475, and *Jones v. Davenport*, 45 N. J. Eq. 77, 17 Atl. 570. Similarly this court follows the practice of the house of lords of England, as held in *Newark etc. R. R. Co. v. Mayor and Common Council of the City of Newark*, 23 N. J. Eq. 515.

Under the English decisions the rule of noninterference of equity with law is so well recognized that it has been rarely questioned (*Mayor of Gloucester v. Wood*, 3 Hare, 153), and an application similar to the one before us was characterized by Mr. Lord Justice James as a very bold application to induce the court to repeal settled law: *Garbutt v. Fawcus*, 33 L. T. 617.

Courts of equity as such have no revising, controlling or superintending power over the judgments, proceedings or decisions of courts of law: *Hood v. New York etc. R. Co.*, 23 Conn. 609; *Crim v. Handley*, 94 U. S. 652, 24 L. ed. 216.

In this state in 1844 the court of chancery, after reviewing the American and English decisions, declared for the same doctrine: ³³⁰ *Executors of Powers v. Administrator of Butler*, 4 N. J. Eq. 465.

Equity interferes with judgments at law only where there has been fraud, or mistake, or accident in procuring the judgment and where the legal remedies are inadequate.

To hold that a court of chancery may grant a stay, as in this case, in legal proceedings, when a court of law, which has all the facts before it, and which has exclusive jurisdiction of the action, has decided the question on its merits, is to hold that a court of equity may set up its judgment in opposition to the judgment of the law court and may virtually take unto itself jurisdiction of a cause over which it had originally no jurisdiction. Such a position is obviously unsound and inconsistent with the history and established principles of equity jurisprudence, and results, as here, in an attempted usurpation of the jurisdiction of the supreme court and of even this court by the court of chancery.

Counsel for both appellant and respondent have assumed that the writ of error to this court did not act as a stay, and therefore we have not considered that question.

The orders appealed from are both reversed.

To Obtain Relief in Equity Against a Judgment at Law, some ground for equitable relief must be shown: Note to *Oliver v. Pray*, 19 Am. Dec. 605. A court of equity will not relieve from a judgment unless the party seeking its interference can assail the judgment by facts or on grounds of which he could not avail himself at law, or was prevented from doing so by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part: *City of Fort Pierre v. Hall*, 19 S. D. 663, 117 Am. St. Rep. 972. A suit in equity to obtain relief from a judgment as a collateral attack is discussed in the note to *Morrill v. Morrill*, 23 Am. St. Rep. 117. Relief in equity from judgments at law is discussed in the note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218.

LISTER v. HARDIN.

[76 N. J. Eq. 360, 76 Atl. 558.]

WILLS.—Whether Annual Payments of the Interest on a certain sum for life provided for by a will is a charge upon the whole residuary estate or a specific bequest of the sum must be determined from the language of the bequest. (p. 768.)

WILLS.—Annual Payments as Charge on Estate.—A provision in a will giving fifty thousand dollars to the testator's wife, provided she waives her dower rights, and if she does so, "I direct my executor to pay her annually during her lifetime the income derived from the investment of the sum of fifty thousand dollars in addition to the above," does not create a charge upon the whole residuary estate but is a bequest of a definite sum of money. (p. 768.)

EXECUTORS.—Embezzlement—Liability of Residuary Legatees.—Where an executor makes payment of a fund to a legatee or to a trustee for him, or makes such appropriation as is equivalent to payment, the persons entitled under the will to the residuary estate will not be called upon to make contribution for any loss to such fund by embezzlement of the executor or trustee, or otherwise. (p. 769.)

Harry V. Osborne, for the complainant.

Egner, for the defendants.

³⁶⁰ STEVENS, V. C. This case comes up on demurrer to the bill. Complainant is the widow of Edwin Lister, who, by a codicil to his will, provided as follows:

"Instead of the provisions in my will for my wife I give and bequeath to her the sum of fifty thousand dollars to be paid to her within ten days after vacation of my homestead and after her releasing of her dower right in my real estate, the same to be in full satisfaction of such right, but if she neglects or refuses within six months after my decease to comply with above conditions, she is to have her dower right only in my real estate and no share whatever in my personal estate.

³⁶¹ "If my wife accepts above conditions, I direct my executor to pay her annually during her lifetime the income de-

rived from the investment of the sum of fifty thousand dollars in addition to the above."

The widow accepted the first-mentioned bequest, and received \$50,000 in money. As to the second bequest, the bill alleges that complainant received the interest on \$50,000 from the sole executor, Weeks, in accordance with the provisions of the will up to October 8, 1901, the testator having died on May 18, 1898; that it was discovered "that Weeks had misappropriated the trust fund which had been set aside for your oratrix, to wit, the sum of \$50,000, leaving remaining of such fund about the sum of \$29,350"; that on June 6, 1902, Weeks was removed from the trusteeship because of his misappropriation, and that the new trustee took possession of \$29,350, the balance left by him. The bill then states that the residuary estate has been wholly distributed to and between Robert Lister and Esther G. Sc'by, the residuary legatees, who are also residuary legatees of the \$50,000 fund.

Taking the allegations of the bill as a whole, it appears that Weeks, in accordance with the directions of the codicil, set apart the \$50,000 as a separate fund; that he paid the complainant the interest accruing from the investment of it down to October, 1901; that he misappropriated it to the extent of \$20,670, and that for this misappropriation and other acts in breach of his duty as trustee he was removed.

The question is whether the complainant can compel the residuary legatees, to whom the residuary estate has been completely transferred, to make good out of what has come into their hands the amount so misappropriated by Weeks; in other words, whether the annual payment to be made to the widow during her life is a charge upon the whole residuary estate. This must depend upon the intention of the testator as we find it expressed in the language of the bequest. The direction is to pay "the income derived from the investment of the sum of \$50,000." That means that the executor is to take \$50,000 out of testator's estate, invest it and pay the income, whatever it may be, derived from the sum thus invested. It thus appears that what the testator intended to give, and did give, was a definite sum of money, ³⁶² the interest of which was to be paid to Mrs. Lister for life and the principal of which was to be paid to his two children at her death, and not an annuity chargeable on the entire residue.

In *Willmott v. Jenkins*, 1 Beav. 404, Lord Langdale says: "If an executor makes payment to a legatee in person or to a trustee for a legatee, or makes such appropriation as is equivalent to payment, the other persons entitled under the will are not to be called on to contribute for any loss which may happen to the fund so paid or appropriated." It was held there that the appropriation was incomplete because the executor

had carried several sums to one account and had invested them in his own name, without making any declaration of trust, but here the bill states that the sum of \$50,000 was set apart by the executor for the particular purpose directed and that all the other money of the estate was distributed. Even where a testator gave an annuity, which in general stands upon a different footing, and directed that it should issue "out of so much stock in the navy five per cent annuities as shall be fully sufficient to produce and answer the payment" of the yearly sum given, Vice-Chancellor Shadwell held that the investment having been made as directed, the legatee was not entitled to have the deficiency caused by the enforced conversion of the five per cent into a four per cent annuity supplied out of the testator's residuary estate: *Kendall v. Russell*, 3 Sim. 424.

The case of *Mills v. Smith*, 141 N. Y. 256, 36 N. E. 178, is directly in point. There a testator gave to his executors the sum of \$20,000 in trust to invest on bond and mortgage and apply the net income to L. M. for life and at his decease to divide the principal among his children. The fund was invested and subsequently misappropriated. The effort was to hold the residuary legatees. Justice Gray said: "This action is simply an attempt to fasten upon the distributees of testator's residuary estate the responsibility for the subsequent default of the executors, as trustees for plaintiff's father. This cannot be done. Where the loss of a fund is due to waste or misconduct of the executor and trustee, he and his estate alone can be looked to. No claim for contribution arises against residuary legatees in such a case."

³⁶³ The authority mainly relied upon by complainant's counsel (*Trenton Trust & S. D. Co. v. Donnelly*, 65 N. J. Eq. 119, 55 Atl. 92) is not in point. There money had been bequeathed in trust to pay the interest to testator's wife for life, remainder to his sisters and the heirs of his deceased brother. The corpus was diminished by an unfortunate investment, and the question was how the loss was to be borne as between the widow and those who took the principal at her death. The widow was held entitled to part of the corpus to indemnify her, in part, against her loss of interest. There was no attempt to make the residuary or other legatees contribute to or make good the loss suffered. The bill in the present case is not framed upon the theory of that case, and no facts are stated that would make its principle applicable.

The complainant also asserts that when she relinquished her dower right, she gave a valuable consideration for the legacies, and that she therefore stands upon a different footing from the ordinary legatee. If the question had been whether she was not entitled to a preference on a deficiency

of assets, she might have prevailed, but the question here is quite different. She received, in the first instance, all that she bargained for. The estate gave her \$50,000 in cash and it appropriated to her use, in the hands of a trustee, the other \$50,000. The mere fact that that trustee was Weeks, the executor, instead of someone else, can make no difference so far as the legal aspect of the case is concerned. If the trustee subsequently misappropriated the money, he is responsible and not the other distributees of the estate.

The bill should be dismissed.

Legacies, When Specific, are not Subject to Contribute to any deficiency occurring in other bequests, nor can a specific legatee claim to have any deficiency which may be found to exist in his legacy made up from other portions of the estate: Evans v. Hunter, 86 Iowa, 413, 41 Am. St. Rep. 503. Actions for contribution not founded on an express promise is the subject of a note to Stockwell v. Mutual Life Ins. Co., 98 Am. St. Rep. 31.

Liability of Executor or Administrator for Loss of Trust Property: Davis v. Chapman, 83 Va. 67, 5 Am. St. Rep. 251. That such trustees may be guilty of embezzlement, see notes to Eggleston v. State, 87 Am. St. Rep. 45; Pfefferle v. Herr, 138 Am. St. Rep. 548.

CROPPER v. BROWN.

[76 N. J. Eq. 406, 74 Atl. 989.]

JUDICIAL SALES—Confirmation—Written Objections.—The only office of a written objection to the confirmation of a sheriff's sale in foreclosure, under the act of March 12, 1880, and rule of court 205, is to urge the overthrow of the sale upon the sole ground that the property did not bring the highest and best price that could be obtained for it in cash, and an attack upon the sale on any other ground must be made the basis of an independent action either by bill or petition. (p. 772.)

JUDICIAL SALES—Relief of Purchaser, How Obtained.—Any effort on behalf of the purchaser at a judicial sale to be relieved of his purchase must be by some independent proceeding, and not by mere objections to confirmation. It may be by petition to the court. (p. 772.)

JUDICIAL SALES—Petition by Purchaser for Release.—In the absence of a showing that the property did not bring the best price or that the sale was not properly conducted, a petition by a purchaser at a judicial sale to be released from his purchase, heard before confirmation of the sale, will be treated the same as if the sale had been, or was about to be, confirmed. (p. 772.)

JUDICIAL SALES—Rights of Purchaser.—A purchaser at a judicial sale becomes invested with a fixed and definite legal right, which is recognized and enforced by the law, and of which he cannot be deprived except upon some legal or equitable ground; and, although in those cases where confirmation is required the right is subject to be defeated, the right of the purchaser and the correlative rights of the judicial officer are established at the time of the sale and by the contract then made. (p. 775.)

JUDICIAL SALES—Contract Subject to Rules of Private Sale. When the judicial officer, observing proper legal formalities, at a public sale strikes off the property to a purchaser, who thereupon signs the conditions of sale, thereby entering into a contract to purchase the premises named, at the price named, the situation is exactly the same as if the contract were between private parties, and the same principles will control as would control private parties entering into a similar contract. (p. 776.)

JUDICIAL SALES—Deed Relates Back to Sale.—The giving of the officer's deed upon a judicial sale is a mere ministerial act, and not a substantial part of the sale. When given it relates back to the sale and the contract there made. (p. 778.)

JUDICIAL SALES—Relief of Purchaser.—In those cases in which the court itself is requested by the purchaser to relieve him of his purchase, the matter is dealt with as if it were an action of specific performance, and the same principles are applied. (p. 780.)

JUDICIAL SALES—Title of Purchaser.—The legal title does not vest in the purchaser at a judicial sale until the delivery of the deed, but in the meantime it is held in trust for him. Since he has stipulated that he is not to receive possession until a future date, namely, the time the deed is to be delivered to him, he is not entitled to the fruits of possession, which are the current avails of the land, but he is vested with the beneficial ownership of the property, and any increase of value or decrease therein inures to him, and the loss or destruction of the property falls upon him and not upon the vendor. (pp. 780, 783.)

JUDICIAL SALE—Destruction of Property Pending Confirmation.—Where, subsequent to a judicial sale and the signing of the conditions of sale by the purchaser, but prior to confirmation, the property is destroyed, the purchaser must sustain the loss, and will not be relieved from his contract because of such destruction. (p. 783.)

INSURANCE.—The Purchaser at a Judicial Sale has, prior to obtaining the officer's deed or possession, an insurable interest in the property. (p. 783.)

The petitioner at a sale by the sheriff of Hudson county under a writ of fieri facias bid in certain improved property for two thousand three hundred dollars and signed the usual conditions of sale. On the night after the sale a house on the premises was destroyed by fire. The purchaser then filed his petition praying to be relieved from his bid or due allowance of a deduction therefrom of the amount of the loss occasioned by the fire.

Maximilian T. Rosenberg, for Gormley, petitioner.

William R. Barricklo, for the complainant.

Peter Stillwell, for David and Nellie Brown, defendants.

408 GARRISON, V. C. The fact that this petition is filed before the date fixed for the confirmation of the sale does not, in my view, affect the principle which should be applied in the decision of the case.

This is a foreclosure suit, and the statute requiring confirmation is the act of March 12, 1880: Gen. Stats., p. 2111,

sec. 45. This statute and rule 205 of this court concerning the same subject matter recently received judicial construction in this court in the case of *Oakley v. Shaw* (N. J. Eq.), 69 Atl. 462. In that case the court refers to many of the cases upon this subject matter, and reaches the conclusion "that the only office of a written objection to the confirmation of a sheriff's sale in foreclosure, under the act of March 12, 1880, and rule 205 of this court, is to urge the overthrow of a sale upon the sole ground that the property did not bring the highest and best price that could be obtained for it in cash, and that an attack upon the sale on any other ground must be made the basis of independent action either by bill or petition": See, also, *Bethlehem Iron Works v. Philadelphia etc. R. R. Co.*, 49 N. J. Eq. 356, 23 Atl. 1077, and *Fleming v. Fleming Hotel Co.*, 70 N. J. Eq. 509, 61 Atl. 157. Any effort on behalf of the purchaser at the sale to be relieved of his purchase must be by some independent proceeding and not by mere objections to confirmation, and may be by petition.

Since the statute in question, which requires confirmation, has been judicially held to have been enacted for the purpose of enabling the court before the sale is carried out to be assured ⁴⁰⁹ that the property has brought the best and highest price obtainable in cash at the time of the sale, the court, in this case, must treat this sale as if it were, or were about to be, confirmed, and as it would treat either a confirmed sale or one that required no confirmation, because there is nothing before me to show that the property did not bring the price obtainable in cash at the time of the sale, and nothing to show that the sale was not properly conducted and should not therefore be confirmed.

The practice of the English court of chancery in opening sales whenever an offer of a larger amount for the property was made was discarded and not adopted in this state: *Morris v. Inglis*, 46 N. J. Eq. 306, 19 Atl. 16; *Rogers v. Rogers Locomotive Co.*, 62 N. J. Eq. 111, 50 Atl. 10; *Fleming v. Fleming Hotel Co.*, 70 N. J. Eq. 509, 61 Atl. 157.

The English practice treats the bidder in the light of one who has made an offer to be reported to the court, and if a larger offer is made by another, the sale to the former is not confirmed. This is so radically different from our practice that the English authorities will have to be viewed with great caution, particularly those which lay stress upon the effect of confirmation.

There are some cases in England which hold that there is no contract until the court has confirmed the bidding in the master's office, but even these cases are doubted by later decisions, and it would not seem, from a consideration of the

English authorities, that such was now the rule there. However that may be, after the courts in England have once determined that the contract of sale was complete, whether they fixed that period at the time of the sale or at the time of the confirmation, they then applied the rule concerning the rights and responsibilities of the parties which, I think, is the correct rule, and which I shall formulate and state hereafter.

Ex parte Minor, 11 Ves. Jr. 558: The estate of a lunatic was sold before the master on the 9th of February, 1805. On the 26th of February there was a petition that the report of the master might be confirmed. On the 28th of February there was a fire, and this was a petition by the purchaser to have the value of the premises destroyed ascertained and the amount deducted ⁴¹⁰ from the purchase money. The argument on behalf of the petitioner was that it was necessary to distinguish this case from those cases in England which are cited in his brief and which hold that from the date of the contract of purchase the purchaser was, in equity, the owner to all intents and purposes, and should gain or suffer, as the case might be, by changes in the subject matter of the sale, because in this case the highest bidder could not be considered the owner until the confirmation of the report, and if the premises, by accident, were increased in value, as by the discovery of a mine, the court would require an increase of price (citing cases).

The contrary argument was that, referring to all legal and equitable consequences attaching to sales, the court could not properly distinguish sales before masters from sales in any other manner, and that from the time the purchaser signs the master's book, and has the report declaring him the purchaser, all those consequences must follow.

Lord Chancellor Eldon, upon the argument, said: "The question must depend upon the point, What is the date and time of the contract at which it can be said to have been complete? Is the bidding in the master's office the contract between the court and the bidder, or only an authority to the master to tell the court that, if the court approves, the court may make a contract with him (the purchaser) upon the terms proposed?" Subsequently, his lordship determined that the loss must fall upon the vendor.

The same judge, in the case of *Anson v. Towgood*, decided in 1820, about fifteen years after the previous case, said, concerning a sale before a master: "Can anything turn upon the report not being confirmed? There was a case about a house being burned down before the confirmation of the report (*Ex parte Minor*, 11 Ves. 559), but if the tenant for life had died the same night, must not the purchase money have been paid? The report, I think, when confirmed, must

have relation back to the purchase, and the contract, I apprehend, was made the moment that the purchaser's name was entered in the master's book."

And in *Millican v. Vanderplank*, 11 Hare, 135, decided in 1853, the vice-chancellor, Sir W. Page Wood (at page 140), says: ⁴¹¹ "There are material distinctions between a sale by private contract and a sale by auction before the master in the ordinary view. Sales by auction before the master are of a peculiar character. The person who is the highest bidder knows that he is not the purchaser until the confirmation of the report, and that, until such confirmation, any stranger may apply to the court to open the biddings, and that, upon such an application, the party making it does not necessarily become himself the purchaser, . . . and the property is again put up to auction. All persons bidding at sales before the master are aware that they are of this peculiar character. I cannot, however, concur in the argument which was addressed to me in this case, that a distinction between sales by auction and private contract was that the purchaser was not bound in the former case until the confirmation of the report.

"Lord St. Leonards, in *Vesey v. Elwood*, 3 Dr. & W. 74, after considering the cases of *Ex parte Minor*, 11 Ves. 559, and *Anson v. Towgood*, 2 Jac. & W. 637, came to the conclusion that the purchaser was bound before the confirmation of the contract by the court. He held this in the strongest case which can be supposed, in which a life dropped in the meantime before the purchaser could, according to the practice of the court, have confirmed the report."

In the case of *Robertson v. Skelton*, 12 Beav. 260, the master of the rolls, Lord Langdale, held: "By the established rule of the court the purchaser is to be considered, in fact, as the owner of the estate from the date of the order confirming the report, and any deterioration of the property arising from accident, as by fire, without the fault of the vendor, falls upon the purchaser." In this case two houses were sold by auction in a creditor's suit. By the conditions of sale the purchaser was to get the report confirmed before the 8th of August, 1846, and pay his purchase money into court before the 12th of November, 1846, and be let into possession as from the 29th of September, 1846. After the confirmation, but before he paid his purchase money and obtained the conveyance and possession, part of the property fell down and had to be repaired. It was held that the loss fell upon ⁴¹² the vendee. No point, of course, was involved in this case as to the matter of confirmation.

In New Jersey the courts have always endeavored to give the greatest stability to judicial sales, and upheld them unless

there was some strong, equitable or legal reason to the contrary.

"A purchaser at an official sale becomes invested with a fixed and definite legal right, which is recognized and enforced by the law, and of which he cannot be deprived except upon some legal or equitable ground": *Chamberlain v. Larned*, 32 N. J. Eq. 295. See, also, cases cited in *Palladino v. Hilpert*, 72 N. J. Eq. 270, 65 Atl. 721.

This right of the purchaser, in those cases in which confirmation is required, is fixed, though defeasible, and is subject to be defeated if the court refuses to confirm the sale, but, notwithstanding this, the right of the purchaser and the correlative rights of the judicial officer are established at the time of the sale and by the contract then made.

In my view, there is no real distinction in this state in respect to the principles to be applied respecting the rights of the parties between judicial sales and other similar sales voluntarily made between parties.

The judicial sale is made by the officer in whom the law has lodged the power to make the sale. The fact that it is in invitum, and that the officer is only exercising a power and has not title, does not, in my view, in any way alter the rules to be applied when the contract has once been made.

Since there exists a parallel line of decisions which are contradictory and confusing upon this point, it will be necessary to consider them in order to reach a clear determination and conclusion.

In *Den v. Steelman*, 10 N. J. L. 193, Chief Justice Ewing, in the supreme court, held that the substantial part of a judicial sale was the delivery of the deed by the sheriff to the purchaser and that everything related to that; and he further held that under our law the exercise by the sheriff of the power of sale vested in him did not become effective until he delivered the deed, and that, therefore, there was no relation⁴¹³ back to the date of the sale (when the contract between the purchaser and the sheriff was entered into). He therefore held that the law which would obtain as between a voluntary vendor and vendee did not apply as between sheriff and purchaser. The decision in the case involved these facts: A sale under a judgment by a sheriff who made a contract with A as purchaser. Before the sheriff's deed was delivered to A a judgment was recovered by B against A. Under B's judgment against A, A's interest in the premises purchased by him at the sheriff's sale aforesaid was attempted to be sold, and the contest was between the respective titles. The court held that whatever right A, the purchaser at the first sale, had, it was not such as was subject to execution under a writ of fieri facias issued on a common-law judgment.

Since there was no provision in any of the statutes which subjected an equitable estate to levy and sale under a common-law judgment, this decision seems to me to be unexceptionable, but the reasoning of the chief justice concerning these other matters does not seem to me to have been necessary for the decision of the case.

His reasoning, however, was adopted in other cases: *Bloom v. Welsh*, 27 N. J. L. 177; *Disborough v. Outcalt*, 1 N. J. Eq. 298; *Ketchum v. Johnson's Exrs.*, 4 N. J. Eq. 370; *Pearman v. Gould*, 42 N. J. Eq. 4, 5 Atl. 811; and particularly by Chancellor Magie in the case of *Thompson v. Ramsey*, 72 N. J. Eq. 457, 66 Atl. 588, with which I shall deal hereafter.

Parallel with these cases, and not adverting to them, there were the decisions in *Morse v. Hackensack Savings Bank*, 47 N. J. Eq. 279, 20 Atl. 961, 12 L. R. A. 62, *Wimpfheimer v. Prudential Ins. Co.*, 56 N. J. Eq. 585, 39 Atl. 916, *First Nat. Bank v. Thompson*, 61 N. J. Eq. 188, 48 Atl. 333, and *Carpenter v. Shanley*, 75 N. J. Eq. 369, 138 Am. St. Rep. 576, 73 Atl. 64, where exactly the opposite is held, namely, that the substantial thing in a judicial sale is the "contract made at the time of the sale between the officer and the purchaser, and that the delivery of the deed is a mere ministerial act on the part of the judicial officer, a mere formality, and that when it is delivered it relates back to the date of the sale.

The sheriff or other judicial officer is held to be the agent appointed by law for the person or persons whose rights are to be disposed of (*Brady v. Carteret Realty Co.*, 67 N. J. Eq. 641, 110 Am. St. Rep. 502, 60 Atl. 938, 3 Ann. Cas. 421), and the statute prescribes that the deed of conveyance which he shall give "shall transfer to or vest in the said purchaser as good and perfect an estate to the premises therein mentioned as the person, against whom the said writ or writs of execution were issued, was seised of or entitled to at or before the said judgment; and as fully, to all intents and purposes, as if such person had sold the said lands, tenements, hereditaments and real estate to such purchaser and had received the consideration money, and signed, sealed and delivered a deed for the same."

By what seems to me to be a perfect analogy, it must therefore be held that when this legal agent, namely, the judicial officer, observing proper legal formalities, at a public sale strikes off the property to a purchaser, who thereupon signs the conditions of sale, thereby entering into a contract to purchase the premises named at the price named, the situation is exactly the same as if the contract were between private parties. The sheriff is vested by law with the power, on behalf of the persons against whom he holds the writ, to sell

the property. This he does, and a written contract satisfying the statute of frauds is then made. I cannot perceive any reason why the same principles should not control the parties with respect to this contract as would control private parties voluntarily entering into a similar one.

Nor can I perceive why, when the deed which the judicial officer subsequently gives is delivered, it should not relate back to the time of the contract which undoubtedly, in my view, is the substantial thing in the transaction. The fact that the deed is not to be delivered at once, and that in the meantime, under the law, the purchaser is not entitled to possession, and is not ⁴¹⁵ entitled to possession until he secures his deed, does not affect the situation as equity views it.

Chancellor Magie, in the case of *Thompson v. Ramsey*, 72 N. J. Eq. 457, 66 Atl. 538, reverted to and depended upon the doctrine of *Den v. Steelman*, 10 N. J. L. 193, and refused to adopt the doctrine enunciated by Mr. Justice Depue in *Morse v. Hackensack Savings Bank*, 47 N. J. Eq. 279, 20 Atl. 961, 12 L. R. A. 62, because he held that the doctrine enunciated in the last-named case that the contract between the judicial officer and the purchaser was the substantial thing, and the delivery of the deed a mere formality, which, when delivered, related back to the date of the contract, was not necessary to the decision of that case, and was therefore obiter. The chancellor thereupon refused to consider *Morse v. Hackensack Savings Bank* as a precedent, and discarded the reasoning therein in favor of the reasoning of Chief Justice Ewing in *Den v. Steelman*.

I do not think it is clear by any means that the expression of opinion by Mr. Justice Depue in *Morse v. Hackensack Savings Bank* concerning this matter was obiter, and, in my view, it was necessary for him to decide the point in question to reach the decision which the court did upon the facts in that case. In that case Terhune was the executor of his father's will and was also one of the devisees thereunder. Upon a judgment obtained against him his interest as heir was set up and sold by the sheriff on the 29th of August, 1888, to the bank. On the twenty-second day of September, 1888, Terhune, exercising the power of sale vested in him by the will, sold all of the lands of which his father was seised to Morse and immediately gave him a deed which was immediately recorded. The sheriff's deed was not delivered to the bank (the purchaser at the sheriff's sale) until five days thereafter, namely, on the 27th of September, 1888. The contest was between the bank and Morse.

A perfectly familiar principle was involved in the suit, namely, that the title which descended to the heir was subject to be defeated by the exercise by the executor of the power of

sale contained in the will. That power of sale, when executed, related back to the date of the death, when the will became operative, and cut out the right of the heir and those who claimed by, through or under the heir.

⁴¹⁶ Of course, if the executor had exercised the power of sale before the rights of the bank had attached—that is to say, before those who claimed under the heir had any rights—there would have been no occasion for any extended discussion, and no issue calling for the application of any principle excepting the perfectly familiar one above mentioned. But it is obvious, from the opinions in the court of chancery (46 N. J. Eq. 161, 18 Atl. 367), and in the court of errors and appeals, *supra*, that other issues were in the suit and were determined.

The bank took the ground that, notwithstanding the familiar principle above alluded to, it was not operative in this case, because, having acquired their title through the heir before the exercise by the executor of the power of sale, they had the right to hold the title as against the purchaser at the executor's sale on account of certain equities which they urged. In the court of chancery this claim was held to be good. In the court of errors and appeals it was first held that, under the law, the purchaser at the sheriff's sale did convey a title prior in point of time to that of the purchaser at the executor's sale, and therefore was in a position to urge the equities in his behalf which he had raised and which had been considered in the court of chancery.

The investigation of the court of errors and appeals into these issues resulted favorably to the defendant, and resulted in a reversal of the court of chancery.

But upon the point which we are considering, the court of errors and appeals affirmed the position taken in the court of chancery. Mr. Justice Depue upon this point held: "The date of the delivery of the sheriff's deed is a circumstance of no importance. A purchaser at a sheriff's sale acquires by the act of purchase a right to a conveyance of the premises in pursuance of the sale. The delivery by the officer of a deed is a mere ministerial act which the officer is required to perform to consummate the sale and vest in the purchaser a title in compliance with the law under which the sale was made.

"The sheriff's deed, when delivered, has relation back to the time of the sale of which it is the consummation. . . . As a conveyance of the property the executor's deed (which, it ⁴¹⁷ will be recalled, was made, dated, delivered and recorded September 22d) was, in legal effect, subsequent in point of time to the sheriff's deed to the complainant (which, it will be recalled, was made, executed and delivered on the twenty-seventh day of the same September)."

The cases which have followed this decision and adopted its finding upon this point have been given, *supra*.

I incline to the opinion that this case is a precedent. I also incline to the opinion that, upon reason as well as upon authority, the doctrine therein enunciated is the correct one.

If I am correct upon this matter, the result is that the confusion both of decision and reasoning arising out of the contradictory nature of the respective cases above mentioned is dissipated, and our rule is that the giving of the sheriff's deed is a mere ministerial act, and is not the substantial part of a judicial sale, and, when given, relates back to the sale and the contract there made, with the result, likewise, that such contract is then to be treated, as previously stated, just as a similar contract voluntarily entered into between private parties concerning the same subject matter would be treated.

That this latter is the case seems to me to be borne out by those authorities which hold that upon such a contract an action at law will lie by either party against the other for a breach (*Townshend v. Simon*, 38 N. J. L. 239; *Smith v. Cunningham*, 69 N. J. Eq. 622, 61 Atl. 561), or a bill in equity will lie by either party for the specific performance of the contract: *Ely v. Perrine*, 2 N. J. Eq. 396; *Bowne v. Ritter*, 26 N. J. Eq. 456.

The whole matter is so well expressed by Chief Justice Depue in the case of *Townshend v. Simon*, 38 N. J. L. 239, that a quotation will be useful. Commenting upon cases which hold a contrary doctrine to the one which he approved, and with respect to one of them which held that the signing of conditions of sale was a mere submission to the authority of the court, and not a contract either with the sheriff or the plaintiff, he said: "The argument by which this conclusion ⁴¹⁸ was reached was that the memorandum lacked the essential elements of a contract, not only in parties but also in mutuality and consideration. Inasmuch as the legal results of a purchase at a sheriff's sale are an obligation on the part of the officer to convey, and on the part of the purchaser to accept a conveyance and pay the purchase money, it is difficult to perceive wherein the undertaking is deficient in either mutuality or consideration. The duty of the officer to make conveyance of the lands on his acceptance of the bid of the successful bidder, and his power to transfer to the purchaser the title he is selling, are as much a consideration as his ability to pass the property and chattels on the sale of personal property. The only difference is that property in chattels passes by the sale, whereas, on a sale of lands, a deed is necessary to convey the legal title. The rights of the buyer, in both instances, are fixed when the bid is accepted. Whatever else is necessary to complete the transaction is merely a compliance with the forms of passing title to land. Each party, it is admitted, may compel performance by the other by the intervention of the court out of which the process issued. A

more decided illustration of consideration and mutuality of a contract can scarcely be found. The same elements of mutuality and consideration are present in a sale by an officer having power to sell and ability to make conveyance, as attend a sale by an owner at public auction." And on page 244: "The notion that the contract is with the court is too fanciful to merit much consideration. It is regarded as such a contract as may be made the ground of a bill for specific performance in the name of the officer."

And in those cases in which the court itself is requested by the purchaser to relieve him of his purchase, the matter is dealt with as if it were an action of specific performance, and the same principles are applied: *McCarter v. Finch*, 55 N. J. Eq. 245, 36 Atl. 937; *Campbell v. Parker*, 59 N. J. Eq. 342, 45 Atl. 116.

In my view, therefore, the correct rule to be applied in our jurisdiction is that the purchaser at a judicial sale enters into a contract with the officer to which the same principles should ⁴¹⁹ be applied which are applicable to a similar contract between private parties voluntarily entered into. And the fact that by the terms of the contract the purchaser is not entitled to possession until a future date does not in any way alter the legal or equitable rights of the parties.

The legal title does not vest in the purchaser until the delivery of the deed, but in the meantime it is held in trust for him. Since he has stipulated that he is not to receive possession until a future date, namely, the time when the deed is to be delivered to him, he is not entitled to the fruits of possession, which are the current avails of the land. There are numerous cases, which I shall not stop to cite, which hold that until he is entitled to possession he is not entitled to such avails. But excepting with respect to the time when he is entitled to possession and the fruits of possession, the contract vests the beneficial ownership of the property in such purchaser, and any increase of value or decrease therein inures to him.

In other jurisdictions the rule is, in some, as above stated, and in others otherwise by reason of their statutes, and in some it is otherwise by reason of the different view which the court in question takes of the situation arising out of a judicial sale.

Much care must, of course, be exercised in reading cases from other jurisdictions, to observe the extent to which they are affected by statute. Many of the cases will be found gathered in the note to *Robertson v. Van Cleave*, 15 L. R. A. 68. See, also, *Yeazel v. White*, 40 Neb. 432, 58 N. W. 1020, 24 L. R. A. 449, and *Vance's Admr. v. Foster*, 9 Bush, 389.

And in disposing of a case arising under the laws of Nebraska—the courts of which hold that the confirmation of the

sale is necessary to its completion—the supreme court of the United States, in the case of *Woodworth v. Northwestern Ins. Co.*, 185 U. S. 354, 22 Sup. Ct. Rep. 676, 46 L. ed. 945, said: “The claim in the case at bar is for the rents and profits of the land, which accrued and were collected by the mortgagor after the entry of the order of confirmation of the sale. Upon general principles, independent of the decisions of the courts of Nebraska, we would be constrained to hold that, under the circumstances present in the case at bar, . . . the purchaser acquired, as against the ⁴²⁰ mortgagor, by relation, both the legal and equitable title to the land purchased, at least as of the date of the order of confirmation of the sale.”

And in the brief of counsel in that case there will be found many cases to support the principle there enunciated that the general equitable rule carries the title back by relation to the date of the sale so as to award to the purchaser the intermediate rents. And the case of *Woodworth v. Northwestern Ins. Co.*, above cited, was followed in *Brown v. Northwestern Ins. Co.*, 119 Fed. 148, 55 C. C. A. 654. See, also, *Missouri Valley Land Co. v. Barwick*, 50 Kan. 61, 31 Pac. 685.

I am of opinion, therefore, as I have heretofore stated, that under our decisions and statutes the proper holding is that the judicial officer and the purchaser at a foreclosure sale (and probably this applied to all similar judicial sales) stand in a similar position to parties who have contracted in writing for the purchase and sale of real estate.

If this is so, the disposition of the precise point in the case at bar is not difficult.

The note to *Bowen v. Lansing*, 57 L. R. A. 643, gathers up the cases from many of the jurisdictions concerning the rights of vendors and vendees in land contracts, and the conclusion to that note so well states what the cases hold that I shall quote it:

“Under the familiar doctrine that equity considers as done that which was agreed to be done, a contract for the sale of land operates as an equitable conversion. The vendee takes an equitable title, and his interest under the contract becomes realty; in case of his death before the conveyance is made the title descends to his heirs; he is entitled to all benefits attaching to the property, and must bear all losses, unless the contract shows a contrary intention on the part of the parties; he may execute a valid mortgage or deed of the property; and is entitled to the usual benefits attaching to the ownership of the property, subject, however, to the rights of the vendor, who holds the legal title as security for the payment of the purchase money.

“Conversely, the vendor’s interest constitutes personalty, and on his death, is distributable as such. He holds the legal

title as trustee for the purchaser and as security for the payment of the purchase money. He cannot give a valid deed or mortgage of the property to one having knowledge of the vendee's equities, though he may transfer his interest under the contract. The decisions are conflicting as to whether a judgment ⁴²¹ against him constitutes a lien on the property; some hold that it does not constitute a lien, while others hold that it constitutes a lien on his interest in the property which may be sold under the judgment.

"The doctrine will not be applied where it is apparent from the contract that the parties intended that it should not operate as an equitable conversion.

"Neither will it be applied where the contract is one the specific performance of which cannot be enforced.

"The conversion takes place at the time of the execution of the contract, even though the purchaser does not take possession or pay the purchase price; though in some cases where the decisions were based on the language of the particular contracts, it was held that the equitable title did not pass until the performance of certain conditions."

And in judicial sales it should be noted that we are not embarrassed by the decisions which hold that the equitable title will not be held to have passed in those cases where the vendor was not in a position to make a good title, because, in judicial sales, the judicial officer is always in a position to make such title as he is bound to give.

Since the precise point involved in the question before me is: Upon whom should fall the loss occasioned by a fire occurring after a contract of sale and before the delivery of the deed, I would particularly direct attention to that portion of the above note which appears on page 647, under the subtitle I. d., and see, also, the authorities cited in 29 American and English Encyclopedia of Law, second edition, 713.

That the conclusions reached by the author of this note are fully justified by the course of decision in our own state will be found by consulting the following authorities in addition to those cited in the note above referred to: *Miller's Admr. v. Miller*, 25 N. J. Eq. 354; reversed, 27 N. J. Eq. 514, but not on this point; *Keep v. Miller*, 42 N. J. Eq. 100, 6 Atl. 495; *Coles v. Feeney*, 52 N. J. Eq. 493, 29 Atl. 172; *Canfield v. Canfield*, 62 N. J. Eq. 578, 50 Atl. 471; *Marion v. Wolcott*, 68 N. J. Eq. 20, 59 Atl. 242.

In *Grunauer v. Westchester Fire Ins. Co.*, 72 N. J. L. 289, 62 Atl. 418, 3 L. R. A., N. S., 107, it was ⁴²² held that "undoubtedly such contract creates the relation of trustee and cestui que trust between vendor and vendee. It produces in equity a complete transition of the vendor's holdings from real to personal, and gives the vendee the equitable ownership. After such contract the vendor's interest is no longer

real estate, and the unpaid purchase money is personalty, and goes to the vendor's personal representative in case of his death. . . . Although the vendor still retains the legal title to the land agreed to be sold and conveyed, he thereafter holds it only as a trustee for the vendee, who becomes the equitable and beneficial owner. . . . Under such a contract and surrender of possession the vendee becomes the beneficial owner, and loss or destruction of the property falls upon him and not upon the vendor, and many cases decided in other jurisdictions directly hold such contract (either with or without transfer of possession) to be a breach of the condition in question." (Citing cases.)

The "condition in question" had reference to the condition in an insurance policy upon the premises issued to the vendor, which provided "that if any change . . . takes place in the interest, title or possession of the subject of insurance . . . the entire policy shall be void."

It has been consistently held that by a completed contract of sale the vendee acquires an insurable interest in the premises, and this is so, irrespective, in my view, of whether or not he has taken possession. It is not the fact of possession which creates the beneficial equitable right in him; it is by force of the contract. Both the vendor and the vendee have insurable interests: See *Grunauer v. Westchester Fire Ins. Co.*, 72 N. J. L. 289, 62 Atl. 418, 3 L. R. A., N. S., 107; *Marion v. Wolcott*, 68 N. J. Eq. 20, 59 Atl. 242; *Richards on Fire Insurance*, 295, sec. 237. See, also, the following cases and notes thereon: *Williams v. Lilley*, 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150; *Phinizy v. Guernsey*, 111 Ga. 346, 36 S. E. 796, 50 L. R. A. 680; *Nanquin v. Texas etc. Co.*, 95 Tex. 313, 67 S. W. 85, 58 L. R. A. 711; *Rawson v. Bethesda Church*, 221 Ill. 216, 77 N. E. 560, 6 L. R. A., N. S., 448; *Zenor v. Hayes*, 228 Ill. 626, 81 N. E. 1144, 13 L. R. A., N. S., 909.

⁴²³ I am therefore of opinion, in the case in hand, that the loss occasioned by this fire falls upon the purchaser at the sheriff's sale. The result is that the petition of such purchaser must be dismissed, with costs, and the sale be confirmed.

The Right of a Purchaser at a Judicial Sale is Subject to be Defeated by the Court's Refusal to Confirm, in cases where confirmation is required, for it is said that a judicial sale is never complete until it is reported to and confirmed by the court: Note to *Kirk v. Oakey*, 135 Am. St. Rep. 918. Confirmation relates back to the date of the sale, and the purchaser is entitled to everything he would have been entitled to had the confirmation and conveyance been contemporaneous with the sale; and the confirmation binds the purchaser: Note to *Watson v. Tromble*, 29 Am. St. Rep. 497. Title does not pass until a deed is given: *International Wood Co. v. National Assur. Co.*, 99 Me. 415, 105 Me. 288; *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381; but, when given, it relates back to the day of sale: *Knox v. Doty*, 81 Kan. 138, 135 Am. St. Rep. 351; *Pennsylvania etc. R. R. Co. v. Cleary*, 125 Pa. 442, 11 Am. St. Rep. 913. The relation of sheriff's deeds is dis-

cussed in the note to *Keaton v. Thomasson's Lessee*, 53 Am. Dec. 57. The purchaser is vested with title to intermediate rents: *Jashenosky v. Volrath*, 59 Ohio St. 540, 69 Am. St. Rep. 786; though it was held to the contrary in *Pearson v. Gillenwaters*, 99 Tenn. 446, 63 Am. St. Rep. 844. That a purchaser has no right to have the amount of an improvement assessment, confirmed after the confirmation of the sale but before the delivery of the deed, paid out of the purchase money so as to get a title free of encumbrance, see *Carpenter v. Shanley*, 75 N. J. Eq. 369, 138 Am. St. Rep. 576. Whether, when, and how a purchaser at a judicial sale may object to title is the subject of a note to *Kirk v. Oakey*, 135 Am. St. Rep. 917.

A Purchaser at a Judicial Sale is Bound to Comply With His Bid, even though he gets no title to the property offered for sale: *Pinkston v. Harrell*, 106 Ga. 102, 71 Am. St. Rep. 242; and it is not necessary for the sheriff at an execution sale to tender a deed to the purchaser in order to hold him to his bid: *Dickson v. McCartney*, 226 Pa. 552, 134 Am. St. Rep. 1078.

VON BERNUTH v. VON BERNUTH.

[76 N. J. Eq. 487, 74 Atl. 700.]

DIVORCE—Defense Arising After Commencement of Action.—It is competent for a defendant in divorce to set up in bar of the suit a matrimonial offense committed by the complaining party which accrued after the filing of the original petition. (p. 787.)

DIVORCE—Cross-petition by Nonresident.—Under the divorce act (section 6a), and chancery rule 206a, a nonresident defendant in a divorce proceeding may file a cross-petition alleging facts which would operate as a bar to the original petition if pleaded by way of answer, and constituting a ground for divorce in his favor, and obtain a decree thereon. (pp. 787, 788.)

DIVORCE—Cross-petition—Service of.—Under chancery rule 206a, the defendant in a divorce proceeding "may set up in the answer matter which would be a proper subject of a bill of complaint or a petition, and may obtain such relief thereon as he or she would be entitled to upon a separate bill or petition against the complainant or petitioner"; and this dispenses with the actual service of process upon the cross-petition, and provides a short and simple method of reaching an issue. (p. 788.)

DIVORCE—Defense Arising After Commencement of Suit.—A defendant in a divorce proceeding may, by cross-petition, set up a cause of action for divorce which has accrued in his favor subsequent to the filing of the original bill and which was not at that time a completed or suable cause for divorce. (p. 788.)

DIVORCE—Cross-petition—Consent of Parties.—Where a cross-petition is filed by stipulation of the parties, such stipulation cannot be considered as a consent to a divorce decree, nor a consent to confer jurisdiction; it is but an agreement of counsel which merely avoids the necessity of the more formal application to the court for leave to file the pleading. (p. 789.)

DIVORCE—Desertion—Time Action Pending Excluded.—As a general rule, the time a divorce proceeding is pending must be excluded in computing the period of desertion necessary to constitute a suable cause of action, but an exception to this rule is made where the action is filed and prosecuted in bad faith. (pp. 789, 790.)

DIVORCE—Prosecution in Bad Faith.—Where a wife in a petition for a divorce makes charges of matrimonial offenses against her

husband so serious that, if true, would lead to his indictment and punishment by the criminal courts, and upon the hearing makes no attempt to substantiate them and dismisses her petition, and also refuses to make any defense to the charges of her husband in his cross-petition, it must be held she has acted in bad faith in the prosecution of the action. (p. 790.)

Thomas L. Raymond, for the petitioner.

Sommer, Colby & Whiting, Charles H. Strong and Clinton H. Blake, Jr., for the defendant.

⁴⁸⁸ HOWELL, V. C. The controversy in this case arises out of a suit for divorce. In order to decide the questions raised it will be necessary to examine the course of pleading and practice which was followed. On October 5, 1908, the wife filed her petition alleging constructive desertion by the husband on June 2, 1906. This pleading contained a large number of allegations of fact tending to show that the wife was driven from her home by the cruelty and malicious acts of the husband and by threatening language to her and the two children of the marriage. On October 21, 1908, she filed an amended petition in which she repeats and ⁴⁸⁹ amplifies her accusations against her husband, and insists on a constructive desertion on June 2, 1906, the day named for the purpose in the original petition. The citation on file was issued October 24, 1906, and was returned not served, whereupon on November 25, 1908, the usual order for publication to effect substituted service was made by which the husband was required to answer the petition on or before January 26, 1909. On January 20, 1909, he, by one of the solicitors of this court, took an order extending his time to answer for twenty days after the expiration of the time allowed therefor by the order for publication; and on February 13, 1909, he took another order granting him twenty days additional. On February 24, 1909, he entered a regular appearance and filed his answer, by which he denied all the material allegations of the petition and alleged that the wife had deserted him on March 19, 1907, setting up this offense in bar of her petition. No replication appears to have been filed to this answer. On May 5, 1909, the husband filed what is styled an "amended answer and cross-petition," again setting up the wife's desertion of him on March 19, 1907, and alleging by way of cross-petition that the wife had deserted him on the day last named without his fault and against his protest, and praying that he might be granted a divorce from the wife on that ground. The files do not show that leave of the court was applied for or given to the husband to file this answer and cross-bill, but upon question being made as to its regularity, the solicitors for the respective parties on June 7, 1909, agreed by stipulation on file that the said "amended answer and cross-petition should be deemed to be duly filed as within time, and should in all re-

spects be treated as the defendant's answer and cross-petition in the cause." On July 1st, the wife filed her replication, joining issue on the cross-petition and denying the desertion charged by it.

It thus appears that the desertion of which the wife complained had ripened into a complete and suable cause of action at the time of the filing of her original petition; and it will be likewise observed that at that time the desertion of which the husband complains had not ripened into a complete and suable cause of action, but that it matured thereafter and before the ⁴⁹⁰ filing of the cross-petition by the husband. In other words, the husband's cause of action had not accrued at the time of the filing of the original petition, but had accrued at the time of the filing of the cross-petition. The cause came on for final hearing in October, 1909. Upon the call of the case counsel for the wife declined to proceed on the petition. The husband's counsel thereupon moved to dismiss the petition, and, at the same time, moved the hearing on the cross-petition. The court directed that the wife's petition be dismissed, and ordered the hearing on the cross-petition and the replication thereto to proceed. The husband adduced his proofs and rested, whereupon counsel for the wife announced that she would make no defense to the cross-suit, giving reasons therefor which are not pertinent to the present inquiry. The defendant's proofs fully sustain the allegations of the cross-petition and entitled him to relief on the facts. Whether or not he may have a decree in his favor on the cross-petition depends upon a solution of these questions of law: First, is it competent for a defendant in a divorce proceeding to set up in bar of the suit a matrimonial offense committed by the complaining party which accrued after the filing of the original petition? Second, can the defendant in such suit set up the same facts by way of cross-petition and obtain a decree thereon, or may the defendant interject the new fact into the old suit and obtain the same relief which he might have obtained by filing an original petition as of the same date?

There are other questions incidental thereto, as, first, whether jurisdiction of the cross-petition may be acquired by this court under the present divorce act except by personal service of process upon the original petitioner; and, second, whether the time during which the wife's petition for divorce was pending can be computed as part of the two years' desertion necessary to give validity to the husband's cause of action?

In *Fuller v. Fuller*, 41 N. J. Eq. 198, 3 Atl. 409, there was an application made for leave to file a supplemental answer for the purpose of setting up a matrimonial offense committed by the petitioner since the filing of his original petition.

⁴⁹¹ It appeared satisfactorily to the court from the moving papers that the defendant had stated therein a case which the court should investigate, and permission was given to file a supplemental answer setting up the petitioner's adultery since the suit was begun. Vice-Chancellor Van Fleet says: "Adultery committed after a suit is brought is just as effectual as a bar as that which may have been committed before. Indeed, the latter would seem to be more offensive to the purity and decency which the law requires those who seek its help to observe than the former. I have been unable to find any case in which an application like that which the defendant now makes has been denied. In *Brisco v. Brisco*, 2 Add. 259, a wife was allowed to charge her husband with having committed adultery pending the suit nearly seven years after its institution. In *Moors v. Moors*, 121 Mass. 232, it was held where a husband who had obtained a provisional decree entitling him to a divorce in the future, but not dissolving his marriage *eo instante*, and he subsequently, under an honest belief that he had a right to do so, married again, that his having sexual intercourse with the woman whom he supposed he had lawfully married constituted adultery and barred his right to a divorce": See *Smith v. Smith*, 4 Paige, 432, and *Burr v. Burr*, 2 Edw. Ch. 448. This case does not appear to have been referred to nor its authority called in question, and I shall assume that it expresses the settled law of this state. Nor, indeed, do I see how it could be held otherwise. If the final decree in a cause fixes the rights of the parties as of its date, it would seem to be consonant with the principles of justice that every right and every defense to which either of the parties was entitled at any time before the date of the decree should be considered. And this leads to the second question, whether the defendant may, by his cross-petition, allege facts which would operate as a bar to the original petition if pleaded by way of answer, and base thereon a final decree in favor of the cross-petitioner. Before proceeding with this branch of the case I will pause to remark that the testimony showed that the wife was actually domiciled in New Jersey and that the husband was residing in New York. Objection was made in *Abele v. Abele*, 62 N. J. Eq. 644, 50 Atl. 686, that a decree could not ⁴⁹² be made on the cross-petition of a nonresident defendant, but it was held that the jurisdiction attached by virtue of the statute which was then in force. The statute now in force (section 6a) confers jurisdiction as broadly as did the act referred to in the *Abele* case. The current of authority is in favor of the proposition that, even in the absence of an enabling statute, nonresidents who are brought into court to answer a complaint may prefer their own complaints and obtain the proper relief thereon: *Clutton v. Clutton*, 108 Mich. 267, 66 N. W. 52, 31 L. R. A. 160; *Jenness v.*

Jenness, 24 Ind. 355, 87 Am. Dec. 335. Our chancery rule 206a, in so far as it has not been abrogated by the present divorce act, does not exclude nonresident defendants from its operation, and its terms are certainly broad enough to include them. The reason is that when the defendant is once personally brought into court, he is there for all purposes that relate to the cause of action embraced within the scope of the suit.

This rule (206a) has a bearing upon the second question hereinabove stated and also on the question of jurisdiction. It unifies the practice in divorce cases with that prescribed in cases arising under the general equity jurisdiction of the court. Its terms include all defendants, nonresident as well as resident. It dispenses with the actual service of process and provides a short and simple method of reaching an issue. The defendant under this rule "may set up in the answer matter which would be a proper subject of a bill of complaint or a petition, and may obtain such relief thereon as he or she would be entitled to upon a separate bill or petition against the complainant or petitioner," etc.

In the case at bar the requirements of this rule seem to have been met. The defendant did set up in his answer matter which would have been a proper subject of a petition, and he seeks to obtain the same relief thereon that he would have been entitled to on the same facts if he had filed an independent petition. He has alleged and proved a desertion by the wife which had ripened into a cause of action at the time of the filing of the cross-petition. Under the authority of *Fuller v. Fuller*, 41 N. J. Eq. 198, 3 Atl. 409, these facts are competent as a defense, and are admissible in evidence ⁴⁹³ for the purpose of barring the petitioner's suit, even though the right accrued after the filing of the original petition. And with the greater reason may these facts be interposed as a defense and be alleged by way of cross-petition for affirmative relief in a case where the right has accrued and the cause of action has become suable prior to the filing of the amended answer and cross-bill.

Counsel have cited cases from other jurisdictions which illustrate the application of the argument to pertinent facts. In *Martin v. Martin*, 33 W. Va. 695, 11 S. E. 12, the petitioner sought a divorce on the ground of adultery. The defendant answered and filed a cross-bill praying for a divorce against the petitioner on the ground of desertion, although at the time of the filing of the original bill the statutory period of desertion had not elapsed. It had elapsed, however, before the defendant filed his cross-bill. This is a state of facts precisely similar to those in this case. The court granted a decree on the cross-bill, stating in the opinion that: "At the time the original bill was filed by the plaintiff the period of three years

had not elapsed since the said plaintiff left the house of the defendant, and when that time did elapse he found it necessary to file his cross-bill in order to then allege willful abandonment and desertion of himself by the defendant for three years as a ground for divorce from the said plaintiff. . . . This cross-bill was filed by said defendant for the purpose of obtaining relief which he could not have obtained by an answer in the original suit, because at the time the said suit was brought the circumstances did not exist which would entitle him to relief, and this made the cross-bill necessary in order that this might be alleged and full relief might be granted the plaintiff in said cross-bill touching the matters of the original bill." In *Neddo v. Neddo*, 56 Kan. 507, 44 Pac. 1, the court held in a case where a cross-petition was filed setting up abandonment of the defendant by the plaintiff that the period of abandonment necessary to give the cross-petitioner a right of action did not terminate with the commencement of the original action, but that it extended to the time of the filing of the cross-petition. The obvious reason is that it is absurd that the defendant should be ⁴⁹⁴ involved in two suits embracing the same facts and be compelled to prove them, first, as a defense, and secondly, as a ground for affirmative relief; and further, that this court having once rightly obtained jurisdiction over the parties and the subject matter of the litigation, will proceed to hear the whole case, and measure out justice to the parties once for all on the facts alleged and proved.

If it be objected that the filing of the cross-petition and amended answer rests wholly in the consent of the parties by reason of the stipulation that was entered into, and that no divorce can be granted in this case because of the well-settled rule that no divorce will be granted upon any consent of the parties, it may be said that if application had been made to the court for leave to file these pleadings, leave would have been undoubtedly granted, as was done in the case of *Fuller v. Fuller*, 41 N. J. Eq. 198, 3 Atl. 409, and in the very well-considered case of *Wadsworth v. Wadsworth*, 81 Cal. 182, 15 Am. St. Rep. 38, 22 Pac. 648. The stipulation therefore must be treated not as a consent to a divorce decree nor as a consent to confer jurisdiction, but rather an agreement by counsel which merely avoids the necessity of the more formal application to the court.

It is manifest that some portion of the time relied upon by the husband for the accrual of his cause of action was occupied and taken up by the original suit brought by the wife—that is, from October 5, 1908, the day of the filing of her petition, to March 20, 1909, the day on which the husband had a right to file an independent petition. It was so held in *Weigel v. Weigel*, 63 N. J. Eq. 677, 52 Atl. 1123, affirmed, 65 N. J. Eq. 398, 54 Atl. 1125, and in *Johnson v. Johnson*, 65 N. J. Eq.

606, 56 Atl. 708. If this rule were applied to this case there would be a considerable reduction from the time during which the husband's cause of action was in process of maturing, and his cross-petition would have been prematurely filed. There are many cases to this effect, most of which are collected by Vice-Chancellor Grey in the Weigel case. There is, however, an exception to this rule which the vice-chancellor comments upon in the Weigel case within which the case at bar clearly comes, and that is that the petitioner cannot insist upon the enforcement of the ⁴⁸⁵ rule in a case in which it appears to the court that his or her original petition was filed and prosecuted in bad faith. In the present case the wife, in the most formal and solemn manner, formulated charges of matrimonial offenses against her husband which were sufficient, if true, to have led to his indictment and punishment by the criminal courts. These were repeated and enlarged upon in her amended petition, and again referred to less virulently in the replication to the cross-petition. One would naturally expect that some attempt would have been made to substantiate these charges, but at the hearing she not only abandons her own attack, but declines to produce any evidence by way of defense against the attack of her husband. These acts show that the petition of the wife was filed and prosecuted in bad faith, and that she ought not to be allowed to set up her own delinquencies in bar of her husband's right.

Having found the facts in favor of the defendant on his cross-petition, it remains only to state, in conclusion, that there is nothing in the law which stands in the way of granting him the relief prayed for in the cross-petition, and I will advise a decree in his favor.

There may be a Cross-complaint in an Action for Divorce or for annulment of marriage: Wadsworth v. Wadsworth, 81 Cal. 182, 15 Am. St. Rep. 38. In Indiana, a cross-petition may be filed to obtain affirmative relief in an action for divorce, and residence of the defendant in the state is not necessary: Jenness v. Jenness, 24 Ind. 355, 87 Am. Dec. 335.

In Reckoning the Statutory Period on Which an Action for Divorce because of desertion is based, the time of separation while another action between the parties has been pending is ordinarily excluded: Easter v. Easter, 75 N. H. 270, ante, p. 688; note to Hudson v. Hudson, 138 Am. St. Rep. 149.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

IN RE CITY OF NEW YORK.

[198 N. Y. 84, 91 N. E. 278.]

EMINENT DOMAIN—Basis of Proceeding.—All proceedings prosecuted under the right of eminent domain are based upon two fundamental facts: That the owner's land is taken from him, theoretically against his will, and that the owner is not permitted to fix his own price, but must be content with just compensation. (p. 792.)

EMINENT DOMAIN—Value of Improvements.—Where the character of structures is well adapted to the kind of land upon which they are erected, the value of the buildings enhances the value of the land, and such enhanced value of the land is the measure of the owner's just compensation when his property is condemned for public use. (p. 793.)

EMINENT DOMAIN—Structural Value of Buildings.—Where the buildings are suitable to the land sought to be condemned, evidence of their structural value—i. e., the cost of reproduction after making proper deductions for wear and tear—is competent to show the market value of the property: *Village of St. Johnsville v. Smith*, 184 N. Y. 341, distinguished. (pp. 793, 795.)

EMINENT DOMAIN—Evidence of Market Value.—When the state compels a man to give up his land for public use, and permits him to recover, not what he thinks it is worth, but only its fair market value, he should at least have the right to prove every element that can fairly enter into the question of market value. (p. 794.)

EMINENT DOMAIN.—Courts of Review will not Disturb the determination of commissioners in condemnation proceedings for mere errors in the admission or exclusion of evidence, unless the commissioners have proceeded upon a wrong theory, to the prejudice of one of the parties. (p. 796.)

EMINENT DOMAIN—Determination of Commissioners—How Made.—The commissioners view the premises, and in coming to a conclusion as to the value, they may take into consideration the knowledge thus acquired in connection with the oral evidence produced before them. (p. 796.)

Henry W. Simpson and Harry G. Smith, for the appellants.

Francis K. Pendleton, Thomas P. Noonan and Theodore Connolly, for the respondent.

⁸⁵ WERNER, J. A single question is presented by this appeal, and that is whether an owner whose lands are taken in invitum may give evidence as to the structural value of buildings thereon, for the purpose of establishing his total damages. This question, although extremely simple in theory, has proven difficult of practical application to the multiform circumstances in which it arises, and it is, therefore, not strange that the courts have at various times given divergent decisions upon it. In the case at bar the city of New York instituted proceedings to acquire certain lands needed for the approaches to Blackwell's Island Bridge. These included the lands of the appellants situate on East 59th street and Avenue A. or Sutton place. Upon these lands there were the usual ⁸⁶ tenement houses, four and five stories high, constructed of brick and stone, and concededly suitable to the locality. Upon the original hearings the commissioners of estimate and appraisal permitted the appellants to give testimony of the cost of reproduction or structural value of these buildings. The report of the commissioners was confirmed at special term, and the city took an appeal, assigning the admission of this evidence as one of the grounds of substantial error. The appellate division reversed the order of the special term and held that evidence of structural value is not competent in condemnation proceedings; Matter of City of New York—Blackwell's Island Bridge, 118 App. Div. 272, 103 N. Y. Supp. 441. Upon the rehearing before the commissioners, the appellants herein again offered evidence of the structural value of the buildings on their land, and this time the evidence was excluded in obedience to the direction of the appellate division on the former appeal. Then the commissioners made their second report, which was confirmed at special term and on appeal affirmed at the appellate division. From that decision the land owners have appealed to this court upon the single question whether the evidence offered by them as to the structural value of their buildings was properly excluded or not.

The learned appellate division has laid down the rule that, in condemnation proceedings, evidence of the structural value of buildings should not be received, and that the landowner must be confined to proof of the value of his land as enhanced by the value of the structures thereon. This is doubtless the rule applicable to certain cases, but we think it is not, and should not be, a rule of universal application. All proceedings prosecuted under the right of eminent domain are based upon two fundamental facts. The first is that the owner's land is taken from him theoretically against his will, and the second is that the owner is not permitted to fix his own price, but must be content with just compensation. The latter is a burden to which the owner must submit, but it is also a right

which he may enforce. What is just compensation? In ⁸⁷ some cases the value of expensive structures may not enhance the value of the land at all. An extremely valuable piece of land may have upon it cheap structures which are a detriment rather than an improvement. A man may build an expensive mansion upon a barren waste, and, in such a case, the costly building may add little or nothing to the total value. In the greater number of cases, however, when the character of the structures is well adapted to the kind of land upon which they are erected, the value of the buildings does enhance the value of the land. In such cases it is true that the value of the land as enhanced by the value of the structures is the total value which must be the measure of the owner's just compensation when his property is condemned for public use. As to that general proposition there can be no disagreement. But how is the enhancement of the land by the structures which it bears to be proven? If all buildings were alike, the rule laid down by the appellate division would be one of convenient and universal application. It is common knowledge, however, that buildings not only differ from each other in design, arrangement and structure, but that many which are externally similar and are situate upon adjoining lands are essentially different in the quality and finish of the materials used and in the character of the workmanship employed upon them. It must follow that such differences contribute in varying degrees to the enhancement in the value of the land, and we think of no way in which they can be legally proved except by resort to testimony of structural value, which is but another name for cost of reproduction, after making proper deductions for wear and tear. This may be by no means a conclusive test as to the market value of premises condemned for public use. But that is not the question at issue. The question is whether evidence of structural value is competent to show market value, when the buildings are suitable to the land. There are instances, of course, when precisely similar buildings upon identical parcels of land may have the same potential market value just as the price of commodities like cotton, flour or potatoes is ⁸⁸ regulated by the law of supply and demand without reference to cost of production in particular cases. When that is true, the market value may be the value of the land as enhanced by the value of the buildings, without reference to structural value. But when a building has an intrinsic value, which must be added to the value of the land in order to ascertain the value of the whole, the owner may not be able to establish his just compensation unless he is permitted to prove the value of his land as land and the value of his buildings as structures. By adding to each other these two quantities, the result is really the value of the land as enhanced by the buildings

thereon. In valuing real estate for purposes of taxation the state resorts to the cost of improvements for the purpose of ascertaining the value of the land: *People v. Wells*, 54 Misc. Rep. 322, 105 N. Y. Supp. 326; affirmed, 126 App. Div. 944, 111 N. Y. Supp. 1135, and 193 N. Y. 614, 86 N. E. 1129; *People v. Kalbfleisch*, 25 App. Div. 432, 49 N. Y. Supp. 546; affirmed, 156 N. Y. 678; *People v. Barker*, 31 App. Div. 315, 51 N. Y. Supp. 1102, 53 N. Y. Supp. 111; affirmed, 158 N. Y. 709, 53 N. E. 1130. By analogy it would seem that when the state compels a man to give up his land for public use, and permits him to recover, not what he thinks it is worth, but only its fair market value, he should at least have the right to prove every element that can fairly enter into the question of market value.

The court below cites our decision in *Village of St. Johnsville v. Smith*, 184 N. Y. 341, 77 N. E. 617, 6 Ann. Cas. 377, in support of the rule that in condemnation cases evidence of structural value of buildings is not admissible, and it quotes from the concluding passage of Judge Willard Bartlett's opinion, in which he said: "In holding, as we do, that the appellant is entitled to have the improvements made upon his land by the respondent while a trespasser taken into consideration in ascertaining his compensation, it must be distinctly understood that the measure of such compensation is neither the cost of the improvements nor their value or the value of their use to the village. The true inquiry is, How much do the improvements placed upon the property enhance the value of the appellant's land?"

⁸⁰ The language used by this court in that case has no application to the question here under consideration. The statement there made that the measure of compensation to which the village was entitled was neither the cost of the improvements nor their value, or the value of their use to the village, but that the true inquiry was how much did the improvements enhance the value of the land, involved no intimation as to the character of the evidence which should be received in order to ascertain the extent of such enhancement. There was nothing, in our opinion, in that case which affirmed or disaffirmed the admissibility of evidence as to the cost of structural value of the buildings.

That the learned court below further misapprehended the scope of our decision in the *St. Johnsville* case, becomes more evident by the statement of a few additional facts. The village of *St. Johnsville* had wrongfully trespassed upon the lands of *Smith*, and had constructed thereon a reservoir and laid pipes for the purpose of obtaining a supply of water for village purposes. After this had been done the village instituted condemnation proceedings, and the commissioners made an award to *Smith* which excluded from consideration

the structures thus wrongfully placed on Smith's land. Upon Smith's appeal the appellate division affirmed the order made upon the report of the commissioners. When the case came to this court, it was held that Smith was entitled to recover the value of his land as it was when the condemnation proceedings were instituted. That, of course, included the structures which had theretofore been wrongfully erected thereon by the village. But the structures were of a peculiar kind. They consisted of a reservoir and water-pipes. The cost of these was obviously much greater than any sum which they could possibly add to the value of Smith's land, if, indeed, they could be said to enhance it at all. These were the conditions which doubtless led Judge Willard Bartlett to qualify his statement of the general rule, and to limit its application to the peculiar facts of the case. The general rule to which he referred is, that when a naked trespasser makes improvements ⁹⁰ upon the lands of another, such improvements become the property of the owner of the land, and this is true even where the trespasser subsequently seeks to acquire the land by condemnation. In such a case the owner is entitled to the value of the land with the improvements. But in Smith's case the cost of the structures built upon his land by the village would have been much more than just compensation, for it was largely in excess of any value which it added to the farm. The distinction between the St. Johnsville case and the case at bar is plain. In that case the structures were not adapted to the land or the locality. They were elaborate and costly, but they added nothing, or at least very little, to the value of the Smith land as a farm. The cost of building a reservoir and laying conduits was one thing. The value which they added to the farm was quite another thing. In the case at bar the houses were concededly suitable to the land and the locality. The land and the houses had a natural and appropriate relation to each other for the purpose of ascertaining the value of the whole. The actual value of the houses was a constituent element of the total value, and for that reason evidence of structural value should have been received.

When the dissenting opinion of our brother Chase is closely analyzed, it will be seen that the very procedure for which we contend may be directly pursued under the rule which he advocates. He admits that an expert may, upon cross-examination, be interrogated as to his qualifications, and that, by this means, the value of the structures and the value of the land may be separately proven in order to test the accuracy of the witness in stating the value of the land as enhanced by the structures. Why may not such testimony be controverted by the direct testimony of other witnesses who arrive at different conclusions as to the separate values of the land and the

structures upon it? We know of no rule which forbids such procedure. In condemnation proceedings the question of value is not a collateral issue, but is usually the main issue. If that may be done, it is obvious that the direct result for which we contend may always be accomplished ⁹¹ by indirection. It may be well to repeat, therefore, that the difference between us is fanciful rather than real. We all agree that the ultimate question is, What is the value of the land as enhanced by the value of the structures upon it? We disagree simply as to the method by which that question shall be solved. Our contention is that the expert who testifies to the value of the whole may also give his views as to the separate values of the constituent parts. Our brother Chase argues that this may not be done directly, but he admits that the same end may be reached by cross-examination. With all deference, we submit that this is a highly technical refinement which is more calculated to produce confusion than justice in condemnation proceedings.

Matter of Simmons, 195 N. Y. 573, 88 N. E. 1132, is cited as holding that in condemnation proceedings evidence of structural value is inadmissible. There were two distinct proceedings under that title affecting separate parcels of land and two appeals from separate orders. Upon the hearings before the commissioners in those cases evidence of structural value was admitted in one case under objection and exception and in the other the same kind of evidence was excluded. The lands there in question were farms, with buildings of small value, and in both cases witnesses were permitted to testify that the buildings upon the lands enhanced their value in different degrees. The cases were decided at special term at the same time with many others of like character. In this court the two appeals were argued as one, although separate briefs were submitted. The main contention, and practically the only one made by the appellants, was that the commissioners should have received testimony tending to establish the value of the lands for reservoir purposes, which was vastly greater than their value for farm purposes. We affirmed the orders of the court below without opinion. It is the well-established rule that courts of review will not disturb the determination of commissioners in condemnation proceedings for mere errors in the admission or exclusion of evidence, unless the commissioners have proceeded upon a wrong theory to the prejudice of one ⁹² of the parties. The commissioners view the premises, and in coming to a conclusion as to the value they may take into consideration the knowledge thus acquired in connection with the oral evidence produced before them. That the courts in the Simmons cases acted upon this rule is shown by the fact that, although there were dia-

metrically contrary rulings upon the same kind of evidence, they did not consider the matter of sufficient importance to reverse either of the determinations there involved. In the proceeding at bar, however, the situation is different. The land involved is improved city property of considerable value. Upon the appeal from the first award the appellate division reversed, and one of the grounds of reversal was the admission of evidence of structural value. Upon the second hearing such evidence was excluded and the award of the commissioners has been sustained. The claimants have now appealed for the sole purpose of obtaining a decision upon this question whether evidence of structural value is admissible in proceedings of this character. We think the courts below erred in excluding the evidence. Ordinarily, we would not reverse for such an error, but as this appeal was taken for the express purpose of settling this question, upon which the courts have long been at variance, we deem it necessary to reverse the orders herein, so that the rule may be finally and definitely settled.

We refrain from discussing the decisions in other jurisdictions because they are not uniform, and it would serve no useful purpose to dwell upon them at length. We conclude that reason and principle alike support the admissibility of such testimony as was excluded in the case at bar.

The orders of the appellate division and special term should be reversed and the matter remitted to the latter court for further proceedings before the same or new commissioners, with costs to the appellants.

Chase, J., dissented.

Eminent Domain.—The Knowledge of the Jury, Acquired from a View of the property, may be taken into consideration by it, in connection with all the other evidence, in fixing the compensation: *Guyandot Valley Ry. Co. v. Buskirk*, 57 W. Va. 417, 110 Am. St. Rep. 785.

Eminent Domain.—Elements of Damages allowed in proceedings in the exercise of the power of eminent domain is the subject of a note to *Board of Trade Telegraph Co. v. Darst*, 85 Am. St. Rep. 281. The measure and evidence of damages is the subject of a note to *Gainesville etc. Ry. Co. v. Hall*, 22 Am. St. Rep. 50. The measure of compensation in eminent domain proceedings is the subject of a note to *Currie v. Waverly etc. R. R. Co.*, 19 Am. St. Rep. 459. The damages which may be recovered is the subject of a note to *Appeal of Sharon Ry. Co.*, 9 Am. St. Rep. 144. What constitutes damage for which compensation must be made is the subject of a note to *Sheehy v. Kansas City Cable Ry. Co.*, 4 Am. St. Rep. 399. Damages in eminent domain proceedings, in general, is the subject of a note to *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 113; and compensation when property is taken by the government is the subject of a note to *Bloodgood v. Mohawk & Hudson R. R. Co.*, 31 Am. Dec. 373.

Evidence of Special Value of property taken for a public use is the subject of a note to *Sargent v. Inhabitants of Merrimac*, 124 Am. St. Rep. 536.

The Market Value for Any and All Purposes for which the property may be available should be considered in an eminent domain proceeding. The land owner is not limited to the value for any particular use: *Cox v. Philadelphia etc. R. R. Co.*, 215 Pa. 506, 114 Am. St. Rep. 979; *Guyandot Valley Ry. Co. v. Buskirk*, 57 W. Va. 417, 110 Am. St. Rep. 785; *Cochrane v. Commonwealth*, 175 Mass. 299, 78 Am. St. Rep. 491; *McKinney v. Nashville*, 102 Tenn. 131, 73 Am. St. Rep. 859; *Northern Pacific & Montana Ry. Co. v. Forbis*, 15 Mont. 452, 48 Am. St. Rep. 692; *Currie v. Waverly & New York Bay R. R. Co.*, 52 N. J. L. 381, 19 Am. St. Rep. 459.

WELLER v. CONSOLIDATED GAS COMPANY.

[198 N. Y. 98, 91 N. E. 286.]

NEGLIGENCE.—A Merchant Maintaining a Wareroom for the exhibition and sale of goods is bound to exercise reasonable care to keep his premises safe for the ingress, progress and egress of authorized visitors. The measure of his duty is reasonable prudence and care. (p. 799.)

NEGLIGENCE.—A Merchant is Required to Light the premises to which strangers are invited, to a degree sufficient to disclose differences in floor levels. It is ordinarily sufficient to light a stairway sufficiently to disclose its existence and character. The persons who make use of it can reasonably be expected to exercise their faculties to some extent in order to ascertain its precise length. (pp. 799, 800.)

NEGLIGENCE.—Descending Insufficiently Lighted Stairway.—Where there is an obvious descent in a passageway which a visitor to the premises is about to enter, the very fact that the light therein is not uniform imposes upon him the duty to proceed with circumspection, and not move blindly on regardless of what may be ahead. A person who knowingly approaches a step beyond which is a darkened space may not assume that such space is level and proceed without the exercise of any care to ascertain whether it is or not. If he does so he acts at his own risk. (p. 800.)

John A. Garver, for the appellant.

Charles Caldwell, for the respondent.

⁹⁹ WILLARD BARTLETT, J. It is a part of the defendant's business to manufacture and sell or rent gas stoves. The ¹⁰⁰ defendant maintains a wareroom for the display of such stoves adjoining its principal office in the city of New York. The floor of this wareroom is fourteen inches lower than the floor of the principal office, and is connected therewith by a passageway in which there is a descent of two steps, each seven inches in height. The plaintiff fell and was injured on the second of these steps while making her way into the stoveroom, which was lighted by a chandelier sufficiently to enable her to see the first step, but, as she testifies, not sufficiently to disclose the presence of the sec-

ond step. According to her testimony, this second step was in shadow, so that she thought she had reached the level of the wareroom floor when she lost her footing in consequence of her failure to perceive that there was another step.

The lack of light enough to reveal this second step is the gist of the plaintiff's cause of action. There is a conflict of evidence as to the number of burners which were lighted on the chandelier in the wareroom at the time of the accident; but whatever the number, it is undisputed that the chandelier furnished sufficient light to acquaint the plaintiff with the fact that there was a difference in the level of the floors, and that she must step down in order to proceed safely from the principal office to the room containing the gas stoves. She saw one step of the descent in the passageway. Beyond this she says her way led into a dark shadow extending three feet out on to the floor beyond. The defendant has been held liable for the existence of this shadow.

The underlying proposition upon which the judgment rests must be that the law imposes upon the defendant the duty of lighting equally every part of the stairway of two steps leading from one part of its premises to another. In our opinion the law does not go as far as this in the case of a merchant maintaining a wareroom for the exhibition and sale of his goods to intending customers. He is bound to exercise reasonable care to keep his premises safe for the ingress, progress and egress of authorized visitors. The measure of his duty has been expressly held to be reasonable prudence and care: ¹⁰¹ *Larkin v. O'Neill*, 119 N. Y. 221, 23 N. E. 563. It may be conceded that this obligation involves the maintenance of a sufficient degree of light to disclose differences of floor levels in apartments which strangers are invited to visit. In the case at bar this obligation was observed. The plaintiff knew that the floor of the storeroom was lower than the floor of the principal office. There was light enough to show this and also to show her the first step. The defendant was justified in assuming that it was also sufficient to acquaint her with the presence of the second step; for no accident had ever occurred there, although the passage had been traversed daily by one hundred and fifty persons, other than those employed by the defendant, for months before the plaintiff fell.

Under all the circumstances attending and surrounding the accident, we think there was no evidence sufficient to permit the jury to find that the defendant had failed to perform any duty which it owed to the plaintiff. A rule of law which required the stairways of whatever length in every shop, store, hotel or building to which the public are invited to be uniformly lighted throughout their whole length would impose a burden much greater than is required for the pro-

tection of the community. It is ordinarily sufficient to light such a stairway sufficiently to disclose its existence and character. The persons who make use of it can reasonably be expected to exercise their faculties to some extent in order to ascertain its precise length. Where, as in the case at bar, there is an obvious descent in a passageway which the visitor is about to enter, the very fact that the light therein is not uniform imposes upon the visitor the duty to proceed with circumspection and not move blindly on regardless of what may be ahead. A person who knowingly approaches a step beyond which is a darkened space may not assume that such space is level and proceed without the exercise of any care to ascertain whether it is or not. If he does so, he does so at his own risk: *Dailey v. Distler*, 115 App. Div. 102, 109 N. Y. Supp. 679, and cases there cited. Although the plaintiff was fully aware of the ¹⁰² presence of the first step, her testimony does not really show that she took any precaution whatever to ascertain whether or not there was another. We think she failed to prove the exercise of any degree of care on her own part, and such proof was essential to make out her cause of action.

For these reasons we conclude that the judgment must be reversed and a new trial granted, with costs to abide the event.

Cullen, C. J., Edward T. Bartlett, Haight, Vann and Chase, JJ., concur; Gray, J., not sitting.

Judgment reversed, etc.

One Who Directly or by Implication Invites or Induces Another to Come on His Premises thereby assumes an obligation that such premises are in a reasonably safe condition, so that the persons there by his invitation shall not be injured by them or in their use for the purpose for which the invitation was extended: *Baltimore & Ohio R. R. Co. v. Slaughter*, 167 Ind. 330, 119 Am. St. Rep. 503; *Klughers v. Chicago etc. Ry. Co.*, 90 Minn. 17, 101 Am. St. Rep. 384; *Thornton v. Maine State Agricultural Society*, 97 Me. 108, 94 Am. St. Rep. 488; *Lowe v. Salt Lake City*, 13 Utah, 91, 57 Am. St. Rep. 708; *Beehler v. Daniels*, 18 R. I. 563, 49 Am. St. Rep. 790; *Hart v. Washington Park Club*, 157 Ill. 9, 48 Am. St. Rep. 98; *Atlanta Cotton-seed Oil Mills v. Coffey*, 80 Ga. 145, 12 Am. St. Rep. 244; *Donaldson v. Wilson*, 60 Mich. 86, 1 Am. St. Rep. 487; *Hayward v. Miller*, 97 Ill. 349, 34 Am. Rep. 229. But an invitation into the hallway of a building upon business is not an invitation to the visitor to thrust his head through the window of an elevator shaft: *Peake v. Buell*, 90 Wis. 508, 48 Am. St. Rep. 946.

An Invitation is Extended by a Merchant by the keeping of a store for the sale of goods and soliciting patronage, and one who accepts such invitation and enters the store is not a trespasser or mere licensee, but is rightfully on the premises, and the storekeeper owes him the legal duty of reasonably safe arrangements for his protection: *Shobert v. May*, 40 Or. 68, 91 Am. St. Rep. 453. A rush at a bargain counter, to attend a sale advertised by a merchant, whereby a girl

is caused to fall and suffer injury on a stairway, constructed in an ordinary manner, near the counter, will not render the merchant liable to the girl for the injury: *Lord v. Sherer Drygoods Co.*, 205 Mass. 1, 137 Am. St. Rep. 420.

A Child of Tender Years who Enters a Store for the purpose of buying candy has no implied invitation to go into another part of the store where a coffee-grinder is in operation, and the merchant is not liable for injury to the child by its going there and putting its hand in the grinder: *Holbrook v. Aldrich*, 168 Mass. 15, 60 Am. St. Rep. 364.

Use in the Ordinary Way as to ingress and egress from his premises is the only use a merchant can reasonably suppose will be made of his premises for such purpose, and he is not required to make his premises safe for a use he could not have reasonably anticipated: *Armstrong v. Medbury*, 67 Mich. 250, 11 Am. St. Rep. 585.

Truckman Who Enters Warehouse, by invitation of its proprietor, to obtain a receipt for goods delivered, has a right to assume them safe, and in the absence of warning need not be held guilty of contributory negligence in failing to watch for or see an open trapdoor: *Pelton v. Schmidt*, 104 Mich. 345, 53 Am. St. Rep. 462.

PEOPLE v. FROST.

[198 N. Y. 110, 91 N. E. 376.]

SEDUCTION—Marriage After Conviction a Bar to Judgment.

A prosecution for seduction under promise of marriage is not terminated until judgment is actually rendered, and a marriage of the parties after a plea or verdict of guilty, but before the rendition of judgment, terminates the prosecution and is a bar to judgment. (pp. 803, 804.)

SEDUCTION—Subsequent Marriage—Plea not Necessary.—In a prosecution for seduction under promise of marriage it is not necessary to plead a subsequent marriage in order to constitute it a bar; it is sufficient if it is proved in any manner to the satisfaction of the court. (p. 803.)

CRIMINAL LAW—Judgment Barred by Statute—Remedy.—Where the statute has interposed a bar subsequent to conviction but prior to rendition of judgment, the remedy is by motion in arrest of judgment, or an appeal from the judgment if rendered. The writ of habeas corpus is not a proper remedy. (p. 804.)

SEDUCTION—Marriage After Conviction—Remedy.—Where the court pronounces judgment against the defendant in seduction after being apprised of his marriage to the prosecutrix subsequent to conviction, his remedy is not habeas corpus, but motion in arrest of judgment, and upon denial thereof to review the action of the trial court on appeal. (p. 805.)

Charles Goldzier and Samuel S. Koenig, for the appellant.

Charles S. Whitman, district attorney, and Robert S. Johnstone, for the respondent.

¹¹¹ WILLARD BARTLETT, J. On the twenty-fourth day of April, 1908, at a term of the court of general sessions held by the Honorable James T. Malone, one of the judges

thereof, the relator pleaded guilty to an indictment charging him with the crime of seduction under promise of marriage. The relator was thereupon remanded for sentence and subsequently, some time between that date and the sixth day of May following, he married the woman upon whose complaint the indictment had been found. This marriage took place with the approval and consent of the court. On May 6, 1908, the court, being ¹¹² held by the same judge who had presided when the plea of guilty was received and who was advised of such marriage, suspended judgment and released the relator from custody. The relator and his wife thereafter lived together but for how long a period does not appear. On February 17, 1909, the suspension of sentence was revoked and the court of general sessions held by the same judge sentenced the relator to imprisonment in the state prison for a term of not less than four years and not more than four years and six months. He was committed to the custody of the agent and warden of the Sing Sing State Prison upon the judgment thus pronounced against him, and while in such custody sued out the writ of habeas corpus in the present proceeding. Upon the return to the writ and a traverse thereof showing the facts substantially as they have been stated, the supreme court at special term denied the application for the discharge of the relator on the ground that he had mistaken his remedy which was by appeal to the appellate division and not by habeas corpus. All the judges of the appellate division agreed that the writ of habeas corpus was the proper remedy, but they disagreed as to the merits of the case—a majority refusing to hold that the marriage of the relator to the complainant before the actual rendition of judgment upon the indictment for seduction operated as a bar and prevented the trial court from proceeding any further in the prosecution.

Section 284 of the Penal Code as in force at the time of the indictment (now section 2175 of the Penal Law) provided as follows: "A person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment for not more than five years, or by a fine of not more than one thousand dollars, or by both." This enactment was qualified by section 285 of the Penal Code (Penal Law, section 2176) in the following words: "The subsequent intermarriage of the parties, or the lapse of two years after the commission of the offense before the finding of an indictment, is a bar to a prosecution for a violation of the last section."

¹¹³ These provisions of the Penal Code were derived from chapter 111 of the Laws of 1848, which provided as

follows: "Any man, who shall, under promise of marriage, seduce and have illicit connection with any unmarried female of previous chaste character, shall be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment in a state prison not exceeding five years, or by imprisonment in a county jail not exceeding one year; provided that no conviction shall be had under the provisions of this act, on the testimony of the female seduced, unsupported by other evidence, nor unless indictment shall be found within two years after the commission of the offense; and provided further, that the subsequent marriage of the parties may be plead in bar of a conviction." The language of the act of 1848 plainly implied that it was necessary that the defendant's marriage with the seduced female must have taken place at such a time as would permit the fact to be pleaded. It manifestly contemplated the interposition of a plea setting up such marriage before the marriage could be regarded as a bar to further proceedings under the indictment. The change in the phraseology of the enactment effected by the Penal Code indicates a change of purpose on the part of the legislature. It was no longer required that the fact of the subsequent marriage to the complainant should be pleaded. It was sufficient if it was proved in any manner to the satisfaction of the court. If this view is correct, the only remaining question on the merits is whether the prosecution under an indictment is concluded by a verdict or a plea of guilty, or must be carried on to judgment before it can be regarded as terminated. If the prosecution of the relator was not ended until judgment was actually rendered upon his plea of guilty, then his marriage operated as a bar to the rendition of judgment. Such seems to us the necessary meaning and effect of the statute. If the court before which he was arraigned for sentence was satisfied of his marriage to the complainant, it became its duty to discharge him from custody and proceed no further in the prosecution.

It is argued that this construction of the statute permits the ¹¹⁴ defendant, under an indictment for seduction under promise of marriage, to put a stop to the prosecution in the course of the trial by marrying the complainant whom he may, nevertheless, at once abandon and leave without his society or support. That this may happen, and sometimes does happen in such cases, cannot be doubted; but we must interpret the statute as it is written, and in view of the obvious purpose and intent of the legislature in enacting it. The idea which is the basis of all legislation of this sort—which is very common throughout the Union—is that the marriage of a seducer to a previously chaste

woman whom he has induced to consent to have sexual intercourse with him under a promise to marry her, even when such marriage is entered into under the compulsion of the law, comes nearer to constituting reparation for the wrong which the man has done the woman than any other redress which can be devised. In *Cheney v. Arnold*, 15 N. Y. 345, 69 Am. Dec. 609, Chief Judge Denio, referring to the act of 1848, speaks of the offense as being absolved by the subsequent marriage of the parties, saying that the legislature intended by this enactment to protect female purity. It is true that the marriage is only a partial atonement for the wrong inflicted; it does not wholly alleviate the mental anguish and social disgrace: *Eichar v. Kistler*, 14 Pa. 282, 53 Am. Dec. 551. The law makers in their wisdom, however, have deemed it better for the woman to relieve the man from punishment if he marries her, and this even in view of the possibility that the marriage may be followed by immediate desertion. It is not for the courts to question the correctness of this view, and many reasons readily occur to the mind by which it may be sustained. In popular estimation the shame of the seduction is lessened to some extent by the fact of marriage—and to a very great extent where the parties, as sometimes happens, continue thereafter to live together in apparent amity. Another consideration of far-reaching importance is the effect of the marriage to render the after-born offspring legitimate. Such legislation may readily be justified upon this ground alone.

Bearing in mind the purpose of the legislature as thus stated, ¹¹⁵ it is apparent that such purpose may be effected just as well by the marriage of the defendant to the complainant at one stage of the prosecution as at another. So long as the prosecution has not ended, the marriage brings the case within the express terms of the statute, and we think it constitutes a bar where, as here, it takes place at any time before judgment.

Being apprised of the fact of the relator's marriage, it was error for the learned judge of the court of general sessions to pronounce judgment against him. The relator's remedy was to move in arrest of judgment, and upon the denial of that motion, if it were denied, he could review the action of the trial court upon appeal. There was not, however, such an utter lack of jurisdiction or power to pronounce judgment as entitled the relator to relief by habeas corpus. The court of general sessions had jurisdiction of the defendant and of the offense, and under the plea of guilty was empowered to pronounce the sentence which it did pronounce, unless the fact of the defendant's marriage to the complainant was established by competent

proof. No one would think of questioning its jurisdiction to render the judgment if it had determined that no marriage had in fact taken place. The mere fact that the marriage is admitted in this habeas corpus proceeding cannot affect the question of the court's jurisdiction. Under these circumstances we feel constrained to hold that the relator has mistaken his remedy and has not shown himself to be entitled to release by habeas corpus. As it does not appear that he made any motion in arrest of judgment, or, indeed, that he has taken any appeal, and as the time for an appeal must have expired, the case is obviously a proper one for the exercise of executive clemency under the view which we have taken as to the proper construction of the statute.

The order should be affirmed.

VANN, J., dissented, and said in part: I concur in the excellent opinion of Judge Willard Bartlett in every respect, except his final conclusion that "the relator has mistaken his remedy and has not shown himself entitled to release by habeas corpus."

Cullen, C. J., Werner and Hiscock, JJ., concur with Willard Bartlett, J.; Haight and Chase, JJ., concur with Vann, J.

Order affirmed.

The Release of a Prisoner on Habeas Corpus After Judgment and Sentence is the subject of a note to Koepke v. Hill, 87 Am. St. Rep. 167.

The Release of a Prisoner Under a Sentence not Authorized by Law is discussed in the note to State v. Klock, 55 Am. St. Rep. 267.

The Writ of Habeas Corpus cannot be Used as a Substitute for Proceedings in Error or for the Exercise of Appellate Jurisdiction: Hovey v. Sheffner, 16 Wyo. 254, 125 Am. St. Rep. 1037; Younger v. Helm, 12 Wyo. 289, 109 Am. St. Rep. 986; Ex parte Gafford, 25 Nev. 101, 83 Am. St. Rep. 568. Jurisdictional facts only can be considered: Servonitz v. State, 133 Wis. 231, 126 Am. St. Rep. 955. Mere errors or irregularities which do not render the judgment void are not ground for relief by a habeas corpus proceeding: Ex parte Morgan, 57 Tex. Cr. 551, 136 Am. St. Rep. 996; Ex parte Burden, 92 Miss. 14, 131 Am. St. Rep. 511; Ex parte Johnson, 1 Okl. Cr. 286, 129 Am. St. Rep. 857; Hovey v. Sheffner, 16 Wyo. 254, 125 Am. St. Rep. 1037; Martin v. District Court, 37 Colo. 110, 119 Am. St. Rep. 262.

Seduction as a Criminal Offense is discussed in the notes to State v. Carron, 87 Am. Dec. 405, and Bradshaw v. Jones, 76 Am. St. Rep. 670.

GARDAM & SON v. BATTERSON.

[198 N. Y. 175, 91 N. E. 371.]

EVIDENCE.—To Render Copies of Letters Admissible as secondary evidence there must be shown an actual deposit of the originals in the postoffice, or a course of office practice, or business, from which a presumption might be legally indulged that the letters had been carried to the postoffice and that they therefore had been received by the addressee in due course of the mails. (pp. 807, 808, 809.)

EVIDENCE—Proof of Mailing Letters.—Testimony that certain papers offered in evidence were copies of letters; that the originals were addressed, sealed, stamped and put in a box, or tray, "on my desk to be mailed in the postoffice, the same as I always do with every letter going from my office; . . . they were put there for the purpose of being mailed by somebody in my employ. I am head of a big insurance company down there. The letters are taken from that tray periodically through the day . . . by the clerk whose duty it was to gather up the mail and post it. That was the way that all mail that emanated from my office always went through the post. That was the regular course of business in my office every day"—is not sufficient to show a mailing, or to raise a presumption of mailing of the original letters, so as to raise the presumption that they were received in the due course of the mail, and entitle the copies to be read in evidence. (p. 807.)

Philip Carpenter, for the appellant.

Jay Noble Emley, for the respondent.

¹⁷⁶ GRAY, J. This action was brought by the plaintiff to recover a balance claimed to be due from the defendant upon ¹⁷⁷ an account, alleged to have been stated between them for the value of work done and materials furnished by the former. The defendant denied the claim of the plaintiff and set up a counterclaim for damages; but, at the trial, he withdrew his counterclaim and the sole issue, upon which evidence was given, or offered, and which was submitted to the jury, was whether there had been an account stated. The question was whether there had been an agreement between the two parties fixing the amount due upon previous transactions between them and promising payment. The jurors found for the plaintiff, and the judgment on their verdict has been unanimously affirmed by the justices of the appellate division. Upon this appeal, the one question of any importance, which the appellant has presented, related to the exclusion of what purported to be copies of certain letters, which he offered in evidence. The originals, he claimed, had been sent to the plaintiff through the postoffice. The letters were four in number; three purporting to have been written at times prior to the rendering of the statement of the account and one subsequently thereto. The writer was a person named Beadnell, who had acted as an agent of the defendant in the transactions with the plaintiff. Beadnell had died before the commence-

ment of the action, and the purpose of the defendant, in offering the copies, was to show from their contents that there had been such dissatisfaction on the part of Beadnell and of himself, with respect to plaintiff's work, as to make it improbable that there had been any promise of payment of the account. A notice had been served upon the plaintiff to produce such letters; but the plaintiff denied having them. The copies were excluded by the trial court upon the ground of insufficient proof of the mailing of the letters.

Looking at these writings, I think, in the first place, that they were of doubtful admissibility. They related to what the plaintiff had done in producing a time recording machine, or clock. Letters written by Beadnell, within the scope of his agency, might be admissible against his principal; but these letters have no bearing upon, or relevancy to, the question ¹⁷⁸ at issue, namely, whether an account was stated on the date mentioned by the plaintiff. They are worthless as evidence, either of any expression of opinion by the defendant himself, or as having any relevancy to the question of the defendant's agreement to pay the plaintiff's account. If we should assume, however, that the letters might be admissible in behalf of the defendant, as exhibiting his attitude toward the plaintiff, through the complaints of his agent, Beadnell, as to the results accomplished in producing a satisfactory machine, the insuperable objection to the admission of the copies, as secondary evidence, is in the lack of a sufficient foundation for their reception. There was no proof of an actual deposit of the originals in the postoffice, and there was no sufficient proof of a course of office practice, or of business, from which a presumption might be legally indulged, that the letters had been carried to the postoffice and that they, therefore, had been received in due course of the mails by the plaintiff. The defendant testified to the paper-writings being copies of original letters written by Beadnell; that the originals were addressed to the plaintiff, sealed, stamped, and put in a box, or tray, "on my desk to be mailed in the postoffice, the same as I always do with every letter going from my office. . . . They were put in there for the purpose of being mailed by somebody in my employ. I am head of a big insurance company down there. The letters are taken from that tray periodically through the day . . . by the clerk, whose duty it was to gather up the mail and post it. That was the way that all the mail that emanated from my office always went through the post. That was the regular course of business in my office every day." No clerk, or employee, was called by the defendant, as a witness to prove anything further upon the subject of the posting of letters deposited in the box, or tray, described. This fell far short of proof warranting the presumption that the letters had been mailed. The rule upon the

subject requires, where the question is whether a letter was sent by mail at a certain time, in the absence of any evidence as to its being deposited with the ¹⁷⁹ postoffice authorities, that the proof shall establish the existence of a course of business, or of office practice, according to which it naturally would have been done: See Stephen's Digest of Evidence, art. 13. The cases require that the evidence shall go further upon the subject than it appears to have gone in this case. In the early case of *Hetherington v. Kemp*, 4 Camp. 192, where a letter was placed on a table, on which letters to go to the postoffice were usually placed, it was held that some evidence must be given that the letters were customarily taken from the table by the porter to put into the postoffice. Lord Ellenborough, in his opinion in that case, said: "Had you called the porter, and he had said that although he had no recollection of the letter in question, he invariably carried to the postoffice all the letters found upon the table, this might have done." In the case mentioned in 1 Greenleaf on Evidence, section 40, of *Skilbeck v. Garbett*, 9 Jur. 939, where a letter had been put into a box in the attorney's office, the evidence showed a course of business that a bellman of the postoffice "invariably called and took the letters from the box," and that was held to be sufficient to warrant the presumption that it reached its destination. The authority of *Hetherington v. Kemp* was recognized in this state in *Thalhimer v. Brinkerhoff*, 6 Cow. 90. In that case, copies of letters from the defendant to the plaintiff, contained in a letter-book, were permitted to be read in evidence, against the objection that the evidence did not prove that the original letters were sent, upon the testimony of the defendant's clerk that "it was his invariable practice to carry the original letters to the postoffice, as soon as he had copied them in that letter-book." It was held that this evidence came "fully up to what Lord Ellenborough, in *Hetherington v. Kemp*, 4 Camp. 192, held would be sufficient." In *Hastings v. Brooklyn Life Ins. Co.*, 138 N. Y. 43, 34 N. E. 289, where the mailing of a letter to the insured was in question, the secretary of the insurance company testified that he had placed the letter in a basket in the office, where letters to be mailed were usually placed; but there was, in addition to his testimony ¹⁸⁰ that of the porter in the office, to the effect that it was his business to take the letters from the basket and to mail them, and that "he mailed all letters found in the basket." That evidence was deemed sufficient to justify the submission of the question of the mailing to the jury.

It was essential, in this case, to the admissibility of the copies, that the testimony of the defendant as to the sending of the letters should have been supplemented by the further evidence of the clerk, or other employee, whose duty it was

to post letters, that in the regular course of business he had invariably collected the letters upon the defendant's desk and had posted them. However strong the convictions and the statements of the defendant as to the usual mailing of the letters placed on his desk, there was the gap in the proof, created by the failure to show that regular practice, or custom, of carrying them to the post, by someone charged with that duty, from which a presumption would naturally arise of these letters having been posted. I think that the trial court committed no error in excluding the copies of letters offered by the defendant.

I advise the affirmance of the judgment appealed from.

Cullen, C. J., Edward T. Bartlett, Werner, Willard Bartlett and Hiscock, JJ., concur; Chase, J., absent.

Judgment affirmed, with costs.

Letters Mailed in Due Course of Business are presumed to have been received in like manner by the addressee, but the presumption is rebuttable: *Long Bell Lumber Co. v. Nyman*, 145 Mich. 477, 116 Am. St. Rep. 310; *Garland v. Gaines*, 73 Conn. 662, 84 Am. St. Rep. 182; *Jensen v. Corkell*, 154 Pa. 323, 35 Am. St. Rep. 843; *Pennypacker v. Capital Ins. Co.*, 80 Iowa, 56, 20 Am. St. Rep. 395; *German Nat. Bank v. Burns*, 12 Colo. 539, 13 Am. St. Rep. 247; and especially where the letter is subsequently found in the possession of the addressee: *Pitts v. Hartford Ins. Co.*, 66 Conn. 376, 50 Am. St. Rep. 96; but delivery will not be presumed at any earlier date than it is actually shown to have been in the addressee's possession, where it was addressed to him at a place other than his regular postoffice, and was found among his papers after his death: *Phelan v. Northwestern Life Ins. Co.*, 113 N. Y. 137, 10 Am. St. Rep. 441.

Judicial Knowledge will be taken of the fact that matter carried through the mails generally reaches its destination in spite of much imperfection in the address: *Gamble v. Central R. R. etc. Co.*, 80 Ga. 595, 12 Am. St. Rep. 276.

Notice by Letter.—There is no indisputable presumption that a letter, which the law does not require to be sent, is read by the recipient, and where a letter is sent to a person not conversant with English, the question whether he received notice thereby is one for the jury: *Bova v. Norigian*, 28 R. I. 319, 125 Am. St. Rep. 741.

PEOPLE v. WILLIAMS.

[198 N. Y. 238, 91 N. E. 638.]

TAXATION OF FRANCHISE—Corporations Liable.—Corporations organized for the purpose of buying, selling, leasing, renting and owning real estate, and of erecting buildings and other structures thereon, are subject to the franchise tax provided by the corporation tax laws. (p. 811.)

TAXATION OF FRANCHISE—Capital Employed.—From the moment a corporation organized for the purpose of owning and improving real estate begins to use its money to purchase real estate for the purposes of its incorporation, it employs its capital in the state within the purview of the corporation tax law. (p. 812.)

TAXATION OF FRANCHISE—Earning of Dividends Immaterial.—The corporation tax law provides for the taxation of corporations which neither earn nor declare dividends. (p. 812.)

TAXATION OF FRANCHISE—Construction of Statute.—Sections 182 and 190 of the former tax laws (Consol. Laws, c. 60) must be construed together and read as a whole, and, where so construed, provide that the tax upon a corporation having an excess of liabilities over assets, the average sale price of whose stock during the year did not equal or exceed its par value, and which paid no dividends, should be assessed upon the actual value of its capital stock and not upon the par value thereof. (pp. 813, 816.)

TAXATION OF FRANCHISE—Appraisal of Stock.—In assessing the franchise of a corporation, the controller is not bound by the appraisal of the officers of the corporation under section 190 of the franchise tax law as it stood in 1907. (p. 816.)

Edward R. O'Malley, attorney general, and Edward H. Letchworth, for the appellant.

Howard Mansfield, for the respondent.

240 WERNER, J. The relator was incorporated on the fourteenth day of February, 1908, under the laws of this state, and began to do business wholly within this state on February 20th of the same year. Its certificate of incorporation authorizes it "to acquire by purchase or lease, or otherwise, lands and interests in lands, . . . and to erect, or cause to be erected, on any lands owned, held or occupied by the corporation, buildings or other structures, with their appurtenances, . . . and to lease . . . any buildings or other structures, and any stores, shops, suites, rooms, or part of any buildings or other structures, at any time owned or held by the corporation."

The corporation was in fact organized for the express purpose of acquiring the premises fronting on the Broadway side of Madison Square in the city of New York, familiarly known as the Fifth Avenue Hotel property; of demolishing the old building thereon and erecting in its place a modern ²⁴¹ store and office building. During the year ending October 31, 1908, the corporation bought the premises, razed the old building and began the erection of a new structure. Its capital stock consisted of forty thousand shares of the par value of \$100 per share, or a total of \$4,000,000, all of which had been issued for actual property or money, and no part of which represented goodwill, services or other intangible assets. The controller assessed upon the relator a tax of \$3,000, or three-fourths of a mill upon each dollar of its capital stock at its par value. Upon an application for a revision of this tax the relator claimed (1) a total exemption therefrom, on the ground that none of its capital had been employed within the state during the year ending October 31, 1907, and (2) that if it were liable to any tax, it must be upon the basis of the actual value of its capital employed within the state during

that year and not upon its par value. In that connection the relator submitted to the controller a report setting forth in minute detail the condition of the corporation. Some of the statements in that report will be referred to when we reach the question upon which they are material. The controller declined to revise the tax, whereupon the relator sued out a writ of certiorari to review the determination of the controller before the appellate division. In that court the determination of the controller was reversed upon the sole ground that the relator was exempt from the tax, because no part of its capital had been employed within the state during the year ending October 31, 1907. As the case stands, therefore, it follows that if the appellate division was right in holding that the relator is exempt from the tax, the result must be a simple affirmance of the order from which the appeal to this court was taken. If, on the other hand, we disagree with the conclusion of the appellate division and hold that the relator is liable to a tax, the question still remains whether the statute authorizes the tax upon the basis fixed by the controller.

It must now be regarded as definitely settled by authority that corporations of the class to which the relator belongs ²⁴² are taxable under the provisions of section 182 of the tax law. The cases upon which the relator relies (*People v. Roberts*, 30 App. Div. 180, 51 N. Y. Supp. 771; affirmed, 157 N. Y. 676, 51 N. E. 1093; *People v. Miller*, 179 N. Y. 49, 71 N. E. 463; *People v. Wemple*, 150 N. Y. 46, 44 N. E. 787) are not in point, as has been shown in the more recent decisions of this court: *People v. Miller*, 181 N. Y. 328, 73 N. E. 1102; *People v. Glynn*, 194 N. Y. 387, 87 N. E. 434. It would serve no useful purpose to reiterate the discussions of these last cited cases in which the distinctions between them and the earlier cases referred to were fully considered. For present purposes it is enough to say that this court is now committed to the doctrine that corporations organized for the purposes of buying, selling, leasing, renting and owning real estate, and of erecting buildings or other structures thereon, are taxable under the tax law as it now stands. That general proposition is not controverted by counsel for the relator, and is in terms admitted in the opinion of the court below, but it is argued that it has no application to the case at bar because during the year 1907 none of the relator's capital was employed within this state. That argument is based upon the premise that during the year mentioned the relator had simply invested its capital in unproductive real estate from which it had removed old buildings for the purpose of erecting modern structures; that when the latter was finished and rented so as to yield an income on the money invested, and not until then, could the relator be said to have fairly entered upon the business for which it was organized; that not until that stage

of its operations had been reached could the relator be held to have its capital employed in this state within the meaning of the statute. We can find in the statute no authority for this reasoning, and we think there is nothing in the character of the relator's business to warrant it. From the moment when the relator began to use its money to purchase real estate for the purposes of its incorporation it employed its capital in this state within the purview of the ²⁴³ statute. That is the rule which has been applied to corporations engaged in other kinds of business, and we find nothing in the statute which indicates a contrary legislative intention as to corporations organized for the purpose of purchasing, owning and improving real estate. The learned appellate division based its decision upon the consideration that the relator during the year ending October 31, 1907, "had earned no dividends and had as yet derived no benefit or advantage from its capital." This suggestion, it seems to us, ignores the very question which underlies this controversy. The statute clearly provides for the taxation of corporations which neither earn nor declare dividends, and the real question is, Upon which basis shall such corporations be taxed? Every business corporation has to go through an initial and formative period in which there is a constant outlay of capital with no prospect of immediate return, and many embark upon ventures which never prove successful; but that has never been regarded as a sufficient reason for exempting from this tax such corporations as may be engaged in the various fields of commercial enterprise outside of operations in real estate. We find nothing in the statute to indicate that corporations engaged in buying and selling real estate are an exception to the general rule. As we have said, however, this question has been definitely disposed of in the two most recent expressions upon the subject in this court.

In *People v. Miller*, 181 N. Y. 328, 73 N. E. 1102, Judge Vann expressed the views of a majority of the court as follows: "The claim is made that the large amount thus paid for a building . . . is not capital employed within this state, but is an inactive investment, and that the relator is not carrying on any business in this state. It does business in no other state and it has no surplus. While a foreign corporation may invest its surplus earnings in real property situate in this state and lease the same to third parties, so long as it does not occupy it or use it in transacting its ordinary business, the amount thus invested is apparently not subject to taxation as capital employed in doing business. When, ²⁴⁴ however, it has no surplus and all its capital is placed in a single venture which requires active management and constitutes its sole business, such capital is employed in business within the fair meaning of the statute now in force, which is more comprehensive than any of its predecessors." Again, in *People v. Glynn*,

194 N. Y. 387, 87 N. E. 434, Judge Willard Bartlett wrote for a unanimous court and said: "The capital stock of the relator is employed rather than invested. It is being used for the precise purpose specified in the certificate of incorporation. . . . The capital stock has been applied to the very use contemplated by the incorporators as the object of the organization. If this is not the employment of the capital stock, then it is impossible to conceive how the capital stock of such a corporation can ever be regarded as being employed at all." There is nothing to distinguish these cases from the case at bar, except that there the corporations purchased properties which were immediately productive of rentals, while here there was no prospect of income until the new structure would be rented. That is a mere detail, however, which cannot affect the principle that the latter, no less than the former, was employing its capital within this state in the conduct of the only business for which it was organized. Upon this branch of the case, which was the only one considered by the appellate division, we must reverse the order of that court and affirm the determination of the controller. This result does not dispose of the appeal, however, but compels us to pass upon the construction of those sections of the statute which prescribe the basis and method to be employed in assessing the franchise tax.

The question is whether the relator is to be taxed at the rate of three-quarters of a mill upon each dollar of its capital stock at its par value, or at that rate upon the actual value of its capital stock. The learned attorney general contends that section 182 of the franchise tax law, as amended by chapter 474, Laws of 1906, contains a clear and explicit direction that corporations whose "assets do not exceed the liabilities exclusive of capital stock," or whose stock ²⁴⁵ has sold at an average price during the year which "did not equal or exceed its par value," or which have declared no dividend, shall be taxed at three-quarters of a mill upon each dollar of their capital stock at its par value. It may be conceded that the language of this section, taken by itself, is capable of that construction, but it is by no means clear and explicit. That portion of the section which follows the part which we have paraphrased reads as follows: "Then each dollar of the amount of capital stock employed in this state, determined as hereinbefore provided, shall be taxed at the rate of three-fourths of one mill." When we refer to the preceding part of the section, which in general terms provides for the tax, we see that it throws no light upon the part just quoted, for it simply enacts that the corporations enumerated "shall pay to the state treasurer annually, in advance, an annual tax to be computed upon the basis of the amount of its capital stock, employed during the preceding year within this state, and upon each dollar of such amount." Neither in this general

statement nor in the language applicable to corporations of the class to which the relator belongs do we find any definite declaration that nondividend paying corporations whose assets do not exceed their liabilities, exclusive of capital stock, or whose stock has been sold during the year at an average price which does not equal or exceed its par value, shall be taxed upon the basis of the par value of their capital stock. This is practically conceded by the learned attorney general, but he argues that other portions of section 182 disclose the legislative intent. He calls our attention to the fact that corporations which pay dividends amounting to six per centum or more upon their capital stock are first placed in a class by themselves. They are taxed at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the par value of the capital stock during the preceding year. Next the statute proceeds to deal with corporations of the second class, to which the relator belongs, which are distinguished (1) by an excess of liabilities over assets, exclusive of capital stock; (2) by an average sale price of its stock ²⁴⁶ during the year which did not equal or exceed its par value; and (3) by nonpayment of dividends. Then there follows the provision as to corporations of the third class which are characterized (1) by dividends of less than six per centum on the par value of the capital stock; (2) by assets in excess of liabilities, exclusive of capital stock, to an amount equal to or greater than the par value of the capital stock; and (3) an average sale price of the stock during the year equal to or greater than the par value. As to this third class of corporations, the section provides that "the amount of the capital stock, determined as hereinbefore provided to be employed in this state, shall be taxed at the rate of one and one-half mills on each dollar of the valuation of the capital stock employed in this state, but such valuation shall not be less than (1) the par value of such stock, (2) the difference between the assets and liabilities, exclusive of capital stock, (3) the average price at which such stock sold during said year." This last paragraph indicates, of course, that as to the corporations of the third class or division, the tax of one and one-half mills is to be based upon the value of the stock, as distinguished from the par value, and it may be assumed that this is because the valuation cannot be less than the par value. From this the learned attorney general argues that the direction for valuation of the capital stocks of corporations of the third class, and the absence of such direction in that paragraph of the section which relates to corporations of the second class, discloses the legislative intent to tax the latter upon the basis of the par value of its capital stock. While the argument is not without force, it is obviously inconclusive. Upon principle there is no greater reason for a valuation of

a capital stock that is worth more than par than there is for a valuation of one that is worth less than par. But even if we concede that this difference in the phrasing of the two subdivisions of the same section is indicative of an intent to tax nondividend paying corporations with impaired capital upon the basis of the par value of their capital stock, we cannot escape the conviction that a very simple idea which might ²⁴⁷ have been framed in very plain language has been obscured in a mass of verbiage much better calculated to conceal than reveal the true intent. Nor is this the only difficulty which we encounter in construing this statute. It is an elementary canon of construction that statutes consisting of several parts relating to a common subject must be read as a whole and construed together: *People v. Knight*, 173 N. Y. 255, 65 N. E. 1102; *People v. Angle*, 109 N. Y. 564, 17 N. E. 413; *People v. McGloin*, 91 N. Y. 241; *Matter of New York & B. Bridge*, 72 N. Y. 527. Section 190 of the franchise tax law, as it stood in 1907, provided that "If the dividend or dividends amount to less than six per centum on the par value of the capital stock, or no dividend is declared, the president, treasurer or secretary of the company liable to pay a tax under the provisions of section one hundred and eighty-two of this chapter, shall, under oath, between the first and fifteenth days of November, in each year, estimate and appraise the capital stock of such company at its actual value": *Laws 1907, c. 734*. To what class of corporations does this section apply, if not to the class to which the relator belongs? We can think of none, and unless we hold this latter section to be of no effect, it must be read in *pari materia* with section 182. If the two are inconsistent with each other, the plainest principles of justice require us to give the relator the benefit of the section most favorable to it. In *People v. Miller*, 177 N. Y. 51, 69 N. E. 124, we said: "A statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax." Beyond all this, we are concluded by a previous decision which was made at a time when section 190, which has been several times amended, was in substantially the same form as it stands to-day. In the case of *People v. Roberts*, 168 N. Y. 14, 60 N. E. 1043, we had occasion to construe section 182 as affecting corporations paying ²⁴⁸ dividends of less than six per centum. Under the section as it then stood the attorney general contended that the tax was to be assessed upon the par value of the capital stock, while the relator in that case claimed that it should be assessed upon the basis of the actual or appraised value of its capital stock. There, as here, this court was in doubt as to the true meaning

of section 182, and, in considering the effect of section 190, reached the conclusion that, by reading both together, the tax was to be assessed upon the actual value of the capital stock rather than upon the par value.

It is a coincidence which cannot escape notice that, although section 190 seems to have been amended in 1906 so as to obviate the difficulties suggested in the East River Ferry case (168 N. Y. 14, 60 N. E. 1043), it was in 1907 restored to substantially the same form in which this court found it when considering the case last cited, and so it stands to-day. As a study in the mutations of legislation, it might be interesting to trace minutely the various amendments of the two sections under consideration, but it would tend to confuse rather than to clarify the question before us. So we leave the matter with the suggestion that, since it is easily possible to frame a statute providing that nondividend paying corporations whose liabilities exceed their assets, and whose stocks sell at prices which do not exceed or equal their par value, shall be taxed upon the basis of the par value of such stocks, we should not indulge in strained or doubtful constructions of ambiguous statutes in favor of the state. This leads to the conclusion that, under sections 182 and 190 as read together, corporations of the class to which the relator belongs are to be taxed upon the basis of the actual value of their capital stocks and not upon their par value. In arriving at this conclusion we have not overlooked the so-called "dragnet" clause of section 182, as amended in 1907. We do not quote or discuss it, because it seems to be conceded that it has no application to this case.

We have still to consider whether the tax assessed upon the relator can be upheld upon the theory that the actual value, rather than the par value, of the capital stock is the true basis²⁴⁹ for the tax. It is obvious that the controller did not value or appraise the relator's capital stock. He levied the tax upon the basis of the par value thereof. Therefore the tax as assessed cannot stand. It is equally clear that the controller is not bound by the arbitrary and insufficient appraisal of the relator's vice-president. This can easily be demonstrated by the reproduction of a few figures from the report of the relator to the controller. The capitalization of the company is \$1,000,000. This was all contributed in actual property or in cash. Its total assets were \$6,810,000, and its total liabilities were \$5,230,000, leaving an apparent excess of assets over liabilities of \$1,580,000. We need go no further to show that if this represented the true state of the relator's financial condition, its capital stock was worth more than \$10 per share, which was the valuation placed upon it by the relator's vice-president. Upon that showing the controller was clearly justified in refusing to accept the relator's valua-

tion. Under the circumstances, the case must go back to the controller for a reassessment of the tax.

The order of the appellate division should be reversed and the determination of the controller annulled, without costs of the appeal to either party, and proceedings remitted to the controller for a reassessment of the tax.

Cullen, C. J., Haight and Willard Bartlett, JJ., concur with Werner, J.; Hiscock and Chase, JJ., concur with Vann, J.

Order reversed, etc.

Vann, J., Dissenting. I agree with Judge Werner that corporations of the class to which the relator belongs are taxable under section 182 of the tax law, and I concur in all that he has said on that subject. I do not concur in his conclusion or reasoning upon the question whether the relator should be taxed at the rate of three-quarters of a mill upon each dollar of its capital stock at its par value, or at that rate upon each dollar of its actual value. I think it should be taxed at the rate named on the par value of its capital stock, and I have expressed my reasons for this conclusion in an opinion filed in a case, decided herewith, involving the same question: *People v. Gaus*, 198 N. Y. 250, 91 N. E. 634.

The order of the appellate division should be reversed, the determination of the controller confirmed, and the writ of certiorari dismissed, with costs in both courts.

The Taxation of Franchises of Corporations is the subject of a monographic note to *Blackrock Copper Min. etc. Co. v. Tingey*, 131 Am. St. Rep. 862.

The Term "Franchise" has various significations, both in a legal and a popular sense, and especially two well-defined meanings, one pertaining to what is called the "primary franchise," the right to exist as a corporation, and the other to the different rights, privileges and powers obtained and exercised by the corporation which are not a prerequisite to corporate existence, such as the right to occupy public streets and places for the operation of a system of water or gas works, railroads and the like: *Cooper v. Utah Light etc. Co.*, 35 Utah, 570, 136 Am. St. Rep. 1075.

LIGHTFOOT v. DAVIS.

[198 N. Y. 261, 91 N. E. 582.]

STATUTE OF LIMITATIONS—Debt not Discharged.—While the statute of limitations may bar the remedy, it does not cancel or discharge the debt. It may operate to transfer title to property, as in case of adverse possession of real property. (p. 820.)

ADVERSE POSSESSION—Personal Property.—By adverse possession, title to chattels may be acquired which will be paramount to that of the true owner, but this possession must be peaceable, undisturbed and open, with an assertion of ownership for the period which, under the law, would bar an action for its recovery by the real owner. (pp. 820, 821.)

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ADVERSE POSSESSION.—*Mere Possession.*—continued how-ever long, will not divest the owner of his property unless the possession is under a claim of title. Otherwise the possession will be presumed to be in subordination to the true legal title. (p. 821.)

ADVERSE POSSESSION—*Stolen Personality.*—A thief can acquire no title to the stolen property. Where a person obtains possession of property secretly by a common-law larceny and conceals that possession, no lapse of time should confer title on him. (p. 822.)

STATUTE OF LIMITATIONS—*Fraud.*—Under section 382, subdivision 5 of the code, an action in equity based on fraud, even where the jurisdiction in equity is only concurrent with that of law, may be brought at any time within six years after the discovery of the fraud. Nor does the fact that the ultimate relief sought is a money judgment take the case without the statutory provision. (p. 824.)

STOLEN PROPERTY—*Recovery of Proceeds from Estate of Thief.*—Where certain bonds, together with all evidence of their identity, were stolen from the owner, who was thereby rendered unable to stop payment thereon or trace them, and years after, upon the death of the father in law of the owner, evidence of the theft and collection of the bonds by him was found among his papers, the owner may, upon discovery of the facts, recover the value of the bonds and interest thereon from the estate of the thief. (pp. 824, 825.)

STOLEN PROPERTY—*Equitable Action to Recover Proceeds—Theory of Action.*—The basis of an action in equity to recover from the thief the proceeds of stolen property is that of fraud, and the method by which equity proceeds is to turn the wrongdoer into a trustee. (pp. 824, 825.)

STOLEN PROPERTY—*Recovery of Proceeds from Estate of Thief.*—Where bonds were stolen and collected by one whose identity as the thief was not discovered until after his death, the owner of the bonds may recover the amount thereof from the estate of the thief, although he fails to identify in the estate the proceeds of his bonds, in an equitable action, for in equity "the relief to be administered will be adapted to the exigencies of the case as they exist at the close of the trial." (p. 826.)

Fletcher C. Peck and Charles Ward, for the appellant.

Edwin A. Nash and George W. Atwell, for the respondent.

263 CULLEN, C. J. This is a singular case. In March, 1875, and for some years previous the plaintiff had been the owner of several school bonds issued by various counties in the state of Kansas, aggregating in amount the sum of four thousand dollars. These, together with a memorandum stating the numbers and other details of the bonds, he kept locked in a bureau drawer. At the time mentioned, during the plaintiff's absence, the drawer was broken open and the bonds abstracted by the defendant's testator, the plaintiff's father in law and a banker in the village of Lima, in this state. No suspicion seems ever to have attached to the deceased during his life. The plaintiff made every effort to discover the bonds and who had purloined them. The only record of their numbers was the memorandum taken with the bonds. He was, therefore, unable to stop their payment or to trace them. He

had bought these bonds originally through the deceased, and immediately after their loss gave him notice of that fact. In response the deceased wrote him: "I am going to Hamilton Station to-morrow. If you will bring over all the records you have of the lost bonds I will look at them and will try and notify the districts of the loss and stop payment." The plaintiff was never able to obtain any further information as to the bonds. They matured within a few years and the interest as it accrued and the principal was collected by the deceased. Upon his death in 1899 there was found among his papers the memorandum which had been stolen from the plaintiff, and an examination of his books showed that he had collected the bonds. Upon the discovery of these facts, the plaintiff brought this suit against the defendant, as administrator with the will annexed of the deceased, praying judgment that the defendant "may account and pay over to him the amount of said bonds and the income thereof if it can be traced, and if it cannot be traced, that he may have judgment against" the defendant as administrator for the sum of sixteen thousand dollars. The answer denied any knowledge or belief as to the facts charged, and interposed both the six and ten years' statute of limitations. The referee before whom the case was tried found all ²⁶⁴ the facts as hitherto recited, and awarded judgment to the plaintiff for the principal of said bonds and the interest thereon. The learned appellate division reversed the judgment on questions of law alone, leaving undisturbed the facts as found by the referee. It held on the authority of *Allen v. Mille*, 17 Wend. 202, and *Burt v. Myers*, 37 Hun, 277, that the plaintiff's claim was barred by the statute of limitations, despite his ignorance of the fact that the deceased had purloined the bonds.

The principle involved in this case is a far-reaching one. During the last thirty years there have been a number of bank robberies where by burglary very large amounts of securities have been stolen, and it has frequently proved impossible to detect the thieves or secure a return of the stolen property except in some cases by negotiations through "fences" or agents of the criminals. These securities are often, if not generally, long-time bonds not maturing until after the expiration of the six-year statutory period for bringing actions for conversions. If it be the law that a thief by avoiding detection and concealing the stolen property during that period may acquire title to the property or secure immunity from suit for its proceeds in case he has sold it, certainly we should call the attention of the legislature to the defect in the law in order that it might be remedied. In my opinion, however, since the adoption of the Code of Civil Procedure in 1876 the law is in no such unfortunate condition and appeal for legislative relief is unnecessary.

The first question to be considered is whether the lapse of time would have vested a good title in the defendant's testator had he remained in possession of the bonds until the time of his decease, for if such is the law, it is clear that he did not become liable because, instead of retaining the bonds, he collected the money due thereon. The law is settled in this state that while the statute of limitations may bar the remedy, it does not cancel or discharge the debt: *Hulbert v. Clark*, 128 N. Y. 295, 28 N. E. 638, 14 L. R. A. 59. This general doctrine is subject to the qualification that the statute may operate to transfer title to property. ²⁶⁵ Thus, in the case of our statutory provisions as to the adverse possession of real property, the statute not only bars the remedy, but confers title on the party who has held the land adversely during the prescribed period: *Baker v. Oakwood*, 123 N. Y. 16, 25 N. E. 312, 10 L. R. A. 387. We have in our state, however, no statute relating to the adverse possession of chattels or personal property, nor do I know of any in any other state. Nevertheless, it seems to be the generally accepted doctrine that by adverse possession title to chattels may be acquired which will be paramount to that of the true owner. Though there are no decisions in our courts on the question, they are numerous in other jurisdictions: *Brent v. Chapman*, 5 Cranch, 358, 3 L. ed. 125; *Layne v. Norris Admr.*, 16 Gratt. 236; *Newby's Admrs. v. Blakey*, 3 Hen. & M. 57; *Dragoo v. Cooper*, 72 Ky. (9 Bush), 629; *Carr v. Barnett*, 21 Ill. App. 137; *Gaillard v. Hudson*, 81 Ga. 738, 8 S. E. 534; *Connor v. Hawkins*, 71 Tex. 582, 9 S. W. 684; *Chapin v. Freeland*, 142 Mass. 383, 56 Am. Rep. 701, 8 N. E. 128. In *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. Rep. 209, 29 L. ed. 483, in discussing the power of the legislature to revive an outlawed debt by repeal of the statute of limitations, Judge Miller wrote: "Possession has always been a means of acquiring title to property. It was the earliest mode recognized by mankind of the appropriation of anything tangible by one person to his own use, to the exclusion of others, and legislators and publicists have always acknowledged its efficacy in confirming or creating title. The English and American statutes of limitations have in many cases the same effect, and, if there is any conflict in the decisions upon the subject, the weight of authority is in favor of the proposition that, where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title—a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title. This doctrine has been repeatedly asserted in this court: *Leffingwell v. Warren*, 2 Black, 599, 17 L. ed. 261; *Croxall v. Shererd*, 5 Wall. 268, 18 L. ed. 572;

Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618; ²⁶⁶ Bicknell v. Comstock, 113 U. S. 149, 5 Sup. Ct. Rep. 399, 28 L. ed. 962. It is the doctrine of the English courts, and has often been asserted in the highest courts of the states of the Union." This statement is cited in the opinion rendered in Baker v. Oakwood, 123 N. Y. 16, 25 N. E. 312, 10 L. R. A. 387, and though that case involved only the title to real property, we accepted it as a correct exposition of the law. But none of the cases involved the power of a thief to acquire title by lapse of time where he had concealed the property. Judge Miller speaks of a case where the possession is "Peaceable, undisturbed, open . . . with an assertion of his ownership," and it is apparent that if title to personal property may be acquired by possession in analogy to the acquisition of that to real property, that possession must have the qualifications stated. From the earliest period in our state it has been uniformly held that mere possession of real estate continued however long will not divest the owner of his property unless the possession is under a claim of title. Otherwise the possession will be presumed to be in subordination of the true legal title: Gansevoort v. Parker, 3 Johns. Cas. 124; Poor v. Horton, 15 Barb. 485; Doherty v. Matsell, 119 N. Y. 646, 23 N. E. 994. The nature of the possession required by the statute necessarily makes it open and public. In many of the cases cited from other states the fact that the defendant was a purchaser in good faith and his possession open and public is emphasized in the opinions of the courts. In Dragoo v. Cooper, 72 Ky. (9 Bush) 629, it was admitted that the defendants, who were purchasers of the property, acted in good faith. Judge Lindsay said: "Dragoo does not acquire title to the horse in controversy by reason of Lewis' purchase from the thief, who could have no title, but by virtue of the possession under claim of title continuing in himself and Lewis for more than five years before the institution of the action." In Newby's Admsrs. v. Blakey, 3 Hen. & M. 57, the judgment of the court was that the long and peaceable possession of the slaves in question, acquired without force or fraud, gave to Oswald Newby a legal title to them. In Carr v. Barnett, 21 Ill. App. 137, the court said: "There was no concealment, fraudulent or otherwise, of his possession ²⁶⁷ and claim, but the facts were unknown to the plaintiff until a short time before the suit was brought." In Connor v. Hawkins, 71 Tex. 582, 9 S. W. 684, it was said: "Her [defendant's] possession was adverse, public and continuous." In Gaillard v. Hudson, 81 Ga. 738, 8 S. E. 534, the court said: "The defendant to the possessory warrant, and those under whom he claimed, had been in the peaceable, quiet and honest possession of this property for more than four years next immediately preced-

ing the issuing of the warrant. They had bought the property and paid a fair price for it."

At the same time it is declared, and the declaration constantly reiterated in text-books and decisions, that a thief can acquire no title to the stolen property: *Silbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307; *Bassett v. Spofford*, 45 N. Y. 387, 6 Am. Rep. 101. If the acquisition of personal property by adverse possession rests on analogy to the law relating to real property—and that is the ground on which it seems to rest—it is clear that the possession must be under claim of right, and open, public and notorious. Where a person obtains possession of property secretly by a common-law larceny and conceals that possession, no lapse of time should confer title on the thief. The contrary doctrine seems to me shocking both in morals and to common sense. Had the bonds remained in the possession of the defendant's testator, the plaintiff, on discovering that fact, might have recovered possession of them by legal process. *Chapin v. Freeland*, 142 Mass. 383, 56 Am. Rep. 701, 8 N. E. 128, was an action of replevin for two counters which had been affixed to the floor of a shop. Afterward, through the foreclosure of a mortgage, the premises were sold, the counters removed therefrom and subsequently sold to the plaintiff. The defendant claimed to be their original owner and took them from the plaintiff. Before the defendant regained possession the statute of limitations had run. There was no question of the plaintiff's good faith or of his possession being public and known to the defendant. It was there held that where the statute would be a bar to a direct proceeding by the original owner, it could not be defeated by indirection. "If he cannot replevy he cannot ²⁶⁸ take with his own hand. A title which will not sustain a declaration will not sustain a plea." Under the authorities we have cited it was properly held, I think, that as the defendant could not have regained it by legal process he could not resort to force to reclaim his property. The converse of the proposition seems to me equally true, that if the original owner has not by lapse of time lost title to the property, he is not barred from maintaining legal proceedings to recover possession of it.

We must now consider whether the plaintiff has lost his right to redress by the fact that the defendant's testator collected the money due on the bonds more than six years prior to the plaintiff's discovery of that fact and the institution of this action. That an action of conversion for the original taking of the bonds was barred by the statute is settled by authority. It was so held in *Allen v. Mille*, 17 Wend. 202, which has never been overruled. Whether on discovery of the possession of the bonds by the defendant's testator the plaintiff might not have made a demand for their surrender

and predicated a new conversion on that refusal, it is unnecessary to consider. But though a party may have lost one remedy by lapse of time, it is entirely possible that others may be open to him. In *Ganley v. Troy City Nat. Bank*, 98 N. Y. 487, a married woman had deposited with the defendant two treasury notes under the following receipt:

"Troy, N. Y., 3d April, 1865.

"Received this day of Margaret Ganley for safekeeping for her account two U. S. 7-30 treasury notes, \$500 each, Nos. 166,338 and 9, to be delivered on surrender of this receipt.

"G. F. SIMS,

"Cashier."

The notes matured in August, 1866, and at the request of the husband of Margaret Ganley, plaintiff's intestate, the bank sold the notes and paid the proceeds to him. In August, 1879, Margaret Ganley having died, her administrator brought the action to recover of the bank the amount collected on the ~~269~~ notes. One defense was the statute of limitations. The court held that though the action of trover was barred, the plaintiff could rely on the contract under which the bonds were deposited; that the cause of action thereon did not arise until demand was made and the tender of the receipt to the defendant, though long subsequent to the conversion, and that that claim was not barred. As to the prior conversion the court said: "In such a case a tort-feasor cannot allege his own wrong for the purpose of defeating an action upon the contract. In *Angell on Limitations*, fifth edition, section 72, it is said: 'An action of assumpsit may not be barred by the statute, when, to an action for a tort upon the same demand, the statute may be pleaded.' Again, 'where there has been a tortious taking of his property, the injured party may bring trespass or trover, or he may waive both and bring assumpsit for the proceeds when it shall have been converted into money; and if he choose the latter mode of redress, the tort-feasor cannot allege his own wrong for the purpose of carrying back the injury to a time which will let in the statute.'"

Under the old Code (section 91, subdivision 6) it was prescribed: "An action for relief on the ground of fraud, in cases which heretofore were solely cognizable by the court of chancery, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." Under this provision it was held that the only cases in which the running of the statute was postponed to the discovery of the facts constituting the fraud were those in which equity had exclusive jurisdiction: *Foot v. Farrington*, 41 N. Y. 164. The rule seems to have been the same under the Revised Statutes, where it was held that in actions to enforce constructive trusts the statute ran from the time of the fraud: *Decouche v. Savetier*, 3 Johns.

Ch. 190, 8 Am. Dec. 478; Wood on Limitations, 413. The case of *Burt v. Myers*, 37 Hun, 277, arose under the Code, and it was, therefore, properly decided. But by the enactment of section 382, subdivision 5 of the present Code, the law has been ²⁷⁰ radically changed, and since then an action in equity based on fraud, even where the jurisdiction in equity is only concurrent with that of law, may be brought at any time within six years after the discovery of the fraud. Nor does the fact that the ultimate relief sought is a money judgment take the case without the statutory provision: *Carr v. Thompson*, 87 N. Y. 160; *Bosley v. National Machine Co.*, 123 N. Y. 550, 25 N. E. 990. Therefore, the question is, Was the plaintiff entitled to recover in an equitable action the relief which was awarded him by the referee?

Had the plaintiff been able to trace the proceeds of his bonds to the estate of the deceased, the right to recover would be clear. In *Newton v. Porter*, 69 N. Y. 133, 25 Am. Rep. 152, where negotiable securities were stolen and sold by the thief, it was held that the owner might follow and claim the proceeds in the hands of the felonious taker or his assignee with notice; that the law would raise a trust in invitum out of the transaction, and that the owner's right continued to attach to any securities or property in which the securities were invested so long as they could be traced and identified. Judge Andrews, after stating "when a person, standing in a fiduciary relation, misapplies or converts a trust fund into another species of property, the beneficiary will be entitled to the property thus acquired," thus answers the argument that the thief stood in no fiduciary relation to the property: "It is insisted by the counsel for the defendants that the doctrine which subjects property acquired by the fraudulent misuse of trust moneys by a trustee to the influence of the trust, and converts it into trust property and the wrongdoer into a trustee at the election of the beneficiary, has no application to a case where money or property acquired by felony has been converted into other property. There is, it is said, in such cases, no trust relation between the owner of the stolen property and the thief, and the law will not imply one for the purpose of subjecting the avails of the stolen property to the claim of the owner. It would seem to be an anomaly in the law, if the owner who has been deprived of his property by larceny should be less ²⁷¹ favorably situated in a court of equity, in respect to his remedy to recover it, or the property into which it had been converted, than one who, by an abuse of trust, has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. The law in such a case will raise a trust in invitum out of the transaction, for the very purpose of subjecting the substituted property to the purposes of indemnity and recom-

pense." The same learned judge said, in *American Sugar Ref. Co. v. Fancher*, 145 N. Y. 552, 40 N. E. 206, 27 L. R. A. 757: "The jurisdiction of courts of equity in cases of trust or agency, or cases of like character, it is insisted, is founded upon the ancient jurisdiction of these courts over trusts and fiduciary relations, and has not been, and ought not to be, extended beyond these cases. It is very true that trusts and trust relations are peculiarly cognizable in equity, and have been so cognizable from the earliest period of equitable jurisprudence. But it is to be said that these are but branches of the larger jurisdiction over frauds, which equity abhors, and of which it has cognizance admittedly in many cases not connected with technical trusts or agency."

Holmes v. Gilman, 138 N. Y. 369, 34 Am. St. Rep. 463, 34 N. E. 205, 20 L. R. A. 566, is to the same effect. There a partner had embezzled funds of the firm and had taken out with such funds insurance policies on his life in favor of his wife, and had abstracted further funds to continue the payments of the annual premiums. The partner having died, it was held that all the moneys payable under the insurance policies, though in excess of the amount abstracted, in equity, belonged to the firm. Judge Peckham there said: "In case the trustee took a thousand dollars of trust funds and five hundred of his own, and purchased property which advanced in value to twice its original sum, I have seen no case where the point has been determined that the whole increased value belongs to the trustee, and that only the original sum taken and interest can be given to the cestui que trust, although it was by reason of the wrongful use of the trust funds that the trustee was enabled to realize such value." The method by which equity proceeds in all these cases is to ²⁷² turn the wrongdoer into a trustee. If it may do so for the purpose of subjecting identified funds to the claim of the defrauded party, I do not see why it should not pursue the same method wherever it is necessary to protect the rights of the original owner. In the case of an actual trustee, the cestui que trust may not only reclaim the trust property if he is able to trace it, but failing to trace it, he is entitled to an accounting and personal judgment against the trustee: 3 Pomeroy's Equity Jurisprudence, sec. 1058. If in the *Holmes* case the insurance moneys had been squandered or lost before the action was commenced, I cannot see why the plaintiffs should be deprived of remedy or why equity should not retain the case for the award of a personal judgment. It is true that while equity has a most comprehensive jurisdiction over cases of fraud, it is not in every such case that it will exercise that jurisdiction: 1 Pomeroy's Equity Jurisprudence, sec. 188; 2 Pomeroy's Equity Jurisprudence, sec. 914 et seq.; Bispham's Equity, sec. 200. So, ordinarily, a party would be remitted to his

action at law to recover damages for deceit or fraudulent representations, though even in such a case he might obtain relief in an action in equity to rescind: *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75. Nor ordinarily will equity entertain an action to recover damages for trespass or trover: *United States v. Bitter Root Development Co.*, 200 U. S. 451, 26 Sup. Ct. Rep. 318, 50 L. ed. 550. In the case cited, however, the court took occasion to say that while there were found in the bill general characterizations of the defendant's acts as fraudulent, no specific allegations of fraud were stated, and the case was merely a common one of trover or trespass.

In cases like the one before us there are two distinct elements of fraud—first, the original larceny; second, the subsequent concealment of the stolen property and of its sale and the receipt of its proceeds. Assuming (but only for the argument) that under the first no bill in equity could be maintained, I think the second affords a good ground for the interposition of equity, and, as already stated, though the plaintiff failed to identify in the estate of the deceased the proceeds of his bonds, he was still entitled to what would ²⁷³ be a personal judgment were the original wrongdoer still living, for in equity it is the general rule "that the relief to be administered will be adapted to the exigencies of the case as they exist at the close of the trial": *Spears v. Mayor etc. of New York*, 87 N. Y. 359; *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. 407; *Sanders v. Soutter*, 126 N. Y. 193, 27 N. E. 263. Cases of the character of the one before us are to be distinguished from that large class, often those of principal and agent, in which it is held that an accounting in equity will not lie, and that the accounting must be had in an action at law. In such cases there exists merely a debt from one party to the other, while in those of the former class, the property or fund itself belonging to the claimant, he is entitled to follow the proceeds as long as he may be able to identify them, or failing that, to recover not only the amount of the fraud, but also any profits acquired by its wrongful appropriation.

There remain to be considered certain authorities which may be cited in opposition to the views which I have expressed. In *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504, and *Matter of Hicks*, 170 N. Y. 195, 63 N. E. 276, the claimants were defeated, having failed to identify their funds in the estate. One was the case of the estate of an insolvent, and the other that of a deceased person. In both of these cases the sole attempt was to gain a preference over other creditors; not to establish a claim against the estate. This is the vital distinction between those cases and the one before us. *Bosley v. National Machine Co.*, 123 N. Y. 550, 25 N. E. 990, was an action against a corporation and its promoters to cancel a subscription for the stock of the corporation on the ground that

it was obtained through fraud and misrepresentation, and to recover the money paid thereon not only from the corporation, but from the agent of the company who made the fraudulent representations. This court said that no equitable cause of action was set forth against the individual defendant, but as the exception taken to the decision of the trial court was a joint one by the corporation and the individual defendant, the latter could not avail himself of that exception on appeal. The statement that no equitable action ²⁷⁴ lay against the individual defendant was, therefore, in reality obiter, and must be considered as overruled by the decision in *Mack v. Latta*, 178 N. Y. 525, 71 N. E. 97, 67 L. R. A. 126, where this court expressly held that an equitable action would lie against the agents and promoters of a corporation as well as the corporation itself. In this connection attention may be called to *Bosworth v. Allen*, 168 N. Y. 157, 85 Am. St. Rep. 667, 61 N. E. 163, 55 L. R. A. 751, where it was held that the directors of a corporation, while not technically trustees, were liable in equity to account the same as ordinary trustees for their conduct in the management of the corporation, and for the moneys they had received as a consideration for the turning over the control of the corporation to third parties. The case seems to be a clear authority for the proposition that a constructive trustee may be compelled to account in equity in the same manner as an actual trustee.

I think the order of the appellate division should be reversed and the judgment of the trial court affirmed, with costs in both courts.

Haight, Vann, Werner, Willard Bartlett, Hiscock and Chase, JJ., concur.

Order reversed, etc.

The Fraudulent Concealment of a Cause of Action Ordinarily Prevents the Running of the Statute of Limitations: *Boro v. Hidell*, 122 Tenn. 80, 135 Am. St. Rep. 857; *Leslie v. Jaquith*, 201 Mass. 242, 131 Am. St. Rep. 395; *State v. Standard Oil Co.*, 49 Ohio St. 137, 34 Am. St. Rep. 541; *Wood v. Williams*, 142 Ill. 269, 34 Am. St. Rep. 79. The statute in such case does not begin to run until the discovery of the fraud: *Conditt v. Holden*, 92 Ark. 618, 135 Am. St. Rep. 206. Where the original basis of the action is not fraud, there must be something of an affirmative character designed to prevent, and which does prevent, a discovery of the cause of action: *Fortune v. English*, 226 Ill. 262, 117 Am. St. Rep. 253; and the acts constituting the fraudulent concealment may precede or be concurrent with or subsequent to the accruing of the cause of action: *Whitesell v. Strickler*, 167 Ind. 602, 119 Am. St. Rep. 524. Concealed fraud, as preventing the running of the statute, can be availed of only in an equitable action: *Pietsch v. Milbrath*, 123 Wis. 647, 107 Am. St. Rep. 1077.

Fraud at Law as Preventing the Operation of the Statute of Limitations is discussed in the note to *Snodgrass v. Branch Bank at Decatur*, 60 Am. Dec. 511.

The Title of a Bona Fide Purchaser of Stolen Property is the subject of a note to *Cochran v. Fox Chase Bank*, 103 Am. St. Rep. 979.

Stolen Bonds, Coupons and Other Negotiable Instruments are discussed in the note to *Ehrlich v. Jennings*, 125 Am. St. Rep. 802.

Prescriptive Title to Personal Property is discussed in the note to *Menzel v. Hinton*, 95 Am. St. Rep. 671.

PEOPLE v. ERIE RAILROAD COMPANY.

[198 N. Y. 369, 91 N. E. 849.]

CONSTITUTIONAL LAW—Regulation of Hours of Labor.—

The doctrine that the legislature, under proper circumstances and within reasonable limits, may exercise its police power in the regulation of hours and conditions of labor is now thoroughly and broadly established. One form of such class of legislation has for its object the promotion of the health and welfare of the employee, and another seeks to protect the safety of the public by limiting the hours of labor of those who are in control of dangerous agencies. (p. 830.)

CONSTITUTIONAL LAW—Hours of Labor—Train-dispatchers.

A statute making it unlawful for an employee of a railroad company in charge of a block signal tower to be on duty more than eight hours in a day of twenty-four hours is valid as an exercise of the police power to protect the safety of the public by limiting the hours of labor of those who are in control of dangerous agencies, lest by excessive periods of duty they become fatigued and indifferent, and cause accidents leading to injuries and destruction of life. (p. 831.)

CONSTITUTIONAL LAW—Hours of Labor—Train-dispatchers.

A statute making it unlawful for an employee of a railroad company in charge of a block signal tower to be on duty more than eight hours in a day of twenty-four hours cannot be said to be an unreasonable exercise of the power and discretion of the legislature, when considered with relation to the duties performed by such employees. (p. 831.)

CONSTITUTIONAL LAW—Hours of Labor—Corporations.—

Under the reserved control of the state over corporations, the legislature has power to limit the hours of labor of employees of a railroad company in charge of a block signal tower. (p. 832.)

COMMERCE—Federal and State Jurisdiction.—

The general subject of commerce for the purpose of defining federal and state jurisdiction in legislation may be divided into three fields: 1. That in which the power of the state is exclusive; 2. That in which the state may act in the absence of legislation by Congress; and 3. That in which the authority of Congress is exclusive. (p. 833.)

INTERSTATE COMMERCE—Regulation of Hours of Labor.—

Section 8 of the labor law in the consolidated laws, making it unlawful for an employee of a railroad company in charge of a block signal tower to be on duty more than eight hours in a day of twenty-four hours does not conflict with the act of Congress, approved March 4, 1907, making it unlawful for such employee, engaged in interstate commerce, to be on duty more than nine hours in any such day. (p. 834.)

INTERSTATE COMMERCE—Statutes of Safety—Power of

States.—Where Congress has prescribed a general minimum of safety

applicable to average conditions throughout the country in the movement of interstate traffic, a state statute does not become obnoxious because, in response to special conditions prevailing within its limits, it has raised such limit of safety. (p. 836.)

STATUTES—Conflicting State and Federal Acts.—A statute does not become controlling until it actually becomes operative, and hence a state statute upon a subject on which Congress has also passed a statute remains in force until the federal statute goes into effect. (p. 838.)

Action to recover judgment against the defendant for a fine because it permitted or required an employee in charge of one of its block signal towers to be on duty more than eight hours in twenty-four, in violation of section 7a of the labor law (now section 8 of the labor law in the consolidated laws) which follows: "It shall be unlawful for any corporation or receiver, operating a line of railroad, either surface, subway or elevated, in whole or in part in the state of New York, or any officer, agent or representative of such corporation or receiver to require or permit any telegraph or telephone operator who spaces trains by the use of the telegraph or telephone under what is known and termed the 'block system' (defined as follows): Reporting trains to another office or offices or to a train dispatcher operating one or more trains under signals, and telegraph or telephone levermen who manipulate interlocking machines in railroad yards or on main tracks out on the lines or train dispatchers in its service whose duties substantially, as hereinbefore set forth, pertain to the movement of cars, engines or trains on its railroad by the use of the telegraph or telephone in dispatching or reporting trains or receiving or transmitting train orders as interpreted in this section, to be on duty for more than eight hours in a day of twenty-four hours, and it is hereby declared that eight hours shall constitute a day of employment for all laborers or employees engaged in the kind of labor aforesaid; except in cases of extraordinary emergency caused by accident, fire, flood, or danger to life or property, and for each hour of labor so performed in any one day in excess of such eight hours, by any such employee, he shall be paid in addition at least one-eighth of his daily compensation. Any person or persons, company or corporation, who shall violate any of the provisions of this section, shall, on conviction, be fined in the sum of not less than one hundred dollars, and such fine shall be recovered by an action in the name of the state of New York, for the use of the state, which shall sue for it against such person, corporation or association violating this section, said suit to be instituted in any court in this state having appropriate jurisdiction. Such fine, when recovered as aforesaid, shall be paid without any deduction whatever,

one-half thereof to the informer, and the balance thereof to be paid into the free school fund of the state of New York. The provisions of this section shall not apply to any part of a railroad where not more than eight regular passenger trains in twenty-four hours pass each way; provided, moreover, that where twenty freight trains pass each way generally in each twenty-four hours then the provisions of this section shall apply, notwithstanding that there may pass a less number of passenger trains than hereinbefore set forth, namely eight."

The defendant was engaged in interstate as well as intrastate commerce, and the majority of the trains which the employee spaced were moving the former.

Edward R. O'Malley, attorney general, and Edward H. Letchworth, for the appellant.

George N. Orcutt and George F. Brownell, for the respondent.

³⁷⁴ HISCOCK, J. If section 7a of the labor law, above quoted, was a valid enactment in August, 1907, applicable to a block signal tower operator engaged in spacing interstate and local trains, the order appealed from was erroneous and the judgment of the trial court correct, because there is no question that during that month the respondent required one of its employees thus engaged to be on duty more than eight hours out of twenty-four in violation of the provisions of that act. Two reasons are alleged why said statute was not valid and applicable. The first of these is that the legislature had no power to place such a limitation on the right of the respondent to keep such an employee on duty, and the second one is that such employee, being in part engaged in forwarding interstate commerce, Congress had the superior power to regulate his hours of labor, and that it had done this by legislation which barred or superseded the state legislation referred to.

It is clear that the first defense cannot be maintained. The doctrine that the legislature, under proper circumstances and within reasonable limits, may exercise its police power in the regulation of hours and conditions of labor is now thoroughly and broadly established. One familiar form of this class of legislation is that which has for its object the promotion of the health and welfare of the employee as especially in the case of women and children. Another class seeks to protect the safety of the public by limiting the hours of labor of those who are in control of dangerous agencies, lest by excessive periods of duty they become fatigued and indifferent and cause acci-

dents leading to injuries and destruction of life. This statute comes within the latter class, and this court in the case of *Pelin v. New York etc. R. R. Co.*, 102 App. Div. 71, 92 N. Y. Supp. 468, 115 App. Div. 883, 104 N. Y. Supp. 1136, 188 N. Y. 565, 81 N. E. 1171, affirmed a judgment where the basis of the recovery was as here, that the defendant had permitted or required an employee to be on duty for a length of time in excess of that prescribed by another section of the act which we are now considering.

The counsel for the respondent has reviewed at length the duties discharged and the exact amount of time required in ³⁷⁵ the actual performance thereof by the operator on the occasion in question, and he makes these facts the basis for an argument that no conditions existed which warranted the legislature in fixing the limit which it did, and he insists that the period of service prescribed for this particular class of employees is entirely out of proportion to that permitted to various other employees engaged in the operation of a railroad. His argument is not without force, and very well might be addressed to the legislature as a reason for permitting employment for a larger number of hours. I do not think, however, that we can say that the facts so conclusively show a lack of relation between the legislation and the justifiable ends sought to be gained that we can condemn the statute as unconstitutional. For, while each of the duties performed by the operator seems simple enough, still, as a whole, they form quite a complicated series of acts in the transmission of signals, the giving of orders and the movement of trains, and while the actual time occupied in performing these acts is not large, still the employee for the proper discharge of his duties is compelled to be on the alert during the entire time of his employment, and it not infrequently happens that lack of active occupation during hours of duty is more trying than work itself. Thus it is not at all inconceivable that such an employee subjected to too long hours of duty and confinement might become physically fatigued and mentally inert, and make mistakes which would lead to the destruction of life. This being so, it was permissible for the legislature to pass a statute limiting the hours of labor, and it cannot be said that there is no reason or argument to support its judgment that eight hours was a proper limit.

The control of such a matter by the legislature would naturally be exercised by virtue of the police power. If the form of the statute in question could be criticised as relating only to corporations engaged in the operation of railroads, and, therefore, unduly discriminatory against them, it now being settled that an individual as well as a

corporation may operate a railroad (Village of Phoenix v. Gannon, 195 N. Y. ³⁷⁶ 471, 88 N. E. 1066), I think that we might take judicial notice of the fact that all of the railroads in the state to which this act could apply are, and almost necessarily must be, operated by corporations and not by individuals, since the latter have no power to acquire land by eminent domain for railroad purposes: Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 Sup. Ct. Rep. 370, 53 L. ed. 530.

Moreover, even if the statute failed as a valid exercise of the police power, personally I am not doubtful that under its reserved control over corporations the legislature might pass such an act in regulation of the performance of the business for which a railroad was organized: Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 N. E. 443, 22 L. R. A., N. S., 420; People v. Phyfe, 136 N. Y. 554, 32 N. E. 978, 19 L. R. A. 141; Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 5 Sup. Ct. Rep. 681, 28 L. ed. 1084; Louisville & N. R. R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. Rep. 714, 40 L. ed. 849; Mayor etc. v. Norwich & Worcester R. R. Co., 109 Mass. 103.

Equally important and possibly of more difficult solution are the considerations presented by the second defense, that the statute here sought to be enforced trespasses on a field of legislative action which had already been pre-empted by Congress by virtue of its power to govern interstate commerce and those engaged therein, and that, therefore, it was forbidden and nugatory. It will be noted that this defense assumed, as I think correctly, that the labor law purports and attempts, indiscriminately and inseparably, to regulate the hours of the classes of employees designated whether engaged in interstate or local traffic, and that, therefore, its validity must be tested by the power of the legislature over the former.

This defense is predicated on the fact that Congress passed a statute, approved March 4, 1907, and taking effect a year later, which, so far as is here material, provided: "No operator, train dispatcher or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places and stations continuously operated ³⁷⁷ day and night." Concededly this statute applied to such an operator as the one whose alleged excessive confinement is complained of here when engaged in operating interstate traffic, and the reasoning is that Congress having thus regulated his hours of labor, the state could not prescribe

a different or additional regulation applicable to the same man.

As is well understood, the general subject of commerce for the purpose of defining federal and state jurisdiction in legislation may readily be divided into three fields. The first is that in which the power of the state is exclusive; the second that in which the state may act in the absence of legislation by Congress which is controlling and exclusive; the third that in which the authority of Congress is exclusive and the states cannot interfere at all: *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. Rep. 1087, 38 L. ed. 962.

It is important to keep in mind for the purposes of this discussion that within the first field are included regulation by the state of local or intrastate commerce, and it is conceded, and, therefore, the reason will not be discussed, that the state acting within the second field might pass the present statute in the nature of a police regulation of the hours of those engaged in interstate as well as local commerce, unless the federal statute barred such legislation. Did it do so?

Of course it is apparent that if the federal statute saying that a signal tower operator may not work more than nine hours prevents a state from saying under controlling conditions that he may not work in excess of a lesser number of hours, state legislation of an analogous character on other subjects which readily suggest themselves, such as the proper weight of rails, the safe speed of trains, the necessary proportion of cars to be equipped with air-brakes, may be prevented by federal legislation simply prescribing the minimum rule of precaution, and the protection by the state of the safety of its citizens at least rendered more complicated and difficult. For unless there shall be in the future such a separation of interstate and local traffic as has not yet occurred, and which might be made extremely burdensome to the railroads, it will ³⁷⁸ seldom happen that agencies employed in moving the former will not also be moving the latter, and, therefore, if the state is prevented by a federal statute like that before us from adopting additional but not conflicting requirements which it deems to be necessary, it will be unable to insure the safety of local passengers and traffic. And it is obvious that a factor of safety like that in the present federal statute, adapted, as we must assume, to average conditions prevailing throughout the country, often will be quite insufficient under the special conditions prevailing in a given state.

In addition, it is doubtless established by the *Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. Rep. 141, 52 L. ed. 297, that a person injured in the course of local traffic,

as the result of negligence of an employee, could not predicate a claim for relief on the federal statute limiting the latter's hours of employment.

Passing these general considerations, when we seek for authorities on the question whether the federal statute is exclusive and preventive of the state statute, no decision by the supreme court of the United States is found rendered upon facts so similar to those here presented as to make it clearly and manifestly controlling. We are obliged to rely on general rules which have been laid down by that learned court from time to time in the consideration of questions of the same general class and which do not seem to be always quite harmonious.

In *Gulf etc. Ry. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. Rep. 802, 39 L. ed. 910, the court had before it the question whether a state statute making it unlawful for a railroad company to charge and collect a greater sum for freight than was specified in the bill of lading was, when applied to interstate freight, in conflict with a federal statute providing that it should be unlawful to charge and collect a greater or less compensation for the transportation of property than was specified in the published schedule of rates provided for by the act. It was conceded that the state act, although incidentally relating to interstate commerce, would be valid as a police regulation in the absence of congressional legislation, but it was held that it conflicted with ³⁷⁹ the latter, and was therefore invalid. Mr. Justice Brewer, writing for the court, said: "Clearly the state and the national acts relate to the same subject matter and prescribe different rules. . . . The carrier cannot obey one statute without sometimes exposing itself to the penalties prescribed by the other. . . . In case of such a conflict the state law must yield. . . . The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes operating upon the same subject matter prescribe different rules. In such case one must yield, and that one is the state law."

If we should apply the language quoted with any degree of literalness to the present case, it would be difficult to escape the conclusion that the eight-hour state statute was barred by the federal statute. But it is to be observed that what was there written was so written in a case where at times it would not be possible to observe the state statute without violating the federal one, and an element of possible actual conflict was present which is absent here, for of course a restriction of employment to eight hours

does not in any ordinary sense violate the statute against employment in excess of nine hours.

Other cases seem to me to lay down the rule in more liberal terms in favor of the state legislation.

In *Missouri etc. Ry. Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. Rep. 488, 42 L. ed. 878, and in *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. Rep. 92, 47 L. ed. 108, the court had before it the question of alleged conflict between a federal statute regulating the inspection, etc., of cattle for purposes of interstate shipment and state statutes relating to the same subject. Congress had adopted an act known as the "animal industry act," which was designed to regulate and prevent the shipment of infected and diseased cattle, and which went into the subject with much detail and completeness. Amongst other things it provided that for the purposes of the act, "splenetic or Texas fever should not be considered a contagious, ³⁸⁰ infectious or communicable disease," and apparently it was broad enough to authorize a certificate by federal officials that cattle were free from any disease. Notwithstanding this, the court held in the first case that the state statute was valid which permitted one of its citizens to recover damages sustained by communication to his animals of Texas or splenetic fever by cattle being transported in accordance with the federal statute, and in the last case upheld a statute making it a criminal offense under certain conditions to bring into the state animals without a certificate by state authorities that they were free from disease. It will be observed that in the first case a recovery was had under the state statute on the theory that Texas or splenetic fever was communicable, which was expressly negatived by the federal statute.

Mr. Justice Harlan wrote in each case. In the first one he expressly approved as settled law the rule enunciated in *Sinnot v. Davenport*, 22 How. (U. S.) 227, 16 L. ed. 243, and stated "that a statute enacted in execution of the reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together." In the latter case he wrote: "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested," and again cited with approval *Sinnot v. Davenport*.

In *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. Rep. 564, 31 L. ed. 508, the court passed upon the validity of the

statute of Alabama requiring engineers to undergo an examination and obtain a license from a state board of examiners. The point was made that the statute in its application to engineers on interstate trains was a regulation of commerce among the states and repugnant to the constitution. This contention was overruled, and the statute held to be a proper exercise of the police power in the absence of national legislation which prevented it. Speaking ³⁸¹ upon this subject it was said, referring to the fact that Congress had prescribed the qualifications for pilots and engineers of steam vessels engaged in the coasting trade and navigating the inland waters of the United States while engaged in commerce among the states, that the power of Congress "might, with equal authority be exercised in prescribing the qualifications for locomotive engineers employed by railroad companies engaged in the transportation of passengers and goods among the states, and in that case would supersede any conflicting provisions on the same subject made by local authority. But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. . . . Considered in themselves, they are parts of that body of the local law which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce, and which, until so displaced, according to the evident intention of Congress, remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the state or in commerce among the states": See, also, *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. Rep. 1086, 41 L. ed. 166; *Gladson v. Minnesota*, 166 U. S. 427, 17 Sup. Ct. Rep. 627, 41 L. ed. 1064.

It would seem to me that within the authority of these cases and of what was said in deciding them as above quoted, it may be held that where Congress has prescribed a general minimum limit of safety applicable to average conditions throughout the country in the movement of interstate traffic, a state statute does not trespass upon forbidden territory and become obnoxious because, in response to special conditions prevailing within its limits, it has raised such limit of safety. There is no conflict; the state has simply supplemented the action of the federal authorities. It is the same as if Congress had enacted that the classes of employees named might be employed for nine hours or less, and the state had then fixed ³⁸² the lesser number, which was left open by the federal statute. The

form of the latter fixing the outside limit, but not expressly legalizing employment up to that limit, fairly seems to have invited and to have left the subject open for supplemental state legislation, if necessary. Such is the view which this court has taken on another occasion in the decision of a question quite identical with that here presented.

The case of *Fitch v. Livingston*, 4 Sand. 492, was brought on a bond given for the purpose of discharging a vessel which had been attached as the result of a collision occurring in the Hudson river. The question involved in the action pertained to the negligent management of the vessel for which the bond had been given, and this alleged negligence consisted in noncompliance with the statute of the state requiring such a boat in the night-time to carry and show two lights, one at the bow and the other at the stern. The offending vessel was engaged in interstate business, and the court said: "The great point of the defense is, that the propeller was not bound to carry more than one light, because she was a vessel owned in another state, navigating a river subject to the jurisdiction of Congress, under a national enrollment and license. The act of Congress of July 7, 1838, . . . makes it the duty of the master and owner of every steamboat running between sunset and sunrise to carry one or more signal lights," and the court discussed at considerable length and with much care the question whether a federal statute requiring a boat to show at least one light barred the state statute requiring it to show two lights, and it was held "that the addition of a further qualification is not in direct collision with a law prescribing the first qualification. The act of Congress does not provide that it shall be sufficient for a steamboat navigating at night to be equipped with one light only, or that, if so equipped, she shall be at liberty to navigate in all waters, whether inland or on the coast. . . . The act of Congress of 1838 requires certain safeguards to be observed by steamboats; one of which is, that they shall show at night at least one light. A state, finding those safeguards insufficient, ³⁸³ within its waters, adds others which are necessary to preserve life and property. There is no direct conflict."

The judgment in this case, although not reported, was subsequently affirmed by this court without opinion (January 14, 1853.)

Furthermore, when a libel springing out of this same collision came before the circuit court of the United States for consideration (*The Santa Claus*, 21 Fed. Cas. 406), the court took into consideration the fact that the vessel engaged in interstate travel did not show two lights notwithstanding that the federal statute only required one. While this view was predicated on common-law principles instead of on the

state statute referred to, it would seem indirectly to be authority for the proposition that the state statute, in accordance with the rules of safety and necessity requiring two lights, would have been held valid notwithstanding the federal statute.

We do not, of course, overlook the fact that the court of last resort in four of our sister states upon the precise question here involved has adopted a different conclusion than the one we are reaching (*State v. Chicago etc. Ry. Co.*, 136 Wis. 407, 117 N. W. 686, 19 L. R. A., N. S., 326; *State v. Missouri Pac. Ry. Co.*, 212 Mo. 658, 111 S. W. 500; *State v. Texas & N. O. Ry. Co.* (Tex. Civ. App.), 124 S. W. 984; *State v. Northern Pac. Ry. Co.*, 36 Mont. 582, 93 Pac. 945, 15 L. R. A., N. S., 134, 13 Ann. Cas. 144), but necessarily, in the absence of what we regard as adverse controlling authority of the supreme court of the United States, we follow the views of our own court as above cited.

It has been urged, and in one or more of the decisions of other states cited above it was held, that at least the provisions of the state statute would be controlling during the period elapsing between the date of the enactment of the federal statute and the date, a year later, when it took effect, and in this connection it is pointed out that the alleged violation of the state statute in this case took effect within the period mentioned.

It seems to me that this contention is well founded and sensible. The general rule is, and necessarily must be, that a statute does not become controlling until it actually becomes ³⁸⁴ operative. And it readily will be seen how unfortunate and paralyzing might be the results of any contrary doctrine in this case. From the passage by both Congress and state legislatures of legislation on this subject of hours of employment, we must assume that it was a subject reasonably requiring legislative regulation in the interest of the public. Congress legislating for the entire country might have deemed it wise, under all of the circumstances, to allow two or even three years within which all of the different employers affected by its statute might prepare to comply with the requirements thereof. If the theory of the respondent is correct, no state within that time, however urgent or pressing the necessity and demand for prompt action under special conditions prevailing within its borders, might pass any law which would cover even this interval, because general and average conditions throughout the country might be satisfied by such a statute becoming effective at some rather remote day in the future. I do not believe that such a result should be tolerated or adjudged under the facts of this case, even though it should be decided that

there was a conflict between the federal and the state legislation after the former became effective.

These views were adopted in a well-reasoned opinion by the supreme court of Montana in *State v. Northern Pacific Ry. Co.*, 36 Mont. 582, 93 Pac. 945, 15 L. R. A., N. S., 134, 13 Ann. Cas. 144, although that court disagreed with us in the conclusions reached on the first branch of this case.

These views lead to a reversal of the order appealed from and to an affirmance of the judgment of the trial court, with costs in both courts.

Cullen, C. J., Gray, Edward T. Bartlett, Werner and Willard Bartlett, JJ., concur; Chase, J., absent.

Order reversed, etc.

As to the Constitutionality of Statutes Limiting the Hours which shall constitute a day's work and impairing the right of contracting for one's labor, see *State v. Miksicek*, 225 Mo. 561, 135 Am. St. Rep. 597; *Burcher v. People*, 41 Cal. 495, 124 Am. St. Rep. 143; *People v. Williams*, 189 N. Y. 131, 121 Am. St. Rep. 854; *State v. Muller*, 48 Or. 252, 120 Am. St. Rep. 805; *People v. Lochner*, 177 N. Y. 145, 101 Am. St. Rep. 773, and the cases cited in the cross-reference note to the case last cited.

The Reserved Power of Legislature Over Corporations is considered in the note to *Macon etc. R. R. Co. v. Gibson*, 21 Am. St. Rep. 148; and see note to *People v. O'Brien*, 7 Am. St. Rep. 721. Under a reserved power to amend the charters of corporations the legislature cannot take from them the right to contract; it can regulate that right where the public interest demands, but not to such an extent as to render it ineffectual or substantially impair the object of the corporation: *Leep v. St. Louis etc. Ry. Co.*, 58 Ark. 407, 41 Am. St. Rep. 109. Whatever grants, stipulations or restrictions may be found in the charter of a corporation, it is within the power of subsequent legislatures to render it subject to general laws enacted under the police power of the state: *Venner v. Chicago City Ry. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229.

IN RE CO-OPERATIVE LAW COMPANY.

[198 N. Y. 479, 92 N. E. 15.]

CORPORATIONS.—The Practice of the Law is not a lawful business for a corporation to engage in, as the conditions required by statute and the rules of courts of those engaged in the practice of the law cannot be fulfilled by a corporation. (p. 842.)

ATTORNEYS AT LAW.—Nature of Right to Practice.—The practice of law is not a business open to all who wish to engage in it, but a personal right limited to a few persons of good moral character, with special qualifications duly ascertained and certified. The right to practice law is in the nature of a franchise from the state conferred only for merit; it is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. (p. 842.)

ATTORNEY AND CLIENT—Nature of Relation.—The relation of attorney and client is that of master and servant in a limited and dignified sense, and involves the highest trust and confidence. It cannot be delegated without consent. (p. 842.)

ATTORNEY AND CLIENT—Relation Personal.—The relation of attorney and client cannot exist between an attorney at law employed by a corporation to practice law for it and a client of the corporation, as there would be neither contract nor privity between the attorney and the client. (p. 842.)

CORPORATIONS—Purposes of Incorporation—"Lawful Business."—A statute allowing the formation of a corporation to carry on "any lawful business" does not intend to include the work of the learned professions. Business in its ordinary sense is all that is intended. (p. 843.)

APPEAL—Vacating Order Inadvertently Made.—The appellate court has power to vacate an order, inadvertently made by it, approving a corporation not authorized by law. (pp. 843, 844.)

CORPORATIONS—Practice of Law—Approval by Court.—A corporation formed for the purpose of practicing law is not one "engaged in a business authorized by the provisions of any existing statute," within the meaning of section 280, Penal Laws (Laws 1909, c. 483), and therefore not one whose "existence, organization or incorporation" can be lawfully approved by the appellate division. (pp. 843, 844.)

CORPORATIONS—Application for Approval—Appearance of Attorney General.—By reason of his ancient common-law duty to represent the people, the appearance of the attorney general is proper in a proceeding to obtain the approval of the existence, organization and incorporation of a corporation by the appellate division, the people being concerned therein. (p. 844.)

Darwin J. Meserole, for the appellant.

Edward A. Freshman and Walter Shaw Brewster, for the respondent.

Edward R. O'Malley, attorney general, and Edward H. Letchworth, for the state of New York.

⁴⁸¹ VANN, J. On the 23d of November, 1901, the Co-operative Law Company, the appellant in this proceeding, claims to have been lawfully organized under the business corporations law, with power to carry on the business of practicing law. Its objects as stated in the certificate of incorporation are "to furnish to its subscribers legal advice and service; to operate in connection with the above a department of law and collections for the use and benefit of the subscribers of the company only, and to accomplish these objects said company proposes to employ and maintain a staff of competent attorneys and counselors at law to give such advice; and to prosecute or defend, through such counsel, any claim or suit intrusted to its care by subscribers." Its original capital was five hundred dollars, which was subsequently increased to twenty-five thousand dollars. As it states under the oath of its president: "The company transacts, through its staff of attorneys and counselors at law, a general law business, includ-

ing the prosecution and defense of suits; incorporation of business enterprises; drawing of contracts, leases and agreements, drawing and probating of wills, management of estates, etc. The company's legal staff and general counsel are selected by the board of directors and all matters of general policy, including the general schedule of fees for legal services, are under the direct supervision and control of the directors."

By chapter 483 of the Laws of 1909 it was made unlawful for any corporation to practice law, to render or furnish legal services or advice, to furnish attorneys or counselors for that purpose, or to advertise for or solicit legal business: Pen. Laws, sec. 280. Violation of the statute by a corporation or its officers was made a misdemeanor. The last sentence of the ⁴⁸³ section is as follows: "This section shall not apply to any corporation lawfully engaged in a business authorized by the provisions of any existing statute, nor to a corporation lawfully engaged in the examination and insuring of titles to real property, nor shall it prohibit a corporation from employing an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may be a party, nor shall it apply to organizations organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy, whose existence, organization or incorporation may be approved by the appellate division of the supreme court of the department in which the principal office of said corporation may be located."

Although the statute did not take effect until the 1st of September, 1909, still in June of that year the Co-operative Law Company applied ex parte to the appellate division of the second department "for an order pursuant to chapter 483 of the Laws of 1909 approving the existence of your petitioner and the continuance of its business for the purposes mentioned in its certificate of incorporation." On the 18th of June, 1909, said court "ordered that the existence, organization and incorporation of said Co-operative Law Company, a corporation organized under the business corporations law of the state of New York and lawfully engaged in a business authorized by the provisions of that statute, is hereby approved, and that the corporation be and the same hereby is permitted to continue its business pursuant to the terms of its certificate of incorporation."

In November, 1909, an application was made by Charles J. McDermott, Esq., a member of the Kings county bar and the chairman of the committee on grievances of the Brooklyn Bar Association, upon notice to the Co-operative Law Company and to the attorney general, to vacate said order, and after a hearing the appellate division vacated its previous order and denied the application for approval. While no opinion was written, it was recited in the order "That petitioner ⁴⁸³ is

not a corporation whose existence, organization and incorporation this court has power to approve under the terms of chapter 483 of the Laws of 1909." From that order this appeal was taken.

We agree with the learned counsel for the appellant that the vital question is whether, prior to the act of 1909, a corporation could be lawfully organized to practice law. He claims that authority may be found in that part of the business corporations law which provides that "three or more persons may become a stock corporation for any lawful business": Business Corporations Law, sec. 2. This means a business lawful to all who wish to engage in it. The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose. The right to practice law is in the nature of a franchise from the state conferred only for merit. It cannot be assigned or inherited but must be earned by hard study and good conduct. It is attested by a certificate of the supreme court and is protected by registration. No one can practice law unless he has taken an oath of office and has become an officer of the court, subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension or removal. It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot indirectly by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate. *Quando aliquid prohibetur ex directo, prohibetur et per obliquum: Coke on Littleton, 223.*

The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without ⁴⁸⁴ consent, and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation and not to the directions of the client. There would be neither contract nor privity between him and the client, and he would not owe even the duty of counsel to the actual litigant. The corporation would control the litigation, the money earned would belong to the corporation, and the attorney would be responsible to the corporation only. His master would not be the client but the corporation, conducted, it may be, wholly by laymen, organized simply to make money and not to aid in the administration of justice, which is the

highest function of an attorney and counselor at law. The corporation might not have a lawyer among its stockholders, directors or officers. Its members might be without character, learning or standing. There would be no remedy by attachment or disbarment to protect the public from imposition or fraud, no stimulus to good conduct from the traditions of an ancient and honorable profession, and no guide except the sordid purpose to earn money for stockholders. The bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest member became subject to the orders of a money-making corporation engaged, not in conducting litigation for itself, but in the business of conducting litigation for others. The degradation of the bar is an injury to the state.

A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it: *People v. Woodbury Dermatological Institute*, 192 N. Y. 454, 85 N. E. 697; *Hannon v. Siegel-Cooper Co.*, 167 N. Y. 244, 60 N. E. 597, 52 L. R. A. 429. The legislature in authorizing the formation of corporations to carry on "any lawful business" did not intend to include the work of the learned professions. Such an innovation with the evil results that might follow would require the use of specific language clearly indicating the intention. Recent legislation simply emphasizes and protects the established policy of the state, and although *ex post facto*, tends to show that ⁴⁸⁵ no such object was in contemplation when the general term "lawful business" was used in the statute to authorize the formation of business corporations: Laws 1909, cc. 483, 484. Business in its ordinary sense was aimed at, not the business or calling of members of the great professions, which for time out of mind have been given exclusive rights and subjected to peculiar responsibilities. All statutes relating to the same subject matter must be read together and construed as parts of an entire system. When the provisions of the Code of Civil Procedure regulating the practice of law and the conduct of lawyers are read in connection with the clause of the business corporations law quoted above, it is obvious that they do not relate to the same subject matter, and that in enacting the latter the legislature was dealing with something utterly foreign to the former: Code Civ. Proc., secs. 56-81; Judiciary Law, Laws 1909, c. 35. The special provisions relating to lawyers were not modified or affected by the general provision authorizing the formation of business corporations.

The appellate division was clearly right in vacating its inadvertent order of approval, for it had no power to approve of an organization not authorized by law: *Clark v. Scovill*, 198 N. Y. 279, 91 N. E. 800. The appellant was not "a corpora-

tion lawfully engaged in a business authorized by the provisions of any existing statute," and according to no possible construction of the final sentence of section 280 could its "existence, organization or incorporation" be lawfully approved by the appellate division. These remarks are not intended to cover title guaranty companies, organized under the insurance law and authorized to examine titles, guarantee the correctness of searches and insure against loss by reason of defective titles: Sec. 170. The searching of titles is open to all, and guaranty companies may employ either lawyers or laymen to transact their business. It is not claimed that they prosecute or defend the rights of others, but only their own, including such as the contract to indemnify gives them.

The appearance of the attorney general in this proceeding, pursuant to the notice served on him by order of the appellate ⁴⁸⁶ division, although criticised by the appellant, was entirely proper, for his ancient common-law duty to represent the people called upon him to take part in a controversy in which the people are vitally concerned.

The order appealed from should be affirmed, with costs.

Cullen, C. J., Gray, Haight, Werner and Hiscock, JJ., concur.

Order affirmed.

An Attorney at Law is an Officer of the Court: See note to Burns v. Allen, 2 Am. St. Rep. 847. He is more than a mere agent of his client. Within his sphere and in the line of his special powers, he is as independent as the judge of the court, and has not only his duties and obligations to the court and to his client, but he has rights and powers entirely different from, and superior to, an ordinary agent: Curtis v. Richards, 4 Idaho, 434, 95 Am. St. Rep. 134.

The Relation of Attorney and Client is Based and Founded on Trust and Confidence: Eoff v. Irvine, 108 Mo. 378, 32 Am. St. Rep. 609. It is confidential, and the attorney is bound to discharge his duties to his client with the strictest fidelity: In re Evans, 22 Utah, 366, 83 Am. St. Rep. 794.

Contracts Between Attorneys and Clients are discussed in the note to Shirk v. Neible, 83 Am. St. Rep. 159.

DE COPPET v. CONE.

[199 N. Y. 56, 92 N. E. 411.]

ESTATES OF DECEDENTS—Equitable Action for Administration.—Where a nonresident decedent leaves property in the state and it is impossible to prove his will or have letters testamentary or of administration issued here, leaving citizens, who are creditors, no means of obtaining their demands, equity will entertain a suit for the administration of the property situated in the state and apply it to the payment of creditors. (p. 845.)

ESTATES OF DECEDENTS—Equitable Action for Administration.—The rule which obtains with so much strictness in actions to

set aside fraudulent conveyances and in creditors' bills, that the plaintiff must have exhausted his remedy at law by the recovery of a judgment and the issue of an execution thereon, does not apply to an equitable action for the administration of the estate of a decedent. (p. 847.)

ESTATES OF DECEDENTS.—An Equitable Action for the Administration of the estate of a decedent must be brought on behalf of all the creditors for a ratable distribution of the estate in satisfaction of their respective claims. (p. 847.)

ESTATES OF DECEDENTS.—In an Equitable Action for the Administration of the estate of a nonresident decedent, the foreign executors of his will or the persons beneficially interested in the estate, either as legatees or next of kin, are necessary parties. (p. 847.)

SUPPLEMENTARY PROCEEDINGS—Statute not Exclusive. Section 1871 of the Code of Civil Procedure, authorizing an action against a judgment debtor to compel a discovery of his property, etc., is not exclusive. It does not operate to repeal or curtail the common-law equity powers of the court to investigate the conduct of debtors and grant relief. (p. 849.)

EQUITY—Creditors—Exhaustion of Legal Remedy.—The rule, which demands the exhaustion by the creditor of his legal remedies is one adopted in regulation of the exercise of the equitable jurisdiction of the court, and should not be departed from unless the facts justify through the obvious necessity of the case. (p. 849.)

ESTATES OF DECEDENTS—Equitable Action for Administration.—Where the property of a nonresident decedent in this state consists of an interest in the estate of another decedent, an action to subject such interest to the claims of contract creditors will not lie against the executors of the latter estate, neither the foreign executors nor those beneficially interested in the estate of the nonresident being made parties. (p. 849.)

Harry Van Ness Philip, for the appellants.

Edward Bruce Hill, for the respondents.

⁵⁸ CULLEN, C. J. It is conceded that the statutory provisions governing the probate of wills in surrogates' courts and the issue of letters testamentary and of administration are such that, ⁵⁹ under the facts stated in the complaint, it is impossible to prove the will of the deceased debtor, or to have letters testamentary or of administration issued here. If this concession is well founded, the result is that though there is to be found property belonging to the deceased within this state, our citizens who are his creditors have no means of obtaining payment of their demands through the ordinary procedure for the administration of the assets of a decedent. I think that under such circumstances equity will entertain a suit for the administration of the property of the deceased which is situated here and apply it to the payment of creditors. It is true that the plaintiffs in this action have not put their claim into judgment. I do not think it was necessary that they should have done so. It is also true that the claim accrued several years before the death of the debtor, but during that time the debtor was a nonresident. Unless the plaintiffs could serve

the debtor within this state, they could not get any personal judgment against him, nor were they bound to follow their debtor into foreign jurisdictions. The debt was contracted here, and both the plaintiffs and their debtor were residents of this state at the time. Even if they had obtained a judgment against their debtor in a foreign jurisdiction, before they could attack any fraudulent conveyance it would be necessary for them to have recovered a new judgment here on the foreign judgment: *Tarbell v. Griggs*, 3 Paige, 207, 23 Am. Dec. 790; *Davis v. Bruns*, 23 Hun, 648; *Rocky Mt. Nat. Bank v. Bliss*, 89 N. Y. 338. But the plaintiffs would have the same difficulty in obtaining a personal judgment in this state when they sued on a foreign judgment as they would have had in suing on the original debt. Nor should the plaintiffs be compelled to resort to the jurisdiction of a foreign administration. It may be that they would find their debt outlawed in that jurisdiction. Therefore, if it should be considered that the plaintiffs must have the same status as is required by a creditor seeking to set aside a fraudulent conveyance, it is apparent that none of the courses suggested would have helped them.

The question is not whether the plaintiffs can maintain an action to set aside a fraudulent conveyance, but whether they may maintain one for administration of the estate. The leading case in this state on the subject is *Thompson v. Brown*, 4 Johns. Ch. 619, where Chancellor Kent, after an exhaustive review of the English authorities, held that equity would entertain an action by a contract creditor against an executor for the administration of the estate and the payment of the debts of the deceased, but that the action must be brought on behalf of all the creditors. The authority of this case has never been questioned, and it has been followed in other states. In *Peterson v. Poignard*, 6 B. Mon. 570, the facts were quite similar to those in the present case: The debtor left the state and died. No administrator of his estate was appointed. The plaintiff, a creditor, brought a bill in equity to reach the assets of the debtor in the state. The bill was sustained, the court saying: "The want of an administrator, instead of rendering him powerless, may be the very ground on which, in cases where no one can be charged at law as executor de son tort, the chancellor may be bound to interpose his power, as furnishing the only practical means of relief." *Hefferman v. Forward*, 6 B. Mon. 567, is to the same effect, the court giving as an additional reason for the interposition of equity: "Besides, the personalty might, in the meantime, be sent out of the state to the nonresident heirs, or the debt paid over to them or to some foreign administrator, and the fund, which should be made liable to the creditors here, escape from the power and jurisdiction of the chancellor." In *Cameron v. Cameron*, 82

Ala. 392, 3 South. 148, there had been no administration upon the estate of the debtor. A bill in equity was sustained against the widow and children to satisfy the plaintiff's claim out of the estate of the debtor which had come into their hands.

It is to be borne in mind that in the ordinary administration of estates, creditors are not obliged to put their claims into judgment, unless they are rejected by the administrator, and now the validity and amount of such claims may, by consent of the parties, be adjudicated by the surrogate instead of in an action. So, also, a simple contract creditor may apply ⁶¹ for the appointment of an administrator of the estate by the surrogate. Therefore, the rule which obtains with so much strictness in actions to set aside fraudulent conveyances and in creditors' bills that the plaintiff must have exhausted his remedy at law by the recovery of a judgment and the issue of an execution thereon, does not apply to an action for the administration of the estate of a decedent. There are also other cases in which the rule does not obtain: *McCartney v. Bostwick*, 32 N. Y. 53. But I am of opinion that the present action was properly disposed of by the courts below.

1. Because the suit should have been brought on behalf of all the creditors for a ratable distribution of the estate in satisfaction of their respective claims.
2. Because to the action either the foreign executor or the persons beneficially interested in the estate, either as legatee or next of kin, are necessary parties. It is not the law that in no case can a suit be maintained against a foreign executor. Ordinarily, a suit at law will not lie, but an action in equity will often be sustained: *Johnson v. Wallis*, 112 N. Y. 230, 8 Am. St. Rep. 742, 19 N. E. 653, 2 L. R. A. 828. See, also, *Hopper v. Hopper*, 53 Hun, 394, 6 N. Y. Supp. 271; affirmed, 125 N. Y. 400, 26 N. E. 457, 12 L. R. A. 237.

The judgment appealed from should be affirmed, with costs.

GRAY, J. I think that the courts below were right in sustaining the demurrer to this complaint. As the case is presented, simple contract creditors of a nonresident decedent seek a judgment against the executors of an estate, in which their deceased debtor had an interest, which shall establish their claim as such creditors and decree it to be a lien upon the estate proceeded against. It is not alleged that the plaintiffs have ever sought to establish and to enforce their claim against their debtor, or against his estate, and we must assume, his will having been probated, that there was someone qualified to execute it or to administer upon his estate. This action is an appeal by the plaintiffs to the equitable power of the court, and must rest, if at all, upon the inadequacy of the law to afford relief. In the absence of any representative ⁶² of their debtor, or of his estate, as a party to the ac-

tion, it is not clear how any decree can be binding upon that estate as to the indebtedness alleged. The executors of Edward Weston, who are defendants, notwithstanding Walter Weston had an interest in their estate, owed no duty and were under no liability to the plaintiffs whatever. They have no interest in any controversy over the existence or amount of the debt, and are concerned only with the administration of their testator's estate and with its distribution according to the surrogate's decree. Had the plaintiffs' claim been reduced to judgment and thus established at law, or were the debtor's estate so represented in the action that a decree would be binding upon it, the situation would be quite different, and the defendant executors might be protected in complying with the decision of the court. However great the power of a court of equity to prevent failure in the administration of justice, it will not act in contradiction of legal principles; for equity follows and assists the law. Where, upon the facts, relief is due, but a court of law cannot grant it adequately, or, under the circumstances, at all, then the power of a court of equity may often be ample to afford relief. The exercise of its power in behalf of a creditor is usual where the plaintiff has established his claim by a judgment and has exhausted his remedies at law. It has long been settled upon authority that the creditor's debt should be ascertained by judgment before proceeding in equity: See *Estes v. Wilcox*, 67 N. Y. 264; *Adsit v. Butler*, 87 N. Y. 585; *National Tradesmen's Bank v. Wetmore*, 124 N. Y. 241, 26 N. E. 548; *Hadden v. Spader*, 20 Johns. 554. Where he presents himself upon that footing, the power may be ample to decree satisfaction of the debt out of property, which an execution could not reach; as, for instance, an equitable interest of the debtor. The arm of equity is powerful in cases of frauds and of trusts. It reaches property disposed of in fraud of creditors, or equitable interests, which should be applied upon the beneficiary's debt. While such intervention is, as a rule, limited to cases where there have been the recovery of a judgment and the return of an execution ⁶³ unsatisfied, the rule has its exception where the situation is such as to render it impossible for the creditor to take those preliminary steps. As it was said in *National Tradesmen's Bank v. Wetmore*, 124 N. Y. 241, 26 N. E. 548, "this rule is not so unrelenting as to deny to a party the interposition of the equity powers of the court when the situation is such as to render impossible the aid of a court of law to there take the preliminary steps and produce what ordinarily may be treated as the condition precedent to the application for equitable relief." In that case the plaintiff, as a creditor of Wetmore, sought to set aside, as fraudulent, a deed by the latter to his wife of land in this state, making her the defendant. The plaintiff was a bank in the state of Connecticut, and

Wetmore was a resident of that state. Wetmore had made an assignment for the benefit of creditors to a resident of the same state. Plaintiff brought actions upon its claims against Wetmore, who died while they were pending. Its efforts to revive the actions against an administrator failed under a law of Connecticut, which, upon the ground of the pendency of insolvency proceedings, permitted the filing of a plea in abatement. "The case presented is one," it was said, "in which the plaintiff could recover upon his claim no judgment entitling him to have an execution issued and returned. It is not, therefore, a case within the contemplation of the statute relating to creditor's actions, and the support of the action is dependent upon the common-law powers of a court of equity." The case is referred to as an illustration of when equity will relieve from a situation, in which the creditor, having exhausted every legal remedy, finds himself without a judgment and, without fault or laches on his part, unable to proceed further in preparing the way to an equitable cognizance of his case. Section 1871 of the Code of Civil Procedure, which authorizes an action against the judgment debtor to compel a discovery of his property, etc., after an execution has been returned wholly or partly unsatisfied, is not exclusive. Neither that section nor the statute from which taken (2 Rev. Stats. 173, sec. 38) operated to repeal or curtail the common-law⁶⁴ equity powers of the court to investigate the conduct of debtors and to grant relief: *National Tradesmen's Bank v. Wetmore*, 124 N. Y. 241, 26 N. E. 548. The rule, which demands the exhaustion by the creditor of his legal remedies, is one adopted in regulation of the exercise of the equitable jurisdiction of the court, and should not be departed from, unless the facts are such as to justify the departure through the obvious necessity of the case.

Turning to the facts set forth in this complaint, I think that they appear to be altogether insufficient to justify the court in granting the relief prayed for. The fact alleged of the denial of an application to the surrogate of New York county for the probate of the nonresident debtor's will, upon which argumentative inferences are based, is not enough. The defendants were under no obligation to establish Walter Weston's will in this state, and if the plaintiffs were unable to procure its probate here by reason of inability to produce the paper propounded as the will, as it is said, or for any other reason, that is not of itself a sufficient allegation of fact upon which to move the equitable intervention of the court. It is not alleged that the plaintiffs were unable to put their claim in judgment during the nine years that their debtor was living, or that they attempted to prove it as against the executors of his will during the four years after his death. They have brought the action on the equity side of the court, without it

appearing that they have exhausted all their remedies at law, and ask that their claim be established, and be ordered paid, as against parties, who were under no obligation to pay it and who do not represent the debtor, or the estate to be bound by the claim. Surely the intervention of a court of equity would be unwarrantable in such a case, when the reason appearing for it is so scant and when the conclusiveness of its decree would be doubtful, to say the least.

For these reasons, I advise affirmance of the judgment.

Haight, Willard Bartlett and Chase, JJ., concur with Cullen, C. J.; Hiscock, J., concurs with Gray, J.

Judgment affirmed, with costs.

The Jurisdiction of Equity Over Probate Matters is discussed in the notes to Deck v. Gerke, 73 Am. Dec. 555, Green v. Creighton, 48 Am. Dec. 744. Whether equity, having acquired jurisdiction of the estate of a decedent for some special purpose, or to grant some special relief not within the province of the probate court, will retain it and close the estate, is discussed in the note to Deepwater Ry. Co. v. D. H. Motter Co., 116 Am. St. Rep. 881. While equity will not ordinarily assume jurisdiction over the settlement of the estates of decedents, yet it may do so in a proper case: Potter v. Clapp, 203 Ill. 592, 96 Am. St. Rep. 322; and if it assumes jurisdiction, it will settle all incidental questions, and nothing can thereafter be done in the probate court: Hamby v. Hamby, 165 Ala. 171, 138 Am. St. Rep. 23. Though the settlement of estates of decedents is committed to probate courts by statute, equity has jurisdiction whenever its aid is required and the powers of the probate court are not sufficient to deal with the question at issue: Bailey v. Bailey, 67 Vt. 494, 48 Am. St. Rep. 826; and in such case may proceed with the cause upon proof of the probate of the will in the probate court: Domestic etc. Missionary Society v. Eells, 68 Vt. 497, 54 Am. St. Rep. 888.

A Creditor may Maintain a Bill Against an Administrator and the widow and heirs of a decedent for discovery of assets, settlement of the administration accounts, and, in default of personal assets, to subject to the payment of his debt land conveyed by decedent in his lifetime to children in consideration of love and affection, maintenance and support: Shurtleff v. Right, 66 W. Va. 582, 135 Am. St. Rep. 1041.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY v. WILLIAMS.

[199 N. Y. 108, 92 N. E. 404.]

MASTER AND SERVANT—*Statute Regulating Payment of Wages*.—A statute providing that the employees of a steam surface railroad company shall be paid semi-monthly and in cash, and inflicting a penalty for a violation thereof, operates as a restraint upon the freedom of such corporations to make any contract to pay the wages of their employees otherwise than semi-monthly and in cash. (p. 853.)

CONSTITUTIONAL LAW—*Labor Laws*—*Statute Void in Part*. Assuming that sections 10 and 11 of the labor laws (Consol. Laws, c.

31), requiring the wages of employees of railroads to be paid semi-monthly and in cash, to be unconstitutional so far as individual owners of railroads are concerned, the provision relating to them is readily separable from the rest of the statute relating to corporations, and its validity in this respect need not affect the application of the provision to steam surface railroad corporations. (p. 855.)

CORPORATIONS—Reserved Power of Legislature—Amendment of Charter.—In exercising the reserved power to amend corporate charters, the legislature may not deprive a corporation of property already acquired or the proceeds of lawful contracts previously made, or destroy or substantially impair the purposes of the grant or rights which are vested in the corporation thereunder; but it may make any alteration or amendment of a charter which will not defeat or impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right. (p. 855.)

CORPORATIONS—Reserved Power of Legislature—Right of Contract.—In the case of corporations, such as railroad companies, which are clothed to some extent with a public trust and are under an obligation to discharge duties which affect the community at large, the legislature may make amendments to their charters in furtherance of the public interest for the benefit of their employees, even though such amendments operate as limitations upon the right to contract (p. 855.)

CORPORATIONS—Reserved Power of Legislature.—Increase of Burdens imposed by an amendment of a corporate charter must be deemed to have been contemplated by the corporators at the organization of the corporation. (p. 856.)

CORPORATIONS—Reserved Power of Legislature—Amendment of Charter.—Under its reserved power over corporations the legislature may amend the charter of a corporation by a general law which does not specifically refer to such charter. (p. 857.)

CORPORATIONS—Statute Regulating Payment of Employees. The clause of the New York statute requiring railroad corporations to pay employees semi-monthly, being applicable to all steam surface railroad corporations, operated as a repeal of all the charters of such corporations, if any there were, which provided a different time for the payment of employees and as an amendment or addition to all charters in which no time of payment was prescribed. (p. 857.)

CORPORATIONS—Statute Regulating Payment of Employees. Statutes requiring corporations to pay their employees in lawful money fall within the reserved power to amend corporate charters. (p. 857.)

CONSTITUTIONAL LAW—Statute Regulating Payment of Wages.—A statute requiring all railroad corporations in the state to pay the wages of their employees semi-monthly and in cash does not have the effect of depriving the corporations affected thereby of liberty or property without due process of law or deny to them equal protection of the laws. (p. 859.)

CONSTITUTIONAL LAW.—A Classification of Corporations with reference to their relations to the public is manifestly reasonable, and as long as all corporations of the same class are treated alike, the action of the legislature may not be condemned by the courts for inequality. (p. 859.)

INTERSTATE COMMERCE—Power Remaining With States.—A state law, whose effect upon interstate commerce is only incidental, is not forbidden by the commerce clause of the federal constitution, and may remain in force unless it is displaced by a congressional enactment dealing with the subject matter. (p. 860.)

INTERSTATE COMMERCE—Regulating Payment of Wages.—Until Congress shall intervene to regulate the payment of wages by interstate carriers, a state statute upon the subject is free from the objection that it constitutes a commercial regulation solely within the power of the federal government to prescribe. (p. 860.)

CONSTITUTIONAL LAW.—It is the Duty of the Courts to Uphold a statute enacted by the legislature as constitutional, if it is possible to do so without disregarding the plain command or necessary implication of the fundamental law. (p. 863.)

CONSTITUTIONAL LAW—Regulation of Payment of Wages. Sections 10 and 11 of the labor laws (Consol. Laws, c. 31), requiring the semi-monthly payment of wages by certain corporations is a constitutional enactment under the reserved power of the legislature over corporations. It does not confiscate corporate property, directly or indirectly. (p. 863.)

Alexander S. Lyman, for the appellant.

Edward R. O'Malley, attorney general, and Edward H. Letchworth, for the respondent.

113 WILLARD BARTLETT, J. The purpose of this litigation is to test the constitutionality of a recently enacted statute requiring railroad corporations in this state to pay the wages of their employees semi-monthly and in cash. In order to present the question to the courts for determination, the plaintiffs have brought suit in equity against the state commissioner of labor to restrain him from instituting actions to recover the penalties prescribed by the statute for noncompliance with its provisions. Judgment was rendered in favor of the defendant at special term, and affirmed, by a divided court, at the appellate division. The plaintiff has appealed to this court.

In the briefs of counsel and in the argument at the bar, it has been assumed that the provisions of the labor law which are the subject of attack operate not only to introduce the requirement of semi-monthly payments into all contracts between the railroad company and its employees in which there is no express stipulation as to the time when wages shall be payable, but also to prohibit such corporations from making any contracts with their employees which shall vary the time of payment from that prescribed in the statute. This view is sustained by the amendment to the penal law enacted in 1909, when section 1272 was made to provide that a corporation which does not pay the wages of all its employees in accordance with the provisions of the labor law is guilty of a misdemeanor: Laws 1909, c. 205. It is true ¹¹⁴ that this amendment was not adopted until after the commencement of the present action, but it was in force when the judgment was rendered, and it serves to indicate the intent of the legislature in enacting the labor law itself. Where railroad corporations are commanded to pay the wages of their employees at fixed periods, and are made liable to indictment and criminal

punishment for failure so to do, the implication is tolerably clear that they may not enter into contracts containing provisions at variance with the legislative command. Accordingly, I think we must treat the requirement of the labor law that the employees of a steam surface railroad corporation shall be paid semi-monthly and in cash as a restraint upon the freedom of such corporations to make any contract to pay the wages of their employees otherwise than semi-monthly and in cash. If this were not the necessary construction, the legislation in question would present no serious constitutional difficulty. If we were at liberty to hold that the requirement for semi-monthly cash payments was to apply only in cases where it was not stipulated otherwise in the contract of employment, neither the railroad companies nor their employees would have even any plausible cause for complaint, inasmuch as both master and servant would be left at liberty to make any contract they pleased in regard to the time when the servant's wages should be payable and the medium in which they should be paid. The substance of the grievance which is asserted in behalf of the corporations in this litigation is that they are left no option in the matter but must pay in the method and medium prescribed, although their employees might be entirely willing to agree otherwise. Their contention is that the labor law deprives them of the right of making contracts with their employees on advantageous terms, and that this is beyond the power of the legislature. Of course, if there is no power in the legislature thus to limit the right of contract between steam surface railroad corporations and their employees, this legislation must fail.

The section of the labor law requiring the cash payment ¹¹⁵ of wages applies to manufacturing, mining, quarrying, mercantile, railroad, street railway, canal, steamboat, telegraph, telephone and express companies; every corporation engaged in harvesting and storing ice; every water company not municipal; and every person, firm or corporation engaged in any public work for the state or any municipal corporation. This section is much wider in its application than the clause prescribing the semi-monthly payment of wages, which relates only to "every person or corporation operating a steam surface railroad."

These enactments are attacked as unconstitutional on three grounds. It is contended, first, that they deprive the plaintiff and its employees of liberty and property without due process of law; secondly, that they deny them the equal protection of the laws; and, thirdly, that they constitute a restriction upon interstate commerce. Although the argument has covered a wide field, an analysis of the discussion resolves the defense into two propositions of law: (1) That the legislation which is the subject of attack is a proper exercise of the

reserved power to amend corporate charters contained in the state constitution; and (2) that it constitutes a proper and legitimate exercise of the police power of the state. If either of these propositions is sound, the legislation is constitutional and the judgment must be affirmed.

In this state, since the enactment of chapter 381 of the Laws of 1889, many classes of corporations, including steam surface railroad companies, have been required by law to pay their employees in cash. An act to provide for the weekly payment of wages by corporations was passed in the following year (Laws 1890, c. 388) and amended three years later (Laws 1893, c. 717), but steam surface railroads were expressly excepted from its operation. In 1895, however, the act of 1890 was amended so as to provide, among other things, as follows: "Every person or corporation operating a steam surface railroad shall on or before the twentieth of each month pay the employees thereof the wages earned by them during the ¹¹⁶ preceding calendar month, unless any such employee shall be absent from his regular place of labor at the usual time of payment, in which case payment shall be made at any reasonable time thereafter upon demand": Laws 1895, c. 791, sec. 1.

The monthly payment system thus prescribed for steam surface railroads continued down to the time of the enactment of the provision of the labor law which is now assailed providing that the wages of the employees of such corporations shall be paid semi-monthly. The term "employee" as used in the labor law is defined by the statute itself to mean "a mechanic, workman or laborer who works for another for hire" (section 2); and a question is raised as to whether this definition is broad enough to include conductors, trainmen or locomotive engineers. It is alleged by the appellant and conceded by the respondent that it will cost the railroad company five thousand dollars a month more to pay its employees semi-monthly than it does to pay them monthly.

In the briefs of counsel the constitutionality of the semi-monthly cash payment law (which term I use for convenience in referring to the provisions of the statute prescribing the time of payment and requiring it to be in cash) is discussed in two aspects: (1) As an exercise of the police power of the legislature, and (2) as an exercise of the reserved power to amend the charters of corporations. In the view which I have taken of the case I shall proceed to consider only the question of its validity as warranted by the reserved power to amend.

It is true, as has already been pointed out, that the statutory requirement of semi-monthly payments applies to every person as well as to every corporation operating a steam surface railroad, thereby referring, no doubt, to the operation of short branch lines by individuals or partnerships in connec-

tion with the great railroads of the state, for convenience in sending freight to and from the premises of extensive manufacturing concerns. Such branch lines are only incidental to the general railroad business of the state, and the number of employees thereon must be comparatively few. The constitutionality of ¹¹⁷ the statute is not questioned here by any individuals operating lines of this character, and even if the enactment should be deemed unconstitutional so far as persons are concerned, the provision relating to them is readily separable from the rest of the statute relating to corporations, and its invalidity in this respect, if so adjudged, need not affect the application of the provision to steam surface railroad corporations: *Berea College v. Kentucky*, 211 U. S. 45, 29 Sup. Ct. Rep. 33, 53 L. ed. 81. It matters not that both provisions are contained in the same section: *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 21 Sup. Ct. Rep. 174, 45 L. ed. 280.

In exercising the reserved power to amend corporate charters the legislature may not deprive a corporation of property already acquired or the proceeds of lawful contracts previously made, or destroy or substantially impair the purposes of the grant or rights which are vested in the corporation thereunder; but it may make any alteration or amendment of a charter "which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right": *Close v. Glenwood Cemetery*, 107 U. S. 466, 2 Sup. Ct. Rep. 267, 27 L. ed. 408. In the case of corporations such as railroad companies, which are clothed, to some extent, with a public trust, and are under an obligation to discharge duties which affect the community at large, the legislature may make amendments in furtherance of the public interest for the benefit of their employees, even though such amendments operate as limitations upon the exercise of the right to contract. Such is substantially the doctrine enunciated in the case of *St. Louis etc. Ry. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. Rep. 419, 43 L. ed. 746, where the supreme court of the United States was called upon to pass on the constitutional validity of an act of the Arkansas legislature, which required railroad companies, whenever they discharged an employee, to pay him his unpaid wages then earned at the contract rate without abatement or deduction on the day of his discharge. The state court upheld this legislation as a valid exercise of the power to amend corporate charters ¹¹⁸ reserved to the legislature in the state constitution. It was contended in the supreme court of the United States that as to railroad corporations organized prior to its passage, the statute was void, because in violation of the fourteenth amendment; or, in other words, because it

amounted to a deprivation of property forbidden by the federal constitution. The court, however, declined to sustain this view, but affirmed the judgment of the supreme court of Arkansas, holding that inasmuch as the right to contract was not absolute, but might be subjected to the restraints demanded by the safety and welfare of the state, the legislative power to amend corporate charters in this manner could not be disputed on the ground that its exercise was an infraction of the fourteenth amendment.

In the Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496, the same court, in discussing the power reserved to Congress to amend the charters of the great Pacific railroads, reviewed the earlier decision on the general subject and held that the reservation of the power of amendment "affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the state," citing *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. ed. 204.

In this state the same rule has been laid down with equal emphasis. As illustrations of the extent to which the legislature might subject corporations to new restrictions or increased burdens in the exercise of its reserved power to amend corporate charters, Judge Denio, in *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345, called attention to one case in which the court of appeals had held that the line of a plankroad might be extended and its capital increased, and to another in which a banking corporation chartered under the general act of 1838, without personal liability on the part of the shareholders, was so changed as to render the shareholders liable for all the debts of the company to an amount equal to the stock held by them respectively: See *Schenectady & S. Plankroad Co. v. Thatcher*, 11 N. Y. 102; *Matter* ¹¹⁹ of *Oliver Lee & Co.'s Bank*, 21 N. Y. 9. "It is difficult to put precise limits upon the power of the legislature thus reserved over corporations created by it or under its authority," said Judge Earl, in *Mayor etc. of N. Y. v. Twenty-third St. Ry. Co.*, 113 N. Y. 311, 21 N. E. 60. . . . As it has the power utterly to deprive the corporation of its franchise to be a corporation, it may prescribe the conditions and terms upon which it may live and exercise such franchise. It may enlarge or limit its powers, and it may increase or limit its burdens." The appellant complains because the legislature has increased its burdens by the sum of sixty thousand dollars additional expenses which it must incur annually in order to pay its employees with the frequency prescribed by the statute; but the corporators must be deemed to have contemplated the possibility of any change of burden within the legislative power to make when they organized the railroad company.

In New York a special charter may be amended by a general act which does not refer specifically to such charter: *Pratt Institute v. City of New York*, 183 N. Y. 151, 75 N. E. 1119, 5 Ann. Cas. 198; *People v. Gass*, 190 N. Y. 323, 123 Am. St. Rep. 549, 83 N. E. 64, 13 Ann. Cas. 678. The case of *State v. Haun*, 61 Kan. 146, 59 Pac. 340, 47 L. R. A. 369, is cited as authority against this method of amendment, but it is in opposition to the view repeatedly asserted and assumed in this court, and is also opposed to decisions on the subject in other jurisdictions, where it is held that the fact that an act of the legislature is general in its terms and makes no direct or express reference to the charter of any particular corporation does not prevent it from operating as an amendment to the charter of any corporation comprehended in the classes to which it refers. Such was the effect given by the supreme court of the United States to a general statute of Kentucky which was construed as operative to amend the charter of Berea College, although it was not in terms designated as an amendment thereof: *Berea College v. Kentucky*, 211 U. S. 45, 29 Sup. Ct. Rep. 33, 53 L. ed. 81.

In Massachusetts a general statute relative to railroad crossings was held to operate as an amendment to the act incorporating the Boston and Providence Railroad Corporation, ¹²⁰ under the reserved power of the legislature to alter or amend corporate charters: *City of Roxbury v. Boston & Providence R. R. Corp.*, 6 Cush. 424. Similarly, it has been held in Maine that an act, general in its terms and applicable to all railroads, affects the charter of any railroad company which contains no express limitation to the contrary, and may be passed in the exercise of the legislative power to modify all charters of corporations: *Bangor etc. R. R. Co. v. Smith*, 47 Me. 34.

The semi-monthly payment clause of the labor law being applicable to all steam surface railroad corporations in the state operated as a repeal of all the charters of such corporations, if there were any, which provided for a different time of payment for employees and as an amendment or addition to all charters in which no time of payment was prescribed. That the legislature, by enactments designed to operate prospectively, and not interfering with vested rights, may thus regulate contracts between corporations and their employees in regard to the times when their wages shall be paid, has been expressly held in Massachusetts and Vermont. Statutes requiring corporations to pay their employees in lawful money have been sustained as falling within the reserved power to amend charters in Vermont and Maryland and by the supreme court of the United States as falling within the police power in a case which arose in Tennessee: *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. Rep. 1, 46 L. ed. 55.

In 1895, under a provision of the constitution of Massachusetts permitting such procedure, the justices of the supreme judicial court of that state were requested to give their opinion to the House of Representatives upon the question whether it was within the constitutional power of the legislature to extend the application of an existing law relative to the weekly payment of wages by corporations to private individuals and partnerships, as provided in a bill then pending before the legislature. In response to the request the justices transmitted to the House of Representatives an opinion in which their conclusion was expressed as follows: ¹²¹ "Without attempting to define the limits of the power of the general court [the legislature] in Massachusetts to control the right of its inhabitants to make contracts generally, we cannot say that a statute requiring manufacturers to pay the wages of their employees weekly is not one which the general court has the constitutional power to pass if it deems it expedient to do so": Opinion of Justices, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344. This opinion was signed by all the members of the supreme judicial court, including Mr. Justice Oliver Wendell Holmes, now an associate justice of the supreme court of the United States. In reference to the conclusion reached, however, it is important to note, what the justices themselves expressly point out, that the legislative power granted to the general court by the constitution of Massachusetts is more comprehensive than that found in the constitutions of some of the other states. The legislature is empowered to pass all manner of wholesome and reasonable laws, "so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same." The judges further say that the considerations which may cause the legislature to determine what legislation is required by good public policy as thus defined are not for the court to weigh except so far as may be necessary to determine whether the legislation proposed is repugnant or contrary to the constitution.

The weekly payment act of Vermont (1906) provides that a mining, quarrying, manufacturing, mercantile, telegraph, telephone, railroad or other transportation corporation and an incorporated express, water, electric light or power company doing business in the state shall pay each week, in lawful money, each employee engaged in the business, the wages earned by such employee to a date not more than six days prior to the date of such payment; provided, that if at any time of payment an employee is absent from his regular place of labor, he shall be entitled to such payment on demand. It prohibits the payment of the employees of any such corporation ¹²² in scrip, vouchers, due-bills or store orders, except in

the case of a co-operative corporation in which the employee is a stockholder; and it provides that no corporation shall require an agreement from an employee to accept wages at any other period as a condition of employment: *Lawrence v. Rutland R. R. Co.*, 80 Vt. 370, 67 Atl. 1091, 15 L. R. A., N. S., 350, 13 Ann. Cas. 475.

In the case cited, while the reserved power of amendment was most strongly asserted, it was said to be, like the police power, limited by the requirements of the public good. "And that the act is within the scope of that power cannot be doubted, for its requirement, especially as far as it relates to the defendant and to the class to which it belongs, which are clothed with a public trust, and discharge duties of public concern, affecting the community at large, is promotive of the public good in protecting their employees to the limited extent it does."

In the same case it is held that the medium of payment is as much within the scope of the reserved power of amendment as the time of payment. The opinion deals so fully and admirably with every substantial question involved in the present appeal, that it is difficult to add anything of value to the argument of Chief Justice Rowell in support of legislation of this character.

An act of the Maryland legislature passed in 1880 provided that every corporation engaged in mining or manufacturing or operating a railroad in Allegany county and employing ten hands or more should pay its employees the full amount of their wages in legal tender money of the United States. The Union Mining Company, a corporation within the purview of the act, was the defendant in a suit brought to test its constitutionality. It was conceded that the legislature when it incorporated the Union Mining Company reserved the right to alter or amend its charter at pleasure. Hence, said the Maryland court of appeals, there could be no doubt "that the legislature could enact a law prohibiting the corporation from paying its employees otherwise than in money, and that it could forbid the corporation from making contracts with them for payment ¹²³ in anything but money": *Shaffer & Munn v. Union Mining Co.*, 55 Md. 74.

The discussion thus far has related to the contention of the appellant that the enactments in question deprive the parties of liberty and property without due process of law. The objection that they operate as a denial of the equal protection of the laws is equally untenable. A classification of corporations with reference to their relations to the public is manifestly reasonable. No other corporations occupy precisely the same relation to the public as steam surface railroad companies, and the fact that no other corporations may have been subjected to the same requirement in respect to the pay-

ment of wages does not invalidate the requirement. As long as the classification has a basis in reason and all corporations of the same class are treated alike, the action of the legislature may not be condemned by the courts for inequality.

As to the objection that the semi-monthly payment law constitutes an unconstitutional interference with interstate commerce, it is to be observed that it is not in conflict with any legislation by Congress, nor does it affect interstate commerce directly. It relates to the wages of railway servants employed wholly within the state of New York as well as to the wages of those whose duties take them from this state into others. The subject is one upon which Congress has not undertaken to act. The cases in which state legislation has been judicially condemned for interference with the commercial power of Congress have been cases where the interference was direct. "In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the constitution": *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819. If its effect upon interstate commerce is only incidental, a state law is not forbidden by the ¹²⁴ commerce clause of the federal constitution, and may remain in force until and unless it is displaced by a congressional enactment dealing with the subject matter: *Nashville etc. Ry. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. Rep. 28, 32 L. ed. 352. "While the laws of the states must yield to acts of Congress passed in execution of the powers conferred upon it by the constitution, the mere grant of Congress of the power to regulate commerce with foreign nations and among the states did not, of itself and without legislation by Congress, impair the authority of the states to establish such reasonable regulations as were appropriate for the protection of the health, the lives and the safety of their people": *New York etc. R. R. Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. Rep. 418, 41 L. ed. 853. Neither did it impair the authority of the states to amend the charters of corporations partly engaged in interstate commerce so as to promote the welfare of their employees, under "the power remaining with the state to regulate the relative rights and duties of all persons and corporations within its limits." Until Congress shall intervene to regulate the payment of wages by interstate carriers, I think such state enactments as that under consideration are free from the objection that they constitute commercial regulations solely within the power of the federal government to prescribe.

In reaching the conclusion that the New York statute requiring steam surface railroad corporations to pay their em-

ployees semi-monthly and in cash is a valid enactment under the reserved power of the legislature to amend corporate charters, I have not overlooked the cases in which similar legislation has been condemned in other jurisdictions. I will now refer to the decisions of this character which seem most worthy of notice.

The case of *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354, involved the constitutionality of the Pennsylvania store order act of 1881, which declared that all orders given by manufacturers to their workmen payable in goods or anything other than money to be void, and prohibited the use of such orders in the payment of wages by manufacturers to their employees. ¹²⁵ The supreme court declared that this was an attempt by the legislature to do what cannot be done in this country; that is, prevent persons who are *sui juris* from making their own contracts. Mr. Justice Gordon said: "The act is an infringement alike of the right of the employer and the employee; more than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States." The case contains nothing bearing upon the exercise of the reserved power to amend corporate charters, but is simply a denial that the legislation which was the subject of criticism could be enacted in the exercise of the police power.

An act to provide for the weekly payment of wages by corporations passed by the Illinois legislature in 1891 was held to be unconstitutional in the case of *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206, 35 N. E. 62, 22 L. R. A. 340, on the ground that it did not apply to all corporations existing within the state or to all that had been or might be organized for pecuniary profit under the general incorporation laws of the state. The constitution of Illinois provides: "No corporation shall be created by special laws or its charter extended, changed or amended . . . but the General Assembly shall provide, by general laws, for the organization of all corporations hereafter to be created." The supreme court of Illinois held that this provision of the constitution required all amendments to charters of existing corporations to be made by general laws applicable alike to all existing under the same conditions; and that inasmuch as the weekly payment law could apply to particular corporations only and not to the general body of corporations, it could not be upheld.

The Revised Statutes of 1889 in Missouri made it a misdemeanor for any corporation, person or firm engaged in manufacturing or mining to issue in payment of the wages of laborers any order, check, memorandum, token or evidence of indebtedness payable otherwise than in lawful money of

the United States, unless the same were negotiable and ¹²⁶ redeemable at its face value in cash, goods or supplies at the option of the holder at the store or other place of business of the employer. The supreme court of Missouri held that this was class legislation, and violative of the constitutional guaranty of due process of law. The court conceded that the legislature might regulate the business of mining and manufacturing so as to secure the health and safety of the employees, but it denied that such was the scope of the enactment in question. The legislation was condemned on the ground that it denied to persons engaged in mining and manufacturing the right to make and enforce the most ordinary, every-day contracts—a right which is accorded to all other persons. "This denial of the right to contract," says the opinion, "is based upon a classification which is purely arbitrary, because the ground of the classification has no relation whatever to the natural capacity of persons to contract": *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789. There was an able dissenting opinion in which it was strongly argued that statutes designed to prevent fraud or oppression in the payment of wages in mining and manufacturing enterprises are not objectionable on the ground of the selection or classification of those enterprises as subjects for separate legislation.

An Indiana statute requiring all employers of labor to make weekly payment of the wages due their employees was adjudged unconstitutional as not falling within the police power in *Republic Iron & Steel Co. v. State*, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136. There, as the court said, the statute took away "from both the employer and employee, whether in the shop, in the store or on the farm, all power to contract for labor, except upon terms of weekly payment of wages in cash," and this was pronounced an unreasonable, and therefore unconstitutional, restriction. No question of the reserved power to amend corporate charters appears to have been considered.

Perhaps the strongest authority in favor of the appellant in any state court of last resort is *Johnson v. Goodyear Mining Co.*, 127 Cal. 4, 78 Am. St. Rep. 17, 59 Pac. 304, 47 L. R. A. 338, which invalidated a California statute requiring every corporation doing business in the state to pay ¹²⁷ the wages of its employees in lawful money or checks negotiable at their face value on demand, and which gave the employee a preferential lien on all the property of the corporation for the amount of his wages. It was held that such legislation could not be upheld under the reserved power to amend or on any other theory. On the other hand, the same statute had previously been adjudged to be constitutional by the circuit court

of the United States in *Skinner v. Garnett Gold Min. Co.*, 96 Fed. 735.

Again and again the courts of this country have asserted the proposition, in almost every form in which the English language can phrase it, that it is their duty to uphold a statute enacted by the legislature as constitutional if it is possible to do so, without disregarding the plain command or necessary implication of the fundamental law. If the lawmakers have not violated the constitution, their work must stand until they themselves destroy it, no matter what the courts may think of its wisdom or probable effect. "The courts have no right to set aside, to arrest or nullify a law passed in relation to a subject within the legislative authority on the ground that it conflicts with their notions of natural right, absolute justice or sound morality": *Slack v. Jacob*, 8 W. Va. 612. There is an irreconcilable conflict in the decisions in different jurisdictions as to the constitutional validity of labor legislation fixing the medium and time of payment of the wages of those who work for corporations. After the foregoing review of the leading cases, I find no difficulty in sustaining our New York statute on the ground which has been stated. It does not confiscate corporate property, directly or indirectly. It does impose a greater future burden upon the corporations to which it relates; but that, I think, is within the power of the legislature to the extent to which it has been exercised in this case.

For the foregoing reasons, I advise the affirmance of this judgment, with costs.

Cullen, C. J., Gray, Werner, Hiscock and Chase, JJ., concur.

Judgment affirmed.

CONSTITUTIONALITY OF STATUTES RELATING TO WAGES.

- I. Introductory Remarks, 863.
- II. Time of Payment of Wages, 864.
- III. Method of Payment, 868.
- IV. Manner of Determining Amount of Wages, 872.
- V. Fixing Amount of Wages, 873.
- VI. Imposing Penalties Affecting Amount of Wages, 874.
- VII. Prohibiting Assignment, 875.
- VIII. Prohibiting Garnishment, 876.
- IX. Making Wages Preferred Claims, 877.

I. Introductory Remarks.

The constitutionality of statutes regulating the time and method of paying wages is a subject that we have already considered in the note to *Thompson v. Baltimore etc. R. R. Co.*, 122 Am. St. Rep. 903; but its growing importance seems to now justify its further con-

sideration. Blackstone says that every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws which the community has thought proper to establish: Blackstone, bk. I, c. 1, p. 125. And the liberty which society grants to its individual members to enter into contracts among themselves, while one of the inalienable rights, is yet not absolute and universal. It is within the admitted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. For example, it may deny to all the right to contract for the sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract relieving himself from negligence; and, indeed, may restrain all engaged in any employment from any contract in the course thereof which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services or property: *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. Rep. 586, 39 L. ed. 657.

II. Time of Payment of Wages.

A statute making the wages earned by a laborer payable whenever he ceases work, whether of his own volition or because he is discharged by his employer, is neither opposed to sound public policy nor unconstitutional as a deprivation of liberty or property without due process of law: *Shortall v. Puget Sound Bridge etc. Co.*, 45 Wash. 290, 122 Am. St. Rep. 899, 88 Pac. 212. In *International Text-book Co. v. Weissenger*, 160 Ind. 349, 98 Am. St. Rep. 334, 65 N. E. 521, 65 L. R. A. 599, the court, in upholding the statute of Indiana which provided for regular pay days, says: "A large proportion of the persons affected by these statutes of labor are dependent upon their daily or weekly wages for the maintenance of themselves and their families. Delay of payment or loss of wages results in deprivation of the necessities of life, suffering, inability to meet just obligations to others, and, in many cases, may make the wage-earners a charge upon the public. The situation of these persons renders them peculiarly liable to imposition and injustice at the hands of employers, unscrupulous tradesmen, and others who are willing to take advantage of their condition. . . . It is clear that the object of the act of 1899 . . . was the protection of wage-earners from oppression, extortion, or fraud on the part of others, and from the consequences of their own weakness, folly or improvidence."

In *Arkansas Stave Co. v. State*, 94 Ark. 27, 140 Am. St. Rep. 000, 125 S. W. 1001, 27 L. R. A., N. S., 255, the court, in upholding a statute providing that corporations shall pay their employees semi-monthly, says: "It is also urged that the act is invalid because it restricts the rights of the defendant's employees to contract with it. But it is the established doctrine of the law that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to promote the safety, health and welfare of the people. The right to contract is often limited by the law, and certain contracts are prohibited by statute. It is fundamental that the legislature may de-

clare what persons are competent to enter into a contract. Thus, persons under disability cannot enter into a binding contract. Contracts cannot be made in restraint of trade, and contracts against public policy are void. The statute of frauds enables contracting parties to avoid contracts not in writing; a party will not be allowed to contract to waive the benefit of homestead or exemptions, and a married man cannot convey his homestead without his wife joining in the execution of the conveyance. These instances, and many others that might be mentioned, show that the law-making power of the state does have authority over the right to contract. But under this act the restriction of the employee's right to contract is not direct. That restriction only applies to the corporations, and those dealing with them cannot complain of the incompetency of the corporations to make contracts which are inhibited by the law, any more than they could in making contracts with persons laboring under legal disabilities, or in contracting relative to subject matters prohibited by law: *Lawrence v. Rutland R. R. Co.*, 80 Vt. 370, 67 Atl. 1091, 15 L. R. A., N. S., 350; *State v. Brown & Sharpe Mfg. Co.*, 18 R. I. 17, 25 Atl. 246, 17 L. R. A. 856; *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789. A contract made in violation of this act, is a contract against public policy. The legislature has declared by the enactment of this law that it is for the public good. When the legislature speaks in the exercise of its power to legislate, it thereby declares what is the public policy; and any contract made which is opposed to public policy is void. The law under consideration, we think, is not contrary to any provision of the federal or state constitution; and it was within the valid exercise of legislative power for the General Assembly to enact it."

But in *Johnson v. Goodyear Min. Co.*, 127 Cal. 4, 78 Am. St. Rep. 17, 59 Pac. 304, 47 L. R. A. 338, an act providing, inter alia, that "every corporation doing business in this state shall pay, at least once a month, each and every employee employed by such corporation, in transacting or carrying on its business, or in the performance of labor for it, the wages earned by such employee during the preceding month," etc., was declared unconstitutional. Said Judge Cooper: "The corporation and the laborer are prohibited from making any contract whereby wages are to become due for a longer period than one month as a condition of employment. . . . The workingman of intelligence is treated as an imbecile. Being over twenty-one years of age, and not a lunatic or insane, he is deprived of the right to make a contract as to the time when his wages shall become due. Being of sound mind and knowing the value of a horse, he is not allowed to make an agreement with the corporation that he will work sixty days and take the horse in payment. Business might be such that a corporation could not possibly pay wages without getting laborers who were willing to wait for their wages until the corporation could get money with which to pay them by marketing its products. The laborer might be interested in the corporation, or for some reason willing to wait until the corporation could pay him. Yet, the parties, being able to contract and willing to contract, and desiring for the good of each other to contract, are by this statute forbidden to do so."

And in *Toledo etc. R. R. Co. v. Long*, 169 Ind. 316, 124 Am. St. Rep. 226, 82 N. E. 757, it is decided that a statute requiring every company, corporation or association, in the absence of a written contract

to the contrary, to make a full settlement with, and the payment of money to, its employees engaged in manual or mechanical labor at least once in every calendar month, and imposing a penalty for the violation of this requirement, is unconstitutional, because of the fourteenth amendment to the constitution of the United States, and that such statute imposes duties and penalties on corporations, companies and associations not imposed on individuals in like circumstances.

An act providing that "every corporation doing business in this state shall pay the mechanics and laborers employed by it the wages earned by and due them weekly or monthly, on such day in each week or month as shall be selected by such corporation"; and providing, further, that a violation of the act "shall entitle each of the said mechanics and laborers to a lien on all the property of said corporation for the amount of their wages, which lien shall take preference over all other liens, except duly recorded mortgages and deeds of trust," is unconstitutional as inhibited special legislation, and an attempt to make an arbitrary classification not founded upon natural differences, or differences defined by the constitution, as such act would give a lien in favor of laborers and mechanics who are employed by the week or month, and not to those otherwise employed: *Slocum v. Bear Valley Irr. Co.*, 122 Cal. 555, 68 Am. St. Rep. 68, 55 Pac. 403.

It is worth noticing that the very same act which was declared unconstitutional by the supreme court of California in the above case of *Slocum v. Bear Valley Irr. Co.* was upheld and declared constitutional in *Skinner v. Garnett Gold Min. Co.*, 96 Fed. 735, by Judge Morrow, saying: "The provisions that corporations shall have a regular monthly pay day, and that employees of a corporation shall, in the event of a violation of the provisions of section 1 by the corporation, be entitled to a lien on the property of the corporation, taking precedence over all other liens except recorded mortgages and deeds of trust, to a reasonable attorney's fee if he is obliged to bring an action at law to recover his wages, and to an attachment against the property of the corporation, and that an unrecorded deed shall not be a defense to such an action, are not such as unjustly discriminate against the defendant. Defendant further contends that the act is unconstitutional upon the ground that it deprives the employee and the corporation of the liberty and property of making contracts, without due process of law. . . . It does not appear in what respects defendant is deprived of any liberty in making contracts by reason of these enactments. They simply constitute an effort to secure the regular payment to the employee of a corporation by such corporation, of the wages to which he is entitled by virtue of his work performed, and an effort to make his legal remedy for the irregular payment of such wages as little troublesome and as little expensive as possible. The contention of defendant as to the unconstitutionality of the statute must be denied."

In 1895 the legislature of Massachusetts asked the opinion of the supreme court of that state on the constitutionality of a law providing for the weekly payment of wages by corporations, partnerships and persons engaged in any manufacturing business and having more than twenty-five employees. The court decided unanimously: "There is not in the constitution of Massachusetts anything which in terms relates to the freedom or liberty of contract. . . . There never has been at any time in Massachusetts an absolute right in its inhabitants

to make all such contracts as they pleased. Some contracts have always been held void at common law, and some contracts valid at common law have been declared void by statute. . . . It is manifest, however, from the examples we have given, that the regulation of contracts by statute, not amounting to a determination of rates or prices, has not been confined to public employments or to business which may be said to be affected with a distinct public interest. The legislation on this subject relates to a great variety of contracts, and has been passed, some of it to promote the public health or the public morals or the public convenience, some of it for the protection of individuals against fraud, and some of it for the protection of classes of individuals against unfair or unconscionable dealing. The considerations which may influence the legislature to determine what legislation of this character is required by good public policy, or, in the words of the constitution, what laws are 'for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same,' are not for us to weigh, except so far as may be necessary to determine whether the legislation proposed is repugnant or contrary to the constitution. . . . Without attempting to define the limits of the power of the general court in Massachusetts to control the right of its inhabitants to make contracts generally, we cannot say that a statute requiring manufacturers to pay the wages of their employees weekly is not one which the general court has the constitutional power to pass, if it deems it expedient to do so": Opinion of the Justices, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344.

A statute providing that a mining, quarrying, manufacturing, mercantile, telegraph, telephone, railroad, or other transportation corporation, and an incorporated express, water, electric light or power company, doing and transacting business in this state, shall pay each week, in lawful money, each employee engaged in the business the wages earned by such employee to a day not more than six days prior to the date of such payment; and further providing that, if at any time of payment an employee is absent from his regular place of labor, he shall be entitled to such payment on demand, is constitutional, and does not deprive a corporation, or the stockholders composing it, of liberty or property without due process of law, nor deny to them the equal protection of the laws, nor infringe any of their property rights, guaranteed by the constitution of the state: *Lawrence v. Rutland R. R. Co.*, 80 Vt. 370, 67 Atl. 1091, 15 L. R. A. N. S., 350.

And a statute providing "that all persons, associations, companies and corporations employing the service of ten or more persons in any mining work or mining industry in this commonwealth shall, on or before the fifteenth and thirtieth day of each month, pay within fifteen days of the aforesaid fifteenth and thirtieth days, respectively, each servant or employee in lawful money of the United States, the full amount due each such servant or employee rendering such service, unless prevented by an unavoidable casualty; provided, however, that if at any time of payment any servant or employee shall be absent from his place, he shall be entitled to such payment at any time thereafter on demand," and further providing "that a violation of any of the provisions of the act shall be deemed a misdemeanor, and upon conviction the persons, company or corporation so offending shall be fined," etc., is not unconstitutional as class or special legislation.

The statute does not interfere with vested rights, nor impair the obligations of contracts, nor impose a penalty for the nonpayment of debt: *Commonwealth v. Reinecke Coal Min. Co.*, 117 Ky. 885, 79 S. W. 287. The court declares that it is a well-established principle in this state that, so long as the legislature does not pass the limits fixed by the constitution, the courts have no authority to interfere on the ground that the act in question violates the natural principles of justice and right: *Commonwealth v. Reinecke Coal Min. Co.*, 117 Ky. 885, 79 S. W. 287.

A statute requiring corporations and persons engaged in operating and constructing railroads and railroad bridges, and contractors and subcontractors engaged in such construction to pay their employees on the day of discharge, the unpaid wages then earned by them at the contract rate, without abatement or reduction, and, if not so paid, then, as a penalty, such wages to continue at the same rate until paid, is void as to natural persons, as an invasion of the right to acquire, possess and protect property, but is valid as to corporations, under reserved power to alter, revoke or annul their charters. The words "without abatement or deduction" mean without discount for paying in advance of the time fixed by the contract, and do not prevent a corporation from offsetting the damages sustained by the employee's failure to perform his contract. Such statute is not special legislation, as it is general and uniform in operation on all persons within the class to which it applies: *Leep v. St. L. Iron Mountain etc. Ry. Co.*, 58 Ark. 407, 41 Am. St. Rep. 109, 25 S. W. 75, 23 L. R. A. 264.

In *Republican Iron etc. Co. v. State*, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136, it was decided that the act of 1887 requiring every person, company, corporation, or association employing any person to labor, or in any other service for hire, to make weekly payments for the full amount due for such labor, and that the chief inspector, or any person interested, may bring suit in the name of the state against any person, company or corporation that neglects or refuses to comply within ten days after such payment is due and left unpaid, was not within the police power of the state, and hence was unconstitutional as infringing upon the right of private contract, and as depriving those affected by the act of their property without due process of law. But in *Seelyville Coal etc. Co. v. McGlosson*, 166 Ind. 561, 117 Am. St. Rep. 396, 77 N. E. 1044, 9 Ann. Cas. 234, it is decided that the act of 1901 providing that all persons, natural and artificial, engaged "in mining coal, ore or other minerals, or in quarrying stone, or engaged in manufacturing iron, steel, lumber, staves, heading barrels, brick, tile machinery, agricultural or mechanical implements or any article of merchandise," shall pay their employees semi-monthly, if demanded by them, and further providing penalties for violations of the act, and attorney's fees for the collection of wages, is constitutional, and not in conflict with a constitutional provision that no law shall grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

III. Method of Payment.

Nearly every statute providing the time of payment of wages, provides also the method of paying them; and a few statutes go so far as to provide how the amount of wages shall be determined, particularly with reference to miners. And the authorities do not agree

as to whether or not the method of payment of wages is a subject which the legislature has a constitutional right to regulate by statute. In *State v. Goodwill* and *State v. Minor*, 33 W. Va. 179, 25 Am. St. Rep. 863, 10 S. E. 285, 6 L. R. A. 621, it was decided that a statute declaring that all persons engaged in mining coal, ore, or other minerals, or mining or manufacturing them, or either of them, or manufacturing iron or steel, or both, or any other kind of manufacturing, shall not issue, for the payment of labor, any order or other paper, unless the same purports to be redeemable at its face value in legal money of the United States, bearing interest at the legal rate, made payable to the employee or bearer, and redeemable within thirty days by the maker thereof, is unconstitutional and void, because the rights and privileges of certain specified employers are abridged, while others of the same class (the wholesale merchant with his hundreds of clerks and agents, the railroad construction companies or railroad companies with their thousands of employees) are left free. But in *Shortall v. Puget Sound Bridge etc. Co.*, 45 Wash. 290, 122 Am. St. Rep. 899, 88 Pac. 212, a statute was declared constitutional, which, among other provisions, contained the following: "It shall not be lawful for any corporation, person or firm engaged in manufacturing of any kind in this state, mining, railroading, constructing railroads, or any business or enterprise of whatsoever kind in this state, to issue, pay out or circulate for payment of wages of any labor, any order, check, memorandum, token or evidence of indebtedness, payable in whole or in part otherwise than in lawful money of the United States, unless the same is negotiable and redeemable at its face value, without discount, in cash or on demand, at the store or other place of business of such firm, person or corporation when the same is issued, and the person who, or company which may issue any such order, check, memorandum, token or other evidence of indebtedness shall upon presentation and demand redeem the same in lawful money of the United States." The learned Justice Fullerton, in delivering the opinion for the court in the last case, said: "The practice pursued by certain employers of labor, of paying the wages of their employees in orders drawn upon stores redeemable in commodities other than lawful money of the United States, and of postponing the day of payment until long after the wages were earned, was a real evil, operating to the detriment of the wage-earner, and consequently to the detriment of the state. As such the practices were subject to correction by the legislature, and its act in that regard is well within the rules of sound public policy."

A statute making it a crime for "any person, firm or corporation to issue, pay out or circulate, for the payment of wages for labor, any order, note, check, or other evidence of indebtedness, or other obligation, unless the same is negotiable and redeemable at its face value in lawful money of the United States, by the person, firm or corporation" issuing it, has been held unconstitutional. It interferes with or abridges the right of persons competent to contract with each other with respect to the manner in which employees are to be paid for their services. Nor can it be upheld as a police regulation, when applied to a corporation in no way pursuing a public business, nor devoting its property to a public use. The right to labor or employ labor and to make contracts with respect thereto, upon such terms as may be agreed upon, is, it is said, both a liberty and a property right, and is included in the constitutional guaranty that no person

shall be deprived of life, liberty or property without due process of law, and cannot be arbitrarily interfered with, although it is to be enjoyed subject to reasonable limitations growing out of duties which the individual owes to society: *State v. Missouri Tie etc. Co.*, 181 Mo. 536, 103 Am. St. Rep. 614, 80 S. W. 933, 65 L. R. A. 588, 2 Ann. Cas. 119.

In 1897 the legislature of Kansas enacted the following significant statute: "It shall be unlawful for any person, firm, company, corporation or trust, or the agent, or the business manager of any such person, firm, company, corporation or trust, to sell, give, deliver or in any way, directly or indirectly, to any person employed by him or it, in payment of wages due or to become due, any scrip, token, check, draft, order, credit on any book of account or other evidence of indebtedness, payable to bearer or his assignee, otherwise than at the date of issue, but such wages shall be paid only in lawful money of the United States, or by check or draft drawn upon some bank in which any person, firm, company, corporation, or trust, or the agent or the business manager of any such person, firm, company, corporation, or trust, has money upon deposit to cash the same." The statute also provided that "all contracts to pay or accept wages in any other than lawful money, or by check or draft, as specified in section 1 of this act, and any private agreement or secret understanding that wages shall be or may be paid, in other than lawful money, or by such check or draft, shall be void, and the procurement of such private agreement or secret understanding, shall be unlawful and construed as coercion on the part of the employer." The statute further provided that "if any person shall violate any of the provisions of either section 1 or 2 of this act, or shall compel, or coerce any employee of any corporation or trust, to purchase goods, or supplies from any particular person, firm, corporation, company or trust, or at any particular store or place, he shall be guilty of a misdemeanor, etc.," . . . and "this act shall apply only to corporations or trusts or their agents, lessees or business managers, that employ ten or more men." The statute was declared unconstitutional, in that it violated the fourteenth amendment to the constitution of the United States: *State v. Haun*, 61 Kan. 146, 59 Pac. 340, 47 L. R. A. 360. "While it might be desirable," observes the court, "and profitable to the employee of such corporation to receive a horse or a cow, or a house and lot in payment for his wages, yet the legislature prohibits payment in that way, and places the laborer under guardianship; classifying him, in respect of freedom of contract, with the idiot, the lunatic, or the felon in the penitentiary."

The constitution of the state of Kentucky provides that "all wage-earners in this state employed in factories, mines, workshops or by corporations shall be paid for their labor in lawful money." And a statute enacted in that state provides "that all persons, associations and corporations employing the service of ten or more persons in any mining work or mining industry . . . shall . . . pay . . . in lawful money of the United States. . . . But if such person, corporation or company, after using due diligence, is unable to make said payment as above required, he or it shall . . . make out a pay-roll and statement of amount due each employee and also a due-bill for said sum bearing interest." A succeeding section makes it unlawful for an employer to coerce or require employees to deal with or purchase merchandise from any person or company, or at any place or

store, or to exclude laborers from work, for failing to deal with any person, or at any place or store, or to blacklist them for such failure, etc. It was decided in *Commonwealth v. Hillside Coal Co.*, 109 Ky. 47, 58 S. W. 441 (Justices Du Relle and Burnam, dissenting), that the fact that the statute applies only to persons or companies employing ten or more persons does not render it unconstitutional as special legislation, as the classification is natural and reasonable, and consistent with the end sought to be accomplished by the constitution. The abuse sought to be corrected by the statute was the imposition practiced on the miners by the operation of mines by forcing them, directly or indirectly, into dealing with the "company stores," where goods at exorbitant prices were paid for wages instead of money.

Employer and employee may by contract fix pay days at reasonable periods on which, and not before, the latter may demand his pay. And giving an employee checks, or coin stamped with the company's name and "payable in merchandise," in advance of pay day on his own voluntary application is not a violation of a statute providing that wage earners "shall be paid in lawful money." It would be otherwise if the periods fixed for pay days were of unreasonable length, even by consent of the laborer: *Avent-Beattyville Coal Co. v. Commonwealth*, 96 Ky. 218, 28 S. W. 502, 28 L. R. A. 273. An order issued in payment of wages directing a third party to pay the wage-earner one hundred and eighty dollars, is by its terms payable in lawful money of the United States, and does not violate the provisions of the laws of the state of Washington of 1887-88, forbidding the issuances in payment of wages of an order, check, etc., payable in whole or in part otherwise than in lawful money of the United States: *Agee v. Smith*, 7 Wash. 471, 35 Pac. 370. A statute making it unlawful for "any person, firm, or corporation to issue, pay out or circulate for the payment of wages of labor, any order, note, check, memorandum, token, evidence of indebtedness or other obligation unless the same is negotiable and redeemable at its face value in lawful money of the United States by the person, firm or corporation issuing the same," does not prohibit an employer from giving his note or check for wages earned by his employee, if such note or check is negotiable and redeemable at its face value in money: *State v. Balch*, 178 Mo. 392, 77 S. W. 547.

The benefits secured by a statute, designed to protect the laboring class from the prevalent evil of receiving payment of their wages from their employers by checks, punch-outs, etc., redeemable in merchandise only, and usually at the employer's store, cannot be waived or contracted away by a laborer. Hence if a statute prohibits the payment of wages of laborers in any check, note, etc., that is not negotiable and redeemable at its face value in lawful money of the United States, it is immaterial by whom such check, note, etc., is given. The fact that an employer paid for labor in a check issued and put into circulation by another firm, which check was not redeemable in lawful money but in merchandise, does not relieve him of criminal liability: *State v. Benn*, 95 Mo. App. 516, 69 S. W. 484.

The statute of Indiana (Rev. Stats. 1894, sec. 7060, Horner's Rev. Stats., 1897, sec. 5206x), making it a misdemeanor to issue brass checks to an employee in payment for labor, precludes the purchaser of such checks from making them the basis of an action against the employer issuing them. The purchaser is in no better position to maintain an

action on the checks than the original holder: *Naglebaugh v. Harder & Hafer Coal Min. Co.*, 21 Ind. App. 551, 51 N. E. 427.

IV. Manner of Determining Amount of Wages.

An act which requires every corporation engaged in the business of mining and selling coal by weight to procure scales and pay the miners according to the weight of the coal ascertained before the same is screened is declared constitutional as a valid exercise of legislative power, in so far as it relates to domestic corporations, in *Woodson v. State*, 69 Ark. 521, 65 S. W. 465. It is within the power of a state to adopt a uniform system of weights and measures, and to require all persons whose business transactions require the use of the same to conform thereto. Hence a statute making it unlawful for any mine owner, when more than ten men are employed to mine coal by the bushel or ton, to pass the output of coal over any screen or other device that shall take any part from the value thereof before weighing and crediting the employees, and depriving the latter of all right to waive the benefits of the statute, is within the scope of the police power and not unconstitutional, where the statute gives the owner the right to accept or reject the coal at the surface: *McLean v. State*, 81 Ark. 304, 126 Am. St. Rep. 1037, 98 S. W. 729, 11 Ann. Cas. 72; affirmed in 29 Sup. Ct. Rep. 370.

But in *Ramsey v. People*, 142 Ill. 380, 32 N. E. 364, 17 L. R. A. 853, it was decided that an act that "it shall be unlawful for any owner, agent, or operator of any coal mine, whose miners are paid upon the basis of the quantity of coal which each shall mine and deliver to said employer, to take any portion of the same by any process of screening, or by any other device, without fully accounting for and crediting the same to the miner from whose output such portion is screened or taken. That all coal shall be weighed in the pit-cars before being dumped into screens or chutes—two thousand pounds to the ton," and to compute the payment of each miner's wages on the weight of the unscreened coal, was unconstitutional and void, because it deprived persons, without due process of law, of the property right to make contracts. "The statute," said the court, "attempts to take from both employer and employee, engaged in the mining business, the right and power of fixing by contract the manner in which such wages are to be ascertained. The statute makes it imperative, where the miner is paid on the basis of the amount of coal mined, whatever may be the wishes or interests of the parties, that the coal shall be weighed on the pit-cars before being screened, and that the compensation shall be computed upon the weight of the unscreened coal. In all other kinds of business involving the employment of labor the employer and employee are left free to fix by contract the amount of wages to be paid, and the mode in which such wages shall be ascertained and computed. This is justly regarded as a very important right, vitally affecting the interests of both parties. To the extent to which it is abridged, a property right is taken away. There is nothing in the business of coal mining which renders either the employer or employee less capable of contracting in respect to wages than in any of the other numerous branches of business in which laborers are employed under analogous conditions. There is no difference, at least in kind, so far as this matter is concerned, between coal mining, on the one hand, and other varieties of mining, quarry-

ing stone, grading and constructing railroads, and their operation when constructed, manufacturing in all its departments, the construction of buildings, agriculture, commerce, domestic service, and an almost infinite variety of other avocations requiring the employment of laborers, on the other hand. Upon what principle, then, can those engaged in coal mining be singled out, and subjected to restrictions of their power to contract as to wages, while those engaged in all these other classes of business are left entirely free to contract as they see fit? We think the attempt of the legislature to impose such restrictions is clearly repugnant to the constitutional limitation above referred to, and therefore void."

The act of March 2, 1891, of Indiana requires that all coal mined under contract for payment by the ton or other quantity shall be weighed before being screened, and the full weight credited to the miner of such coal, provided that the payment for impurities loaded with or among the coal shall not thereby be compelled, and section 7 provides penalties for failure to weigh before screening. It was held that a conviction for failure to weigh before screening was improper where the evidence showed that the coal mined was of a nature which made it impossible to weigh the coal before screening without giving the miner credit for impurities: *Martin v. State*, 143 Ind. 545, 42 N. E. 911.

V. Fixing Amount of Wages.

An act fixing the price of unskilled labor on all public works at not less than a sum specified is a legislative interference with the liberty to contract by counties, cities and towns, which finds no sanction or authority in the doctrine that counties, cities and towns are municipal and political subdivisions of the state. Hence a minimum wage law purporting to fix a minimum rate to be paid unskilled labor employed upon any public work of the state or of any county or city therein is unconstitutional. It violates the fourteenth amendment to the constitution of the United States and sections 1 and 23 of article 1 of the constitution of Indiana, securing to every citizen the inalienable right of liberty and the pursuit of happiness, and prohibiting the granting by the legislature to any citizens or class of citizens of privileges and immunities which, upon the same terms, shall not equally belong to all citizens: *Street v. Varney Electrical Supply Co.*, 160 Ind. 338, 98 Am. St. Rep. 325, 66 N. E. 895, 61 L. R. A. 154. A law requiring contractors for public work, employed by a city, to pay their laborers, workmen and mechanics not less than the prevailing rate of wages in the locality, and requiring contractors to insert in their contracts a provision of such law that the contracts shall be void unless such rate of wages is paid, is unconstitutional: 1. Because in its actual operation it permits and requires the expenditure of the money of the city or that of the local property owner for other than city purposes; 2. Because it invades rights of liberty and property, in that it denies to the city and the contractor the right to agree with their employees upon the measure of their compensation, and compels them in all cases to pay an arbitrary and uniform rate which is expressed in vague language, difficult to define or ascertain and subject to constant change from artificial causes; 3. Because it virtually confiscates all property rights of the contractor under his contract for breach of his engagement to obey the statute, and attempts to make acts and omissions penal which in themselves are innocent

and harmless. It, in effect, imposes a penalty upon the exercise by the city or by the contractor of the right to agree with their employees upon the terms and conditions of the employment: *People v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605, 59 N. E. 716, 52 L. R. A. 814. But a general law regulating the compensation of laborers employed by the state, or by officers under its authority, which disturbs no vested right or contract, is within the power of the legislature to enact. Where the amount of compensation of an employee of the state is fixed by statute, it cannot be reduced by the state officer under whom he is employed; and the fact that the employee takes for a time the reduced compensation does not estop him from subsequently claiming the residue: *Clark v. State*, 142 N. Y. 101, 36 N. E. 817.

VI. Imposing Penalties Affecting Amount of Wages.

A statute declaring that no employer shall impose a fine or withhold the wages or any part of the wages of an employee engaged in weaving, is void, because it conflicts with that part of the state constitution enumerating, as one of the inalienable rights of man, of acquiring, possessing and protecting property: *Commonwealth v. Perry*, 155 Mass. 117, 31 Am. St. Rep. 533, 28 N. E. 1126, 14 L. R. A. 325. In *Gallagher v. Hathaway Mfg. Co.*, 172 Mass. 230, 51 N. E. 1086, it is decided that under a statute providing that an employer may retain, as a fine, from the weekly wages of a weaver, an agreed sum for imperfect work produced during the previous week, for which work he has been paid as being of first quality, which, on inspection, proved to be of a lower grade, the deduction by the employer is not a violation of the statute as to the weekly payment of wages. And in *Ferry v. Kinsley Iron etc. Co.*, 195 Mass. 548, 81 N. E. 305, it is decided that the statute providing for the weekly payment of wages of employees of specified employments, and if an employee leaves the employment, or is discharged, he shall be paid in full, does not prohibit an agreement between the employer and employee providing that the latter shall give ten days' notice of his intention to leave the employment, and on failure to give such notice he shall forfeit all the wages that may be due him.

A statute providing that "whenever any railroad company shall discharge any employee, or whenever the time of service of an employee of a railroad company shall expire, or whenever any railroad company shall be due and owing any employee, such railroad company, upon such discharge, or upon the termination of the term of such service, or upon the maturity of said indebtedness, shall, within fifteen days after demand therefor upon the nearest station agent of said railroad company, pay to such employee the full amount due and owing him; and in case said railroad company fails or refuses to pay such employee, then it shall be liable and pay to such employee twenty per cent on the amount due him, as damages, in addition to the amount so due, in no case the amount of the damages to be less than five nor more than one hundred dollars," is invalid as class legislation. No other corporation is embraced within the terms of the statute. The statute singles out railroad companies, on the amount actually due, and attaches a penalty of twenty per cent for failure to pay it within fifteen days. The statute does not protect alike the interests of the employer and employee, and is unconstitutional. It violates the constitution of Texas, and also the fourteenth amend-

ment to the constitution of the United States, in that it deprives the railroad company of its property without due process of law: *Missouri K. & T. Ry. Co. v. Braddy* (Tex. Civ. App.), 135 S. W. 1059.

An act which in substance provides "that whenever a mechanic, artisan, miner, laborer or servant or employee shall have cause to bring suit for wages, . . . and shall establish by the decision of the court or jury that the amount . . . is justly due and owing, and that demand has been made in writing," etc., then it shall be the duty of the court to allow the plaintiff, when the foregoing facts appear, a reasonable attorney's fee in addition to the wages, is not unconstitutional as being class legislation: *Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491. It should be observed in this case that Justice Magruder dissented on the authority of *Hocking Valley Coal Co. v. Rosser*, 53 Ohio, 12, 52 Am. St. Rep. 622, 41 N. E. 263, wherein it is decided that a statute giving the plaintiff in every action for wages in which he shall recover the sum named in his complaint or bill of particulars such costs as the court may allow, not exceeding five dollars for his attorney's fees, if before bringing such action he has made a written demand for the sum due him, is in conflict with the provision of the state constitution affirming the right to possess and protect property and declaring that government is instituted for the equal benefit and protection of all persons.

VII. Prohibiting Assignment.

A statute prohibiting the assignment of future wages to become due employees is constitutional. It does not violate the fourteenth amendment to the constitution of the United States, nor section 1 of article 1 of the constitution of Indiana, declaring all men endowed with certain inalienable rights, among which are life, liberty and pursuit of happiness: *International Text-book Co. v. Weissinger*, 160 Ind. 349, 98 Am. St. Rep. 334, 65 N. E. 521, 65 L. R. A. 599. A statute invalidating assignments of wages to be earned to secure loans of less than two hundred dollars unless accepted in writing by the employer, or consented to in writing by the wife of the assignor if he is married, is not unconstitutional because it exempts from its operation national banks, banking institutions under the supervision of the bank commissioner, and loan companies established by special charters and placed under such supervision. The legislature may be supposed to have known that the business done by those corporations would not need regulation in the interest of employers and employees: *Mutual Loan Co. v. Martell*, 200 Mass. 482, 128 Am. St. Rep. 446, 86 N. E. 916.

A statute providing that no assignment of wages or salaries shall be valid unless in writing, signed and acknowledged by the assignor, and unless a copy of the assignment and acknowledgment is served upon the person, firm or corporation from which the wages or salary is due, and further providing that if the assignor is a married person, the assignment must be executed and acknowledged by the assignor's wife or husband, is an unconstitutional abridgment of property rights, especially as applied to individuals who receive large salaries, the recipients of whom cannot be said to be in need of protection from usurers: *Massie v. Cessna*, 239 Ill. 352, 130 Am. St. Rep. 234, 88 N. E. 152, 29 L. R. A., N. S., 1108.

VIII. Prohibiting Garnishment.

The latest statute on the subject embraced in this note is one prohibiting the garnishment of wages of railroad employees. There seems to be only one case in which the constitutionality of such statute has been questioned. The statute provides that "no garnishment shall be issued by any court in any cause where the sum demanded is two hundred dollars or less, and where the property sought to be reached is wages due the defendant by any railroad corporation, until judgment shall have been recovered by the plaintiff against the defendant in the action." The statute further provides that "no railroad corporation shall be required to make answer to any interrogatories propounded to it, in any action against any person to whom it may be indebted on account of wages due for personal services, nor shall any default or other liabilities attach because of its failure to so answer in such cases, where a writ of garnishment was issued or served in advance of the recovery by the plaintiff against the defendant, in any action for two hundred dollars or less; and any judgment rendered against any railroad corporation for its said failure or refusal to make answer to any garnishment so issued or served before the recovery of final judgment in the action between the plaintiff and defendant in the cases mentioned in section 3447, shall be void, and any officer entering said judgment or who may execute the same shall be taken and considered a trespasser, and in addition thereto may be enjoined by any court having jurisdiction."

The constitutionality of the statute was attacked (*White v. Missouri K. & T. R. R. Co.*, 230 Mo. 287, 130 S. W. 325, 29 L. R. A., N. S., 874), on the following grounds: 1. That it is class legislation, in that it arbitrarily undertakes to separate wage-earners who are in the employ of a railroad corporation from other classes of people, and even other wage-earners, in violation of the fourteenth amendment; and violates paragraph 53, article 4, of the constitution of Missouri, because it grants to the railroad company immunity from garnishment not granted to others; 2. That it shuts the plaintiff off from pursuing his writ of garnishment against an employee of a railroad company when under like circumstances he could attach the wages of an employer of any other kind of corporation or of an individual; 3. It shuts him off from running the garnishment to recover his small debt, whereas a creditor with a debt of over two hundred dollars could go in and recover; 4. It shuts him off from pursuing a railroad company, whereas if it were any other kind of employer, the process of garnishment could be used.

The court, however, decided that the statute is not unconstitutional as arbitrary class legislation. That the class therein marked out for favor is the class of railroad employees covered by its terms. That only incidentally the railroad company receives the favor of freedom from the annoyance which constant calls to answer as garnishee would entail, but that the persons really protected are the employees whose wages, when they are absent or have no notice of suit, cannot be attached. That it is a well-established doctrine of the Missouri supreme court that class legislation is not an offense against the constitution of the state or of the United States, if it is based on reason and includes all persons or corporations coming within the reason. That it is impossible to make all laws applicable to all persons or corporations. That classes in fact exist, and laws must be made to apply

to them as classes. That the General Assembly does not really create the class, although it is usually spoken of in that way. That the class exists by its very nature or inherent conditions, and the lawmakers recognize the fact and make the law to suit. That if there is reason why a law should be made to apply to a particular class, the law-making department has authority to make it. That the legislature may recognize the existence of a class within a class; for a class within a class is but a class, and it may be as well marked as is the larger class out of which it is formed, and if the statute embraces all those who come within its reason, it is not obnoxious to the constitution. Judges Woodson and Gantt dissented: *White v. Missouri K. & T. R. R. Co.*, 230 Mo. 287, 130 S. W. 325, 29 L. R. A., N. S., 874.

IX. Making Wages Preferred Claims.

The statute of Michigan of 1887, No. 94, enacted: "That all debts which shall be owing for labor by any person or persons or corporation at the time he, they, or it shall become insolvent, shall be preferred claims against the estate of such insolvent debtor or debtors, and have precedence in the payment thereof over all debts owing by such insolvent debtor or debtors at the time of becoming insolvent, which shall not have become a lien on such estate, or some portion thereof, prior to the performance of the labor for which such debts for labor shall be owing. In case of suit upon any such preferred claim, or any claim a part of which is preferred as above provided, and the same be prosecuted to judgment, the court rendering judgment thereon shall specify in such judgment the part, portion, or amount for which the same is a preferred claim hereunder against the estate of the defendant or defendants, and thereupon executions may be issued from said court requiring that the amount of such preferred claim be first made out of the goods and chattels, and, for want thereof, then of the lands and tenements of the defendant or defendants therein named, and that the remaining portion of such judgment, if any, shall be collected and made under such execution (executions) as any other unpreferred claim is required to be collected and made under the statute in such case made and provided. Any surplus arising from the sale of property under any such execution shall be disposed of according to law, etc." It was decided that the act was void (1) for the reason that it provided no method for determining questions of insolvency and preferences between those who alone are interested in those issues, namely, all creditors; and (2) that to make a judgment conclusive upon a lienor, without making the lienor a party to the action, would be in direct violation of the constitutional provision that "no person shall be deprived of his property without due process of law": *Fisher v. Wineman*, 125 Mich. 642, 84 N. W. 1111, 52 L. R. A. 192.

CENTRAL NEW YORK TELEPHONE AND TELEGRAPH COMPANY v. AVERILL.

[199 N. Y. 128, 92 N. E. 211.]

RESTRAINT OF TRADE—Partial Restraint.—While a Contract in general restraint of trade is illegal and void, the law permits contracts in partial restraint of trade, under some circumstances, where they are not unreasonable and are supported by sufficient consideration. (p. 880.)

RESTRAINT OF TRADE—Partial Restraint.—Where the Business to which a contract relates is of such a character that it cannot be subjected even to the partial restraint which is contemplated without injury to the public interest, then such partial restraint cannot be tolerated. (p. 880.)

TELEGRAPHS AND TELEPHONES—Contract in Restraint of Trade.—Telegraph and telephone companies are public service corporations, affected by a public interest, and hence contracts tending to restrict the free and general use of their lines are invalid. (p. 881.)

TELEGRAPHS AND TELEPHONES—Contracts in Restraint of Use.—The feature of a telephone system which constitutes its public value and affects it with a public interest is its ability to bring each customer into vocal communication with others, the usefulness of the service being directly proportionate to the number of persons who can be reached thereby, and its franchise is granted because of this element. Any contract by which a telephone company seeks the exclusion of any other telephone service from the premises of its customers is against public policy, and in restraint of trade, and therefore void. (p. 883.)

CONTRACTS—Void in Part—Separable Provisions.—A contract is not altogether void because of a void provision, if that provision can be separated from the rest of the contract. A lawful promise made for a lawful consideration is not invalid by reason only of an unlawful promise being made at the same time and for the same consideration. (p. 885.)

RESTRAINT OF TRADE—Contracts Void in Part.—The provisions of a contract whereby a telephone company installs a system in a hotel upon a covenant by the hotel proprietor to subscribe to the service for nine years, and a provision of the same contract prohibiting him during such time from installing or using the system of any other telephone company, are separable, and while the latter is void as being in restraint of trade, such invalidity does not affect the other provision. (p. 886.)

APPEAL—Direction for Judgment.—Where all the facts necessary to a complete determination of the controversy are found by the trial court, and there is no dispute as to the facts, the only questions being those of law, a new trial will not be ordered, but the entry of the proper judgment directed. (pp. 886, 887.)

A. H. Cowie, for the appellants.

Edwin Nottingham, for the respondent.

131 WILLARD BARTLETT, J. This is a suit in equity for an injunction to restrain the defendants from permitting the introduction of any other telephone system except that furnished by the plaintiff corporation in the Yates Hotel in

the city of Syracuse. On August 18, 1902, the parties entered into a written contract for the rendition of telephone service in the hotel by the plaintiff, including the maintenance of a private hotel telephone exchange therein for a period of nine years. The contract contained the ordinary subscriber's ¹³² agreement such as is in common use by telephone companies, but the only part which it is necessary to consider on the present appeal is a provision, which, for convenience, I shall call the exclusive clause, reading as follows:

"It is understood and agreed by both of the parties hereto that the switchboard, apparatus, wires, cables and fixtures furnished under this contract shall be and remain the property of said Central New York Telephone and Telegraph Company, and that the instruments and apparatus are placed in said Yates Hotel for the purpose herein named, and that no instruments or wires other than those furnished by the first party are to be placed or maintained in said hotel or connected with or maintained in connection with said switchboard, apparatus or fixtures, and that said instruments, apparatus, line or fixtures of the first party are not to be connected with or used in connection with any exchange, office or telephone, except those of the first party, or its connections, and only by lines connecting said switchboard with the company's office and switchboard as within provided."

There was also a provision in the contract under which the defendants claimed the right to terminate it by giving thirty days' written notice to the plaintiff that they desired so to do. It is not necessary to discuss this provision further than to say that the trial judge decided that it did not give the defendants the right which they claimed to terminate the contract. The telephone system of the plaintiff and the private hotel telephone exchange were duly installed in the Yates Hotel under the contract, and no controversy appears to have arisen under the contract until about the time of the commencement of this action in May, 1906, when another telephone system became available to the inhabitants of Syracuse. The defendants thereupon manifested an intention to introduce this other system in the Yates Hotel, and their threat to do so led to the institution of the present action, in which the plaintiff sought to enforce the exclusive clause in the contract which has already been quoted. The defendants pleaded a termination of the contract by reason of the service of a thirty days' ¹³³ notice thereunder, and also that the contract was invalid and illegal, "as void as against public policy, for the reasons that the provisions thereof which in substance purport to confer upon the plaintiff an exclusive right to maintain a telephone system and furnish telephone service in the Yates Hotel tend to destroy competition in the telephone business and are

discriminatory, and therefore void and contrary to public policy."

Upon the trial the court at special term held: (1) That the contract was not terminable by the defendants under the thirty-day clause contained in the printed portion thereof; (2) that the exclusive clause was illegal and void in so far as it purported to grant to the plaintiff the exclusive right to maintain a telephone system in the Yates Hotel and the exclusive right to furnish telephone service thereto; and (3) that the rights in the Yates Hotel granted to the plaintiff by the exclusive clause constituted an inseparable part of the consideration for the contract, and that, therefore, the contract was wholly illegal and void. Judgment was thereupon rendered dismissing the complaint and awarding costs to the defendants. This judgment has been reversed by the appellate division, which has held, one member of the court dissenting, that the exclusive clause is not open to any legal objection whatsoever, but is a valid agreement which the plaintiff is entitled to enforce. We are therefore called upon to determine, as between these conflicting views, which is right.

There is a finding in accordance with the allegations of the complaint, and to which no exception is taken, to the effect that the plaintiff installed the private hotel telephone exchange in the Yates Hotel at an expense of two thousand seven hundred dollars, which it was induced to incur by reason of, and in reliance upon, the nine-year term of service provided for in the contract and the exclusive telephone privilege thereby granted; and that "the plaintiff would not have installed in said hotel said private telephone exchange and incurred said expense in so doing if it had understood said contract might be terminated by the defendants on thirty days' notice after the expiration of one ¹³⁴ year from the commencement thereof, or that the telephone privilege given by it was not exclusive."

It is manifest that the exclusive clause is a contract in restraint of trade. It prevents anyone in the Yates Hotel from having telephone communication with customers of other telephone companies than the plaintiff. It prevents the persons served by such other companies from having telephonic communication with the Yates Hotel. It likewise destroys competition by shutting out all rivals of the plaintiff.

The restraint of trade thus effected, however, is only partial; and while a contract in general restraint of trade is still deemed illegal and void, the law permits contracts in partial restraint of trade, under some circumstances, where they are not unreasonable and are supported by sufficient consideration: *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Leslie v. Lorillard*, 110

N. Y. 519, 18 N. E. 363, 1 L. R. A. 456; *Wood v. Whitehead Brothers Co.*, 165 N. Y. 545, 59 N. E. 357. The respondent contends that the exclusive clause here in controversy belongs to the class of contracts in partial restraint of trade which have thus been sanctioned by the courts; but this view leaves out of sight an essential difference which cannot be disregarded. Where the business to which the contract relates is of such a character that it cannot be subjected even to the partial restraint which is contemplated without injury to the public interest, then such partial restraint cannot be tolerated: *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 46 Am. Rep. 527. In the case cited it is declared that all the authorities warrant the inference "that if there be any sort of business, which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however partial, on this particular business; provided, of course, it be shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public ¹³⁵ interest." The court then proceeds to inquire whether there are any sorts of business of this peculiar character, and concludes that such is the nature of the business carried on by railroad and telegraph companies.

The business of a telephone company, in its broader aspects, at least, is legally indistinguishable from that of a telegraph company, the telephone being a telegraph in all essential particulars. In New Jersey it has been held that a corporation organized under an act to incorporate and regulate telegraph companies, and authorized thereby to exercise the power of eminent domain, may condemn lands for a telephone line, although telephones are not mentioned in the statute: *Duke v. Central New Jersey Tel. Co.*, 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664. In this state the statutory provisions for the incorporation of telegraph and telephone companies are contained in the same article and section of the transportation corporations law, and the same provisions for the exercise of the power of eminent domain and the occupancy of the public roads, streets and highways apply to each: Art. 9, secs. 100, 102. Wherever the character and functions of telegraph companies have been considered by the courts, the prevailing opinion has been that they are to be deemed public service corporations, affected by a public interest, and hence that contracts tending to restrict the free and general use of their lines are invalid. The same doctrine is equally applicable to the business of telephone companies. In the case of *Western Union Tel. Co. v. Chicago etc. R. R. Co.*, 86 Ill. 246, 29 Am. Rep. 28, the contract provided that the railroad company

would furnish and erect telegraph poles and wires along its railroad for the telegraph company, and assured to the latter an exclusive right of way along the railroad, so far as it legally might do so. The court held that, so far as this contract precluded the railroad company from permitting other telegraph companies to place wires on the same poles, it was valid, but that it was contrary to public policy if construed as preventing another telegraph company from erecting a line of its own along the railroad's right of way. To the same effect is *St. Louis & Cairo R. R. Co. v. 136 Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382, where a contract of lease by a railroad company with a telegraph company, whereby the railroad company gave the telegraph company the exclusive use of the railroad right of way, was held to be void upon grounds of public policy, as being in restraint of trade and creating a monopoly. A similar contract was condemned on the same grounds in *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160, 38 Am. Rep. 781, where the court said: "Shall the means, then, by which it (information) is transmitted, be monopolized by a contract? When such exclusive rights exist, or such monopolies are established, the same should be done by legislative grant and not by an individual contract." The likeness between telegraph companies and telephone companies is pointed out by the supreme court of New Jersey in *Duke v. New Jersey Tel. Co.*, 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664, and by the supreme court of Nebraska in *State v. Nebraska Tel. Co.*, 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237, where it is held that a telephone company is bound, under the doctrines of the common law, to furnish a telephone instrument to any person who desires to become a subscriber, who tenders a full compliance with the rules established for other subscribers, and is willing and able to pay the lawful rates for telephone service.

The limitation of the modern doctrine which sanctions certain contracts in partial restraint of trade is aptly illustrated by the case of *Chicago Gaslight Co. v. People's Gaslight Co.*, 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169. A gas company agreed with another gas company that during a period of one hundred years it would not lay any gas mains or pipes or furnish any illuminating gas in the west division of the city of Chicago. This contract was adjudged invalid by the supreme court of Illinois, which said: "The ordinary rule, that contracts in partial restraint of trade are not invalid, does not apply to corporations like appellant and appellee, because they were engaged in a public business and in furnishing that which was a matter of public concern to all the inhabitants of the city."

The telephone is a scientific agency for the transmission of ¹³⁷ human speech over distances a thousand-fold greater than

could be covered by the unaided voice. Interesting, strange and marvelous as the invention seemed when made, it is improbable to the last degree that the state would ever have granted the right to exercise the power of eminent domain to telephone companies, or have permitted them permanently to occupy the public streets or highways, if the only communication feasible had been between each customer and a single other customer. The feature of the modern telephone system which constitutes its public value and affects it with a public interest is its ability to bring each customer into vocal communication with hundreds and oftentimes thousands of others. This makes it an instrument of great public convenience and utility, the usefulness of the service offered by each company being directly proportionate to the number of persons who can be reached thereby. The franchise having been granted because of this very element—that is to say, the capacity to serve the community so generally by serving so large number of individuals constituting the community—it cannot be tolerated that any grantee of the franchise shall exercise it in such a way as to lessen the value of the telephone as an instrumentality of service to the public. If a telephone company may contract for the exclusion of any other telephone service from the premises of its customers, it may thus deprive all those customers of telephone communication with every person who takes telephone service from rival concerns, and thus prevent just what all telephone franchises are designed to promote—that is, the availability to every member of the community who desires it and can afford to pay for it, of the most extensive telephone service attainable.

In return for the franchise which a telephone corporation receives from the state—including, as it does, the privilege of occupying highways and the right to exercise the power of eminent domain—it undertakes to furnish each customer with telephone service to as many other customers as it can obtain at the rates which the law permits it to charge; and ¹³⁸ the law implies an obligation on its part to do nothing to lessen the facilities of the public to procure a more widely extended service. While it may, of course, adopt every proper expedient to enlarge its own business, this does not include the right to pursue a policy of exclusion which is distinctly injurious to the public by restricting their circle of communication by telephone. It matters not that the customer may be willing to agree to exclude others or that the contract to do so is supported by a sufficient consideration as between the parties. The evil in such an agreement is its antagonism to the interests of the public. If a telephone company may make a contract of exclusion with one of its customers, it may make such a contract with all, and thus preclude all from any telephonic communication with persons

who happen to be served by a rival company. It is true that the customers who had voluntarily entered into the agreement of exclusion would have no just ground of complaint themselves; but how about the customers of the rival company who are thereby shut out from communication by telephone with their neighbors? They are not parties to the contract and yet they suffer its consequences, although they constitute a portion of the public for whose benefit the franchise was granted to the corporation, whose action deprives them of the more extended telephone service which otherwise they might enjoy.

It is on this broad ground that I think we ought to condemn the exclusive clause of this contract as against public policy, and, therefore, void. It tends to nullify the consideration moving to the public for the grant of the franchise, by lessening the sphere of telephonic service; and it is impossible to regard a contract as consistent with public policy which would defeat the very policy that induced the state to bring one of the parties to the contract into existence as a public service corporation.

If, as we have seen, a railway corporation may not contract with a telegraph company to exclude all other telegraph companies from its right of way, it is difficult to perceive why it should be permissible for the proprietors of a hotel to contract with a telephone company to exclude all other telephone companies from the hotel premises. There is no stronger inducement to the managers of a public service corporation to serve the public well than a healthy apprehension that a rival concern will do so. It is sometimes argued that the presence of two telephone systems in a given district is a disadvantage to the community, which is best served by one system reaching all subscribers; but one system will never be made to reach all subscribers as cheaply as would otherwise be the case if the possibility of competition is destroyed.

To recapitulate the reasons which lead to the conclusion that this contract (the exclusive clause) is injurious to the public interest generally, the argument may be simply stated. The public franchises which telephone corporations enjoy are granted to promote the transmission of vocal messages between the largest numbers of persons who can be brought into communication with one another under satisfactory economic conditions. This purpose is frustrated by any agreement which operates to prevent the rendition of telephone service where otherwise it could be obtained. A contract between a telephone corporation and one of its subscribers whereby the latter excludes all other telephone service from his premises deprives all the patrons of that other telephone service from telephonic communication with such subscriber and all the occupants of his premises. Though the number affected by one such exclusive contract may not be large, if exclusion

may be exacted from one customer, it may be exacted from all, and so a corporation first in the field might establish a monopoly to the detriment of a large proportion of the community and their deprivation of telephonic intercommunication. This illustration serves to show the danger to the public which would arise from permitting any such exclusive contracts at all. The validity of a single one cannot be recognized without peril to the public interest.

In the courts below much importance was attached to the case of *Lough v. Outerbridge*, 143 N. Y. 271, 42 Am. St. Rep. 712, 38 N. E. 292, 25 L. R. A. 674, as an authority in support of the validity of the exclusive clause in the present ¹⁴⁰ contract. In that case it was held that a contract the tendency of which was to prevent competition in the carriage of goods by ocean steamers running between New York and Barbadoes was not such a contract in restraint of trade as to be contrary to public policy, inasmuch as the rates charged by the defendant were not unreasonable. The case, however, is readily distinguished from the case at bar. It did not relate to the conduct of the business of a public service corporation or the business of a corporation in any wise affected with a public interest. Here the parties directly and indirectly affected are telephone corporations, whose operations continuously and intimately concern the interests of the community which they undertake to serve and in the broadest sense the interests of the public at large.

Having reached the conclusion that the exclusive clause of the contract in controversy is void, we are brought to the question whether its invalidity necessarily avoids the whole contract. I think that it does not. The rule applicable to the solution of this question was admirably stated by Mr. Justice Willes in *Pickering v. Ilfracombe Ry. Co.*, L. R. 3 C. P. 250, where he said: "The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." Sir Frederick Pollock, in his treatise on the Principles of Contract, page 367, says: "A lawful promise made for a lawful consideration is not invalid by reason only of an unlawful promise being made at the same time and for the same consideration." In *Price v. Green*, 16 Mees. & W. 346, the defendant's testator had covenanted not to carry on the trade of a perfumer, toy man or hair merchant within the cities of London or Westminster, or within six hundred miles therefrom. The exchequer chamber, affirming the judgment of the court of exchequer, held that this covenant was divisible, being good as far as it related to the cities of London and Westminster, but void as to the six hundred miles; and upon

evidence ¹⁴¹ that the person bound had carried on trade in the city of London, it was held that he was liable in damages for such breach of the contract. In *Leavitt v. Palmer*, 3 N. Y. 19, 51 Am. Dec. 333, it was said by Bronson, J., that "where a deed or other contract contains distinct undertakings, some of which are legal and some illegal, the former will, in certain cases, be upheld, though the latter are void"; and in *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315, Chitty's statement of the rule applicable to the divisibility of contracts is quoted with approval, where he says "that agreements in restraint of trade, whether under seal or not, are divisible; and, accordingly, it has been held that when such an agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether." It does not seem necessary to specify numerous other authorities which might be cited to sustain the severance of the illegal part of this contract from the portions which are legal.

If I am right in thinking that they may thus be severed it follows that, upon the facts as they appeared without dispute on the trial, the plaintiff was not entitled to enjoin the defendants from introducing into the Yates Hotel other telephone instruments than those which the plaintiff had furnished under the contract. On the other hand, inasmuch as the defendants admitted that they proposed to discontinue and abandon the use of the private hotel exchange with which the plaintiff had equipped the Yates Hotel, the plaintiff was entitled to prevent such discontinuance and abandonment. In other words, the plaintiff was entitled to a part of the relief which it claimed, but not all. It could lawfully insist that the defendants should retain and continue to employ its telephone exchange and telephone system, but it could not lawfully prevent the defendants from admitting other telephone systems or placing other telephone exchanges in their premises. Under these circumstances, the only remaining inquiry is, What relief can be afforded upon the present appeal ¹⁴² to the defendants, who are under a legal obligation to comply with every portion of their contract with the plaintiff except that portion which relates to the exclusion of other telephones?

All the facts necessary to a complete determination of the controversy between the parties were found by the trial judge. There was really no dispute as to the facts. The only questions as to which the parties were at variance were questions of law relating to the validity of the exclusive clause of the contract and its effect, if invalid, upon the remainder of the agreement. Under these circumstances the trial court, hav-

ing denied to the plaintiff any right of relief whatever, the appellate division properly reversed the judgment. Instead of granting a new trial, however, we think it should have directed judgment for the plaintiff as prayed for in the complaint, except so far as the complaint sought to enforce the exclusive clause of the contract; that is to say, it should have directed judgment awarding the plaintiff an injunction against the removal of the plaintiff's telephone system and appliances from the Yates Hotel or their severance from the plaintiff's general telephone system and against any adverse interference therewith. To this extent the plaintiff is clearly entitled to relief; and in an equity suit, where there is no controversy as to the facts and they have all been judicially ascertained and established in the form of findings, there is no occasion to send the case back for a new trial and thus put the parties needlessly to further labor and expense. The order of the appellate division should, therefore, be modified so as to reverse the judgment of the special term and (instead of granting a new trial) direct judgment for the plaintiff to the extent indicated in this opinion, without costs to either party.

Cullen, C. J., Haight, Hiscock and Chase, JJ., concur; Gray, J., not voting.

Ordered accordingly.

The Validity of Contracts in Restraint of Trade is considered in monographic notes to the following cases: Harding v. American Glucose Co., 74 Am. St. Rep. 235, Angier v. Webber, 92 Am. Dec. 751, Pike v. Thomas, 7 Am. Dec. 743, and Smalley v. Greene, 35 Am. Rep. 269,

Contracts in General Restraint of Trade are Void, but Contracts in Partial Restraint of Trade, regulating it to a reasonable extent within a certain locality, have been upheld: Threlkeld v. Steward, 24 Okl. 403, 138 Am. St. Rep. 888; Merchants' Ice & Cold Storage Co. v. Rohrman, 138 Ky. 530, 137 Am. St. Rep. 390; Taylor Iron & Steel Co. v. Nichols, 73 N. J. Eq. 684, 133 Am. St. Rep. 753; Butterick Publishing Co. v. Fisher, 203 Mass. 122, 133 Am. St. Rep. 283; Nicolson v. Ellis, 110 Md. 322, 132 Am. St. Rep. 445; Superior Coal Co. v. Darlington Lumber Co., 236 Ill. 83, 127 Am. St. Rep. 275. The validity of such a contract depends upon whether the restraint is reasonable. If it is, the contract is legal; if it is not, the contract is illegal: Merchants' Ice & Cold Storage Co. v. Rohrman, 138 Ky. 530, 137 Am. St. Rep. 390; and it will not be enforced unless the restraint is no more extensive than is reasonably required to protect the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public: Taylor Iron & Steel Co. v. Nichols, 73 N. J. Eq. 684, 133 Am. St. Rep. 753. A contract restraining the practice of medicine and surgery in a particular locality, within a reasonable area, is valid: Threlkeld v. Steward, 24 Okl. 403, 138 Am. St. Rep. 888; or between a manufacturer of patterns for garments and the owner of the largest dry-goods store in a city that the latter will keep on sale the patterns of the former and none other, and will not permit the sale of any other in his store: Butterick Publishing Co. v. Fisher, 203 Mass. 122, 133 Am. St. Rep.

283. But if the interests of the public are affected, the contract is void, as where one corporation purchases the plants which manufacture all but five or ten per cent of the ice used in a large city, with an agreement that the sellers will not engage in that business in the city for the next ten years, although the price of ice was not changed and no attempt was made to control the independent companies: *Merchants' Ice & Cold Storage Co. v. Rohrman*, 138 Ky. 530, 137 Am. St. Rep. 390; and so an agreement between fire insurance companies to control the business, and fix and regulate prices, or limit or eliminate competition, within a certain area, is void: *Attorney General v. Firemen's Ins. Co.*, 74 N. J. Eq. 372, 135 Am. St. Rep. 708; the public being interested in the subject matter of the contracts.

Any Agreement or Combination Between Competing Corporations, the necessary consequence of which is the controlling of prices, or limiting production, or suppressing competition, in such a way as to create a monopoly, is an agreement in restraint of trade, against public policy, and void: *Merchants' Ice & Cold Storage Co. v. Rohrman*, 138 Ky. 530, 137 Am. St. Rep. 390; *State v. Creamery Package Mfg. Co.*, 110 Minn. 415, 136 Am. St. Rep. 514; *Commonwealth v. International Harvester Co.*, 131 Ky. 551, 133 Am. St. Rep. 256; *State v. Eastern Coal Co.*, 29 R. I. 254, 132 Am. St. Rep. 817; *Southern Electric Co. v. State*, 91 Miss. 195, 124 Am. St. Rep. 638; *Kleingel's Pharmacy v. Sharpe & Dohme*, 104 Md. 218, 118 Am. St. Rep. 399; *State v. Wetser*, 73 Kan. 343, 117 Am. St. Rep. 479; *Pocahontas Coke Co. v. Powhatan etc. Co.*, 60 W. Va. 508, 116 Am. St. Rep. 901; *Dunbar v. American Telephone etc. Co.*, 224 Ill. 9, 115 Am. St. Rep. 132; *Charleston Gas Co. v. Kanawha Gas Co.*, 58 W. Va. 22, 112 Am. St. Rep. 936; *Hunt v. Riverside Co-operative Club*, 140 Mich. 538, 112 Am. St. Rep. 420; *Fueck v. Schneider Granite Co.*, 187 Mo. 244, 106 Am. St. Rep. 452; *Slaughter v. Thacker Coal & Coke Co.*, 55 W. Va. 642, 104 Am. St. Rep. 1013.

Unlawful Trusts and Monopolies is the subject of a note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235.

Monopoly in Trade or in Any Kind of Business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise, or public work under governmental control in the interest of the public. Its tendency is, however, destructive of free institutions, and repugnant to the instincts of a free people, and therefore public policy is, and ought to be, as well as public sentiment, against it: *Merchants' Ice & Cold Storage Co. v. Rohrman*, 138 Ky. 530, 137 Am. St. Rep. 390. Monopolies embrace any combination, the tendency of which is to prevent competition in trade in its broadest and general sense and control prices to the detriment of the public: *Pocahontas Coke Co. v. Powhatan etc. Co.*, 60 W. Va. 508, 116 Am. St. Rep. 901. It is not essential that the monopoly be complete. It is sufficient if it really tends to deprive the public of the advantages which flow from free competition: *State v. Eastern Coal Co.*, 29 R. I. 254, 132 Am. St. Rep. 817; *Dunbar v. American Telephone etc. Co.*, 224 Ill. 9, 115 Am. St. Rep. 132; *Hunt v. Riverside Co-operative Club*, 140 Mich. 538, 112 Am. St. Rep. 420.

HORDERN v. SALVATION ARMY.

[199 N. Y. 233, 92 N. E. 626.]

CHARITABLE INSTITUTION—Liability for Negligence.—The beneficiary of a charitable trust may not hold the corporation liable for the neglect of its servants, nor can an inmate, committed for punishment or reformation, hold a charitable institution of a quasi-penal character liable for such negligence. (p. 891.)

CHARITABLE INSTITUTION—Liability to Strangers.—A charitable or religious institution is liable to those persons who are not beneficiaries and who are injured by the negligence of its servants in the management of its property, to the same extent as any other owner of property. (p. 892.)

John Brooks Leavitt and Louis Levene, for the appellant.

Frederick B. Campbell and Henry S. Curtis, for the respondent.

235 CULLEN, C. J. The action was brought to recover for personal injuries received by the plaintiff, a journeyman mechanic, who was engaged in making repairs on a boiler on defendant's premises. The accident occurred through the defective condition of a runway or staging leading from a door in the boiler-room. It is unnecessary to narrate the details of the occurrence. The learned court below was of the opinion that the runway was not of such a character as to warrant an inference of negligence on the part of the defendant in maintaining it. It is sufficient to say that while it may be conceded that the case is a close one, we are of the opinion that the evidence presented a question of fact for determination by the jury. This statement brings us to the principal question of law presented on this appeal.

The respondent contends that, being a religious or charitable corporation, it cannot be held liable for the torts or negligence of its agents or servants. In other words, that the rule of respondeat superior has no application to such a corporation. That such immunity exists in certain cases is conceded in every jurisdiction so far as our research goes, and in many jurisdictions the immunity is unqualified, existing in all cases, but the extent of the immunity and the grounds on which it rests are the subject of very diverse judicial views. Where the doctrine that the immunity is universal obtains, it is rested on the proposition that the funds of the corporation are the subject of a charitable trust, and that to suffer a judgment to be recovered against the corporation and to subject its property to the judgment would be an illegal diversion and waste of the trust estate. This doctrine has been asserted in Pennsylvania (*Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 6 Am. St. Rep. 745, 15 Atl. 553, 1 L. R. A. 417), Maryland (*Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495), Tennessee

(*Abston v. Waldon Academy*, 118 Tenn. 24, 102 S. W. 351, 11 L. R. A., N. S., 1179), Kentucky (*Williamson v. Louisville Industrial School*, 95 Ky. 251, 44 Am. St. Rep. 243, 24 S. W. 1065, 23 L. R. A. 200), Illinois (*Parks v. Northwestern University*, 218 Ill. 381, 2 L. R. A., N. S., 556, 4 Ann. Cas. 103), and ²³⁶ Missouri (*Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453). It is true that in several of these cases the same decision might have been reached on other grounds—grounds of exemption which seem to be recognized everywhere—but the ground on which the learned courts before whom the cases came placed their decisions was the one stated, viz., the general immunity of charitable corporations for the torts of their agents. In Massachusetts the exemption of certain hospitals from liability seems by the opinions of the supreme court to have been based rather on the theory that those institutions were governmental instrumentalities, than on their character as public charities, though they were recognized as such: *McDonald v. Massachusetts Gen. Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Benton v. Trustees of City Hospital*, 140 Mass. 13. In the earlier case the plaintiff was a gratuitous patient seeking to recover for negligence of the defendant's employee. In the second, the plaintiff, a visitor to a patient in the hospital, sought to recover for injuries sustained in the hospital through the unsafe condition of the stairs. At the same time the supreme court held a religious corporation liable to a workman engaged in painting the ceiling of a church, for defective staging (*Mulchey v. Methodist Religious Society*, 125 Mass. 487), and a similar society liable to a person invited on the premises, for their defective condition* (*Davis v. Congregational Society*, 129 Mass. 367, 37 Am. Rep. 368), and still another liable to a traveler on the highway for having suffered snow to fall upon him from the roof of the church: *Smethurst v. Barton etc. Church*, 148 Mass. 261, 12 Am. St. Rep. 550, 19 N. E. 387, 2 L. R. A. 695. But in *Farrigan v. Pevear*, 193 Mass. 147, 118 Am. St. Rep. 484, 78 N. E. 855, 7 L. R. A., N. S., 147, 8 Ann. Cas. 1109, the same court held that the trustees of an unincorporated charity for the education and maintenance of indigent boys were not liable for the injuries caused by their servants, if they used proper care in their selection, stating that the *Davis* and *Smethurst* cases were not controlling, because the question of the exemption from liability by reason of the charitable character of the defendants was raised in neither case. Whether since this last decision Massachusetts is to be placed in the class of states adhering to the doctrine of total immunity may well be doubted. Certainly, ²³⁷ liability for negligence in the selection of servants may impair the integrity of the trust estate just the same as liability for the negligence of servants, though, of course, not so frequently.

In several jurisdictions, however, the immunity of charitable corporations for the torts of their trustees or servants has been made dependent on the relation the plaintiff bore to the corporation. In all it is recognized that the beneficiary of a charitable trust may not hold the corporation liable for the neglect of its servants. This is unquestionably the law of this state: *Collins v. New York Post Graduate Med. School*, 59 App. Div. 63, 69 N. Y. Supp. 106; *Joel v. Woman's Hospital*, 89 Hun, 73, 35 N. Y. Supp. 37. See, also, *Pryor v. Manhattan E. & E. Hospital*, 15 N. Y. Supp. 621, note, and *Haas v. Missionary Society*, 6 Misc. Rep. 281, 26 N. Y. Supp. 868. It is also the law in this state that there is similar immunity from liability in the case of a charitable institution of a quasi-penal character, as against an inmate committed to it for punishment or reformation: *Corbett v. St. Vincent's Industrial School*, 177 N. Y. 16, 68 N. E. 997. That decision proceeded on the ground that the defendant was engaged in the performance of a governmental duty for the benefit of the state in respect to persons committed to its custody and possessed the same immunity as the state. The principle of this case is very much akin to that on which the early hospital cases in Massachusetts were decided. On the other hand, in *Rector etc. of Church of Ascension v. Buckhart*, 3 Hill, 193, a recovery against a religious corporation by a person injured by the falling of a church wall was upheld. The authority of this case has never been questioned, and the decision is conclusive against the doctrine of total immunity. In *Blaechinska v. Howard Mission etc.*, 56 Hun, 322, 9 N. Y. Supp. 679, reversed, 130 N. Y. 497, 29 N. E. 755, 15 L. R. A. 215, but on another point, a recovery was had against a charitable organization for the maintenance of a vault under a sidewalk, with a defective cover, but no question seems to have been raised as to the immunity of the defendant on account of its charitable character. These seem to be the only cases in this state bearing on the question before us.

In at least two other states the doctrine of total immunity ²³⁸ has been rejected. In *Hewett v. Women's Hospital Aid Assn.*, 73 N. H. 556, 64 Atl. 190, 7 L. R. A., N. S., 496, a recovery by a nurse, for failure to warn her against the presence of a contagious disease, was upheld. In *Bruce v. Central Methodist Ep. Church*, 147 Mich. 230, 110 N. W. 951, 10 L. R. A., N. S., 74, 11 Ann. Cas. 150, the defendant was held liable to a workman employed in painting the church, for defective scaffolding.

So much for authority. If, however, we are to consider the question of the liability of the defendant an open one, despite the decision in *Rector etc. of Church of Ascension v. Buckhart*, 3 Hill, 193, we feel clear that on reason and principle the defendant's claim of immunity should not prevail.

In the case of *Powers v. Massachusetts Homeopathic Hospital*, 109 Fed. 294, 65 L. R. A. 372, 47 C. C. A. 122, and in the case we have cited from the courts of Michigan, there will be found not only an elaborate review of the authorities, but an exhaustive discussion of the grounds on which the claim of universal immunity is sought to be sustained. In the earlier case Judge Lowell, of the United States circuit court, shows that the analogy of the immunity of private trust estates does not support the doctrine. That immunity is only nominal, not real. "It is true that a suit cannot be maintained against a trustee, as such, for torts committed in the management of the trust property. The suit is brought against the trustee as an individual. The judgment and execution run against him individually. When these are satisfied, however, the trustee is reimbursed from the trust estate, unless individually at fault: *Shepard v. Creamer*, 160 Mass. 496, 36 N. E. 475; *Baker v. Tibbetts*, 162 Mass. 468, 39 N. E. 350; *Benett v. Wyndham*, 4 De Gex, F. & J. 259. The trust fund is protected from immediate levy to satisfy the execution, not because of its complete immunity, but rather from technical reasons connected with the legal estate of the trustee in the property. Its technical immunity affords it no ultimate protection." Of the exemption of charitable institutions against the recipients of the charity, the learned judge said: "One who accepts the benefit either of a public or private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at ²³⁹ any rate, if the benefactor has used due care in selecting those servants. . . . It would be intolerable that a good Samaritan, who takes to his home a wounded stranger for surgical care, should be held personally liable for the negligence of his servant in caring for that stranger. Were the heart and means of that Samaritan so large that he was able, not only to provide for one wounded man, but to establish a hospital for the care of a thousand, it would be no less intolerable that he should be held personally liable for the negligence of his servant in caring for any one of those thousand wounded men. . . . If, in their dealings with their property appropriated to charity, they create a nuisance by themselves or by their servants; if they dig pitfalls in their grounds and the like, there are strong reasons for holding them liable to outsiders, like any other individual or corporation. The purity of their aims may not justify their torts; but if a suffering man avails himself of their charity, he takes the risk of malpractice, if their charitable agents have been carefully selected." In the later case, Judge Carpenter, of the supreme court of Michigan, after pointing out that in the earlier decisions in that state immunity only as against beneficiaries of the charity was involved, said: "I

can see no ground upon which it may be held that the rights of those who are not beneficiaries of a trust can in any way be affected by the will of its founder. The rights of such persons are those created by general laws, and the duties of those administering the trust to respect those rights are also created by general laws. The doctrine that the will of an individual shall exempt either persons or property from the operation of general laws is inconsistent with the fundamental idea of government. It permits the will of the subject to nullify the will of the people. Nor can I conceive any ground upon which a court can hold that effect can be given to that will when it relates to property devised or conveyed for the purpose of a charitable trust. Such a holding must rest upon the argument that the advantage reaped by the public from such trusts justify the exemption; that is, as applied to ²⁴⁰ this case, the advantages to the public justify defendant's exemption from liability for wrongs done to individuals. If this argument is sound—and its soundness may be questioned, for there are those who will deny that the advantages to the public justify the wrong to the individual—it should be addressed to the legislative, and not to the judicial, department of the government. It is our duty as judges to apply the law. We have no authority to create exemptions or to declare immunity." We can add nothing to the force of this reasoning, but simply express our concurrence therein, as well as in the argument of Judge Lowell.

To avoid misapprehension, it may be well to say that we do not intimate any view as to the status of persons visiting charity patients and received through the courtesy of the charitable institution, whether there would be any greater liability to such persons than to the patients themselves. In this case plaintiff bore the same relation to the defendant as he would bear to any other owner of property on whose premises he was called to work.

The judgments of the appellate division and trial term should be reversed and a new trial granted, costs to abide the event.

Gray, Vann, Werner, Willard Bartlett, Hiscock and Chase, JJ., concur.

Judgments reversed, etc.

LIABILITY OF CHARITABLE INSTITUTIONS FOR THE TORTS OF THEIR SERVANTS AND AGENTS.

I. Rule of Exemption from Liability.

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I. Rule of Exemption from Liability.

a. In General.—“Charity,” writes Justice Cooley, “is active goodness. It is doing good to our fellow-man. It is fostering those institutions that are established to relieve pain, to prevent suffering, and to do good to mankind in general, or to any class or portion of mankind”: *Allen v. Duffie*, 43 Mich. 1, 38 Am. Rep. 159, 4 N. W. 427. Starting with this high conception of charity, it is not surprising that courts have come to the conclusion, as they have, that an association or corporation, formed and maintained for the purpose of dispensing charity, is not liable, at least to its beneficiaries, for the negligence and torts of its servants and agents committed in administering the trust fund and in carrying on the work contemplated by the donors: *Downes v. Harper Hospital*, 101 Mich. 555, 45 Am. St. Rep. 427, 60 N. W. 42, 25 L. R. A. 602; *Gable v. Sisters of St. Francis*, 227 Pa. 254, 136 Am. St. Rep. 379, 75 Atl. 1087. The supreme court of Maine, in speaking upon this question, has recently observed: “No principle of law seems to be better established, both upon reason and authority, than that which declares that a purely charitable institution, supported by funds furnished by private and public charity, cannot be made liable in damages for the negligent acts of its servants. Were it not so, it is not difficult to discern that private gift and public aid would not long be contributed to feed the hungry maw of litigation, and charitable institutions of all kinds would ultimately cease or become greatly impaired in their usefulness”: *Jensen v. Maine Eye and Ear Infirmary (Me.)*, 78 Atl. 898. See, also, *Farrigan v. Pevear*, 193 Mass. 147, 118 Am. St. Rep. 484, 78 N. E. 855, 7 L. R. A., N. S., 481, 8 Ann. Cas. 1109. “Charity funds,” to quote from *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453, “are things apart from ordinary matters of business or trade. In the thoughts and consciences of men, charities are not loaded with the burdens put upon other matters. Charity suggests different considerations and treatment from matters of ordinary business, and hence there has arisen out of the conscience a principle which protects it in its beneficent and perpetual purpose.”

Some authorities seem to regard the rule of exemption as absolute and universal, but others, as will presently appear, have seen that the exemption must be taken with substantial qualification, and this latter view, we have no doubt, is correct, for to place an institution, merely because it is of a charitable character, above the law of the land, is a doctrine of doubtful propriety.

Indeed, in a few cases, the exemption appears to have been entirely denied. Thus, according to *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675, one who sustains injury at a public hospital from unskillful surgical treatment by an unpaid attending surgeon may maintain an action against the hospital therefor, although the hospital is a public charity, supported by trust funds, and the plaintiff paid nothing but a small amount for board and attendance.

And according to *Davis v. Central Congregational Society*, 129 Mass. 367, 37 Am. Rep. 368, a religious society giving public notice of a meeting to be held at its church and inviting members of other societies to attend, is liable to one so invited and attending for a personal injury sustained by him by means of the dangerous condition of the premises.

b. Reasons for Rule.—Various reasons have been advanced for exempting charitable institutions from liability for the neglect or default of their agents and servants. To quote from the supreme court of Arkansas, "The authorities on the subject of liability of charities for the negligence of agents or employees are extremely divergent. There are at least four classes of cases: (1) Cases holding that the property of a charity cannot be sold under execution. . . . (2) Cases construing charities unfavorably, and assimilating them to private corporations organized for profit. . . . (3) Cases holding that trustees of a charity, though not answerable for the negligence of its agents, were liable for want of ordinary care in their selection. This seems to be a compromise between two irreconcilable principles. . . . (4) Cases holding that on a judgment against a charitable organization the grounds and buildings of the defendant cannot be sold under execution, but that any of its unappropriated funds may be applied to the satisfaction of the judgment": *Fordyce v. Woman's Christian National Library Assn.*, 79 Ark. 559, 96 S. W. 155, 7 L. R. A., N. S., 485.

In *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224, the court suggests that a charitable institution "does not come within the main reason for the rule of public policy which supports the doctrine of respondeat superior; it derives no benefit from what its servant does in the sense of that personal and private gain which was the real reason for the rule." This suggestion is without force, unless it can be said that the doctrine of respondeat superior has no application where the business is not carried on for the purpose of profit. But such, as we understand it, is not the law. The fact that an enterprise is not carried on for profit does not exclude the rule of respondeat superior. Institutions are not exempt from liability for the torts of their agents merely because they do not derive profit or benefit from enterprises in which they are engaged. This is pointed out in *Bruce v. Central M. E. Church*, 147 Mich. 230, 116 N. W. 951, 10 L. R. A., N. S., 74, 11 Ann. Cas. 150; *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, 112 N. Y. Supp. 566.

But the Connecticut court may have intended to place its reason on the broad ground of public policy, for it says in the course of its opinion: "On the whole, substantial justice is best served by making a master responsible for the injuries caused by his servant acting in his service, when set to work by him to prosecute his private ends, with the expectation of deriving from that work private benefit. This has at times proved a hard rule, but it rests upon a public policy too firmly settled to be questioned. We are now asked to apply this rule, for the first time, to a class of masters distinct from all others, and who do not and cannot come within the reason of the rule. In other words, we are asked to extend the rule, and to declare . . . substantial justice is best served by making the owners of a public charity, involving no private profit, responsible, not only for

their own wrongful negligence, but also for the wrongful negligence of the servants they employ only for a public use and a public benefit. We think the law does not justify such an extension of the rule of respondeat superior. It is perhaps immaterial whether we say the public policy which supports the doctrine of respondeat superior does not justify such extension of the rule, or say that the public policy which encourages enterprises for charitable purposes requires an exemption from the operation of a rule based on legal fiction, and which, as applied to the owners of such enterprises, is clearly opposed to substantial justice. It is enough that a charitable corporation like the defendant . . . is not liable, on grounds of public policy, for injuries caused by personal wrongful neglect in the performance of his duty by a servant whom it has selected with due care": *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224.

The reason perhaps put forward the most frequently for denying the liability of a charitable institution for the negligence and torts of its agents and employees is, that to enforce such liability would work a diversion of the trust funds, and defeat the purpose of the charity: *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. 556; *Downes v. Harper Hospital*, 101 Mich. 555, 45 Am. St. Rep. 427, 60 N. W. 42, 25 L. R. A. 602; *Gable v. Sisters of St. Francis*, 227 Pa. 254, 136 Am. St. Rep. 879, 75 Atl. 1087. "It seems to have been thought," to quote from Lord Campbell in *Fcofees of Herriot's Hospital v. Ross*, 12 C. & F. 507, 8 Eng. Rep. 1508, "that if charity trustees are guilty of a breach of trust, the persons damaged thereby have a right to be indemnified out of the trust funds. That is contrary to all reason, and justice, and common sense. Such a perversion of the intention of the donor would lead to most inconvenient consequences. The trustees would in that case be indemnified against the consequences of their own misconduct, and the real object of the charity would be defeated. . . . Damages are to be paid from the pocket of the wrongdoer, not from a trust fund. A doctrine so strange as the court below has laid down in the present case ought to have been supported by the highest authority. There is not any authority, not a single shred, here to support it."

This doctrine is also supported by *Fordyce v. Woman's N. L. Assn.*, 79 Ark. 559, 96 S. W. 155, 7 L. R. A., N. S., 485. It may be logical as applied to persons who accept the benefits of the charity, but it has no application to others. Speaking of this doctrine in *Bruce v. Central M. E. Church*, 147 Mich. 230, 110 N. W. 951, 10 L. R. A., N. S., 74, 11 Ann. Cas. 150, where a religious corporation was held liable for injuries to a workman sustained while repairing its property, Justice Carpenter says: "If this is correct, it is scarcely necessary to say that that principle has no application to the case at bar. Is it correct? The ground upon which liability is denied in nearly all the foregoing cases is that stated in the *Downes* case, viz., that it would thwart the purpose of the trust; that is, it would oppose the will of the founder of the trust to pay from the trust funds damages caused by an agent's torts. It is entirely logical to say that this will must be recognized by beneficiaries of the trust. It may justly be said that the benefit of the trust is extended to them and accepted by them upon the implied condition that they shall recognize that will. By becoming beneficiaries they agree to recognize it. But I can see no ground upon which it may be held that the rights of those who are not beneficiaries of a trust can in any way

be affected by the will of its founder. The rights of such persons are those created by general laws, and the duties of those administering the trust to respect those rights are also created by general laws. The doctrine that the will of an individual shall exempt either persons or property from the operation of general laws is inconsistent with the fundamental idea of government. It permits the will of the subject to nullify the will of the people. Nor can I conceive any ground upon which a court can hold that effect can be given to that will when it relates to property devised or conveyed for the purpose of a charitable trust. Such a holding must rest upon the argument that the advantages reaped by the public from such trusts justify the exemption; that is, as applied to this case, the advantages to the public justify defendant's exemption from liability for wrongs done to individuals. If this argument is sound—and its soundness may be questioned, for there are those who will deny that the advantages to the public justify the wrong to the individual—it should be addressed to the legislative, and not to the judicial department of the government. It is our duty as judges to apply the law. We have no authority to create exemptions or to declare immunity. It is true that in many of the cases above cited it is stated that those administering a trust fund are not responsible for the torts of their agents, because damages for such torts cannot be paid from the trust fund. This statement was first made by the house of lords of England in 1839 in deciding the case of *Duncan v. Findlater*, 6 Clarke & F. 894. In a subsequent case (*Mersey Docks v. Gibbs*, 11 H. L. Cas. 686), the same tribunal said that this statement was unnecessary to the decision of the case in which it was announced, and that it was an incorrect statement of the law. Precisely the same may be said of the repetition of that statement in the foregoing cases. We are justified in saying that the statement was unnecessary to their decisions, because, in determining the noncontract obligation of a trustee toward the beneficiaries of his trust (and that was the question involved in each of these cases), it was not necessary to determine his obligation to others. It is equally true that the proposition that trust funds cannot be used to compensate wrong committed by the agent of the trustee is not a correct statement of the law. That proposition, in my judgment, must rest on the principle—which I have heretofore endeavored to prove unsound—that the will of an individual exempts property from the operation of the general laws of the land. It should also be said that, if the trustee be an individual, he is, like other individuals, personally responsible for wrongs committed by his agents (*Powers v. Massachusetts Homeopathic Hospital*, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372; *Shepard v. Creamer*, 160 Mass. 496, 36 N. E. 475; *Baker v. Tibbetts*, 162 Mass. 468, 39 N. E. 350; *Benett v. Wyndham*, 4 De Gex, F. & J. 259), and, if he is adjudged liable therefor, though an execution will not run against the trust funds, because the judgment is against him personally, he may discharge that liability, or reimburse himself if he has discharged it, from the trust funds: *Powers v. Massachusetts Homeopathic Hospital*, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372, and cases therein cited. *Parmenter v. Barstow*, 22 R. I. 246, 47 Atl. 365, 63 L. R. A. 227, is not opposed to this principle. That case holds no more than this: that trust property may not 'be impaired or dissipated through the negligence or improvidence of trustees.' This does not mean that

the trustee may not reimburse himself for liability occasioned, not by his own, but by his servant's, negligence. The circumstance that the trustee is a corporation instead of an individual cannot affect the question of liability. If authority is needed to justify this statement—which necessarily follows from the elementary principle of law that corporations, like individuals, are amenable to the law of the land—it is found in the following cases: *Gilbert v. Trinity House*, 17 Q. B. D. 795; *Foreman v. Canterbury*, L. R. 6 Q. B. 214; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686. The circumstance that the trustee is a corporation and not an individual may, however, affect the method of satisfying a judgment in favor of a plaintiff who has been wronged by an agent's torts. I can see no reason why the execution issued in such a case may not be levied upon the trust property, particularly if that constitute the entire property of the corporation": *Bruce v. Central M. E. Church*, 147 Mich. 230, 110 N. W. 951, 10 L. R. A., N. S., 74, 11 Ann. Cas. 150. This case is cited with approval in *Hordean v. Salvation Army*, 199 N. Y. 233, ante, p. 889, 92 N. E. 623.

On this question the opinion of Justice Gaynor, in *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, 112 N. Y. Supp. 566, is instructive. He says: "The question presented has been discussed in a large number of cases in this country: 4 Ann. Cas. 104. The opinions and decisions are not only conflicting, but those which reach the same result do not agree upon any rule of exemption from liability, and many of them rest on stated reasons or grounds which may well be challenged as fallacious. This court is free from the constraint of authority, for the question has not been settled in this state, if, indeed, in any state. . . . In many of the cases much is made of the fact that such institutions derive no profit or benefit, on the question of whether such rule applies, or, indeed, whether they can be held liable for any torts. But that exemption from liability does not arise from that fact is manifest from the undoubted liability of other similar institutions which derive no profit or benefit: *Rector etc. v. Buckhart*, 3 Hill, 193; *Blaechinska v. Howard Mission*, 56 Hun, 522, 9 N. Y. Supp. 679; *Mulchey v. Methodist Rel. Society*, 125 Mass. 487; *Davis v. Central Congregational Society*, 129 Mass. 367, 37 Am. Rep. 368; *Newcomb v. Boston Protective Department*, 151 Mass. 215, 24 N. E. 39, 6 L. R. A. 778; *Chapin v. Holyoke Y. M. C. A.*, 165 Mass. 280, 42 N. E. 1130. . . . The law may imply an intention on the part of the donors of charitable funds that such funds shall be used for the charitable purposes only, and then imply an acquiescence in this intention by all persons who accept the benefits of the charity, and in that way spell out a waiver by such persons of any responsibility of the institution for the negligence or torts of its servants. If the courts want to exempt such institutions, this may be a tenable, though some may think a rather ingenious or far-fetched, ground on which to do it. But no such acquiescence or waiver can be attributed to an outsider; to a person run over in the highway by the ambulance of such an institution by the negligence of its driver, for instance, as in the case before us. . . . It is probably manifest enough at this stage that there are tort cases against such institutions which do not come within the foregoing classifications and discussion at all. I refer to cases where the duty owed is one specifically cast upon the defendant by law, and therefore incapable of being evaded or escaped by being delegated to any servant. . . . The decision in the recent case of *Abston v. Waldon Academy*, 118 Tenn. 24, 102 S. W. 351, 11

L. R. A., N. S., 1179, . . . does not seem to be well-bottomed. It is put on the ground of diversion of trust funds, . . . and the negligence being that of the institution itself, i. e., in respect of a duty cast upon it by law, the decision cannot, it would seem, be put on the ground of nonliability for acts or omissions of servants in the routine of their employment. Liability in such cases does not rest on the rule respondeat superior, but on the narrower one that the duty is one for the defendant to perform itself, and into which the question of the negligence of servants does not enter. Of course, if such institutions were to be held not liable for their torts or neglects in respect of duties which cannot be delegated to servants, they would be held not liable for any torts of servants also for the same reason of exemption, whatever it might be; but there is not any disposition to exonerate them from the former liability. For instance, the cases generally admit that they would be liable for negligence in the nondelegable duty of selecting competent servants or employees, of whatever grade or kind."

c. *Effect of Paying for Care or Attention.*—The authorities seem to agree that an institution, otherwise charitable in its nature, does not lose its character as such and its consequent exemption from responsibility for the torts and negligence of its servants and agents, from the fact that persons, availing themselves of its benefits, at least such as are pecuniarily able to do so, contribute money to pay the expenses of the institution, their contributions going to the charity itself and not being a source of private gain to the founders or managers. This has been held true in the case of hospitals and institutions of learning, as will hereafter be seen. It has been decided that an institution does not lose its charitable character so as to be liable for the death of a child through the negligence of an experienced employee, merely because the mother of the child contributed to the expense of its care at the institution: *Cunningham v. Sheltering Arms*, 135 App. Div. 178, 119 N. Y. Supp. 1033.

d. *Effect of Exercising Care in Choosing Agents.*—The statement is occasionally made that a charitable institution is not responsible for the negligence or torts of its servants and agents, provided due care has been exercised in their selection. This proviso may be applicable to railway hospitals where the railway company selects the physicians and surgeons therein, of which more will presently be said, and to other cases where the founder of the charity or the benefactors themselves make the selection. But ordinarily no reason is discernible for making any such modification of the general rule of exemption. In *Fordyce v. Woman's C. N. L. Assn.*, 79 Ark. 559, 96 S. W. 155, 7 L. R. A., N. S., 485, the court says: "Nor do we think that an illogical compromise of that sort would tend to the public advantage. A judge or a jury might be convinced after a case of negligence had occurred that due judgment and discretion had not been used in the selection of expert and other agents, when perhaps they themselves, if put to it, in a similar case, would do no better, and might do worse; and it seems to us that, if our schools, churches, hospitals, and other charities could be sold out on such vague matters of opinion, about which men would naturally differ, the result would be extremely unfortunate."

In *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453, in reversing a judgment in favor of the plaintiff for damages given by a jury on evidence that, while yet under the influence of an anes-

thetic administered for the purpose of an operation, and after the operation he was placed in charge of one or more of defendant's nurses, who were not competent, and by reason thereof they permitted him to be severely burned by rubber bottles filled with hot water, whereby he was painfully and permanently injured, the court says: "The question as presented here relates to the liability of a private, or quasi-private, charity for damages caused by the negligent acts of its employees, or by its own negligent act in employing incompetent employees. We will assume that the evidence tends to show the plaintiff was injured either by the negligence of one of defendant's nurses or by her incompetence. If by the latter, we will assume, for the purpose of disposing of the case, that there is enough in the record to justify a verdict that the defendant was careless in selecting her. But as, in our opinion, the defendant is neither liable for the negligence of one of its employees nor for its own negligence in selecting an incompetent employee, it can make no difference which of the two acts caused the injury."

II. Persons Seeking to Hold Institution Liable.

a. **Beneficiaries of the Charity.**—The courts are practically agreed that a charitable institution is not responsible to those who avail themselves of its benefits for any injuries they may sustain through the negligence or torts of its managers, agents and servants. This rule of exemption is well illustrated in the case of hospitals and also of educational institutions considered in subsequent pages of this note. Decisions recognizing this rule rest, to quote from *Bruce v. Central M. E. Church*, 147 Mich. 230, 110 N. W. 951, 10 L. R. A., N. S., 74, 11 Ann. Cas. 150, "upon the principle, correctly stated in *Powers v. Massachusetts Homeopathic Hospital*, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372, viz., that the beneficiary of such charitable trust enters into a contract whereby he assumes the risk of such torts." In discussing the reasons for this rule, Justice Lowell, in the federal case just cited, says: "One who accepts the benefit either of a public or of a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants. To paraphrase the illustration put by the learned judge before whom this case was tried, it would be intolerable that a good Samaritan, who takes to his home a wounded stranger for surgical care, should be held personally liable for the negligence of his servant in caring for that stranger. Were the heart and means of that Samaritan so large that he was able, not only to provide for one wounded man, but to establish a hospital for the care of a thousand, it would be no less intolerable that he should be held personally liable for the negligence of his servant in caring for any one of those thousand wounded men. We cannot perceive that the position of the defendant differs from the case supposed. The persons whose money has established this hospital are good Samaritans, perhaps giving less of personal devotion than did he, but, by combining their liberality, thus enabled to deal with suffering on a larger scale. If, in their dealings with their property appropriated to charity, they create a nuisance by themselves or by their servants, if they dig pitfalls in their grounds and the like, there are strong reasons for holding them liable to outsiders, like any other individual or corporation. The purity of their aims may not justify their torts; but, if a suffering man avails himself of their charity, he takes the

risks of malpractice, if their charitable agents have been carefully selected." It will be noticed that Justice Lowell suggests that the rule of exemption is restricted to beneficiaries of the charity, and this view has been taken by several courts, as will be seen in the paragraphs which follow.

b. **Persons not Beneficiaries—Employees and Strangers.**—The Michigan court, while recognizing the exemption of charitable institutions from liability for negligence to its beneficiaries, has declined to extend the exemption to other persons. Thus this court has held that a religious corporation is answerable for injuries received by a workman engaged in repairing its property, through the negligence of its servants in furnishing an unsafe scaffolding: *Bruce v. Central M. E. Church*, 147 Mich. 230, 110 N. W. 951, 10 L. R. A., N. S., 74, 11 Ann. Cas. 150. In this case the court concludes that corporations administering a charitable trust, like all other corporations, are subject to the general laws of the land, and therefore cannot claim exemption from responsibility for the torts of their agents, unless that claim is based on a contract with the person injured, as where he is a beneficiary of the charitable trust and hence must be regarded as agreeing to assume the risk of such torts.

The holding of the Michigan court is approved by the New York court of appeals in *Hordern v. Salvation Army*, 199 N. Y. 233, ante, p. 889, 92 N. E. 623, where it is decided that, although a charitable institution is not liable to its beneficiaries for the negligence of its servants, it is liable to a mechanic negligently injured while engaged in making repairs on a boiler on its premises. To the same effect is *Garland v. New York Zoological Society*, 135 App. Div. 163, 120 N. Y. Supp. 24.

The same doctrine has been recognized in *Hewett v. Woman's Hospital Aid Assn.*, 73 N. H. 556, 64 Atl. 190, 7 L. R. A., N. S., 496, where it is held that a hospital conducted as a public charity without expectation of profit is not immune from liability to an apprentice nurse who is exposed to a contagious disease, without informing her of the nature of the case or of the danger involved, by reason of which she contracts the disease herself.

In the comparatively recent case of *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, 112 N. Y. Supp. 566, wherein Justice Gaynor writes a very able opinion, a charity hospital corporation is held liable for the negligence of the driver of its ambulance in running into a person on the street. In *Rector etc. of Church of Ascension v. Buckhart*, 3 Hill, 193, a recovery is had against a religious corporation by a person injured by the falling of the church wall. And in *Blaechinska v. Howard Mission*, 56 Hun, 522, 9 N. Y. Supp. 679, a recovery was had against a charitable organization for the maintenance of a vault under a sidewalk, with a defective cover.

We have no doubt that the view taken by the Michigan, New Hampshire and New York courts is to be commended. The wisdom, even, of exempting a charitable institution from liability in tort to its beneficiaries is not entirely free from doubt. To extend this exemption so as to leave the institution free from responsibility to all persons is to place such an institution above the law, which can neither be of advantage to the public nor, in any true sense, to the charity itself. However, in Arkansas the exemption seems to be regarded as universal, for in that state it has been affirmed that a corporation or-

ganized to maintain a library, which is in its nature a charitable trust, is not liable to a workman negligently injured in preparing a foundation for the building: *Fordyce v. Woman's C. N. L. Assn.*, 79 Ark. 559, 96 S. W. 155, 7 L. R. A., N. S., 485; and in Massachusetts it has been decided that the trustees of an unincorporated public charity are not liable for injuries to one servant through negligent orders given by another: *Farrigan v. Pevear*, 193 Mass. 147, 118 Am. St. Rep. 484, 78 N. E. 855, 7 L. R. A., N. S., 481, 8 Ann. Cas. 1109.

III. Institutions Claiming Exemption from Liability.

a. Hospitals.—The authorities are practically unanimous in holding that an institution incorporated for no private gain, but for the care and medical treatment of the sick without profit to the founders, and for that purpose made the holder or manager of a donated trust fund, is a charitable institution exempt from liability to patients for injuries due to the malpractice or negligence of the managers, surgeons, nurses, or employees: *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; *Pepke v. Grace Hospital*, 130 Mich. 493, 90 N. W. 278; *Murtaugh v. St. Louis*, 44 Mo. 479; *Joel v. Woman's Hospital*, 89 Hun, 73, 35 N. Y. Supp. 37; *Van Tassell v. Manhattan Eye etc. Hospital*, 15 N. Y. Supp. 620; *Ward v. St. Vincent's Hospital*, 79 N. Y. Supp. 1004. The rule in this class of cases is stated in *Downes v. Harper Hospital*, 101 Mich. 555, 45 Am. St. Rep. 427, 60 N. W. 42, 25 L. R. A. 602, as follows: An incorporated eleemosynary hospital, organized and maintained for no private gain, but for the proper care and medical treatment of the sick, and for that purpose made the manager of a donated trust fund, is not liable for injury received by a patient therein, through the negligence of its managers or their employees, and the fact that patients who are able to pay are required to do so does not deprive the corporation of its eleemosynary character, nor permit a recovery for damages on account of the existence of contract relations; and in *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529, it is stated thus: A corporation, the object of which is to provide a general hospital for sick and insane persons, having no capital stock nor provision for making dividends or profits, deriving its funds mainly from public and private charity, and holding them in trust for the object of sustaining the hospital, conducting its affairs for the purpose of administering to the comfort of the sick, without expectation or right on the part of those immediately interested in the corporation to receive compensation for their own benefit, is a public charitable institution, and is not liable to a patient for the negligence of its agents.

The fact that patients who are able to pay are required to do so has been held not to deprive such an institution of its immunity from liability to such patients for the negligence of employees, surgeons or nurses, when the amount so received is not a source of private gain or profit, but is a contribution to the trust fund to enable the purposes of the charity to be more effectually accomplished. All funds thus received are said to be stamped with the impress of charity. Usually the pay patients do not make full compensation for the services rendered; they perhaps pay for their board, room and attendance, but not for medical or surgical treatment: *Jensen v. Maine Eye and Ear Infirmary (Me.)*, 78 Atl. 898; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Downes*

v. Harper Hospital, 101 Mich. 555, 45 Am. St. Rep. 427, 60 N. W. 42, 25 L. R. A. 602; Adams v. University Hospital, 122 Mo. App. 675, 99 S. W. 453; Wilson v. Brooklyn Homeopathic Hospital, 97 App. Div. 37, 89 N. Y. Supp. 619; Powers v. Massachusetts Homeopathic Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372.

The extent to which this doctrine has been carried is well illustrated in *Gable v. Sisters of St. Francis*, 227 Pa. 254, 136 Am. St. Rep. 879, 75 Atl. 1087, where it is held that a hospital corporation, founded from funds bequeathed to that end, and maintained by charitable donations, appropriations made by the state and pay received from a certain class of patients, is not liable to a pay patient injured through the negligence of nurses, although she disclaims any right of execution against any fund other than that received from pay patients. In the course of its opinion the court says that "it is wholly immaterial that the plaintiff who here complains of injury was admitted as a pay patient. It is insisted, however, that the reason for the rule does not obtain in this particular case, since the appellees have filed a paper in the court below disclaiming any right of execution against any fund of the defendant corporation held for charitable uses and all income of said corporation other than that received from pay patients; and have asked that the verdict be paid out of funds derived from pay patients only. The argument overlooks the fact that every dollar received by the defendant corporation, from whatever source, is stamped with the impress of charity. For what did these plaintiffs pay? For accommodations which the hospital was enabled to provide through the use of money charitably donated to it. The room, the bed, the furnishings and conveniences for which the plaintiff paid are all of them the direct and immediate product of the voluntary donations it received. It follows that the money that the hospital receives from its pay patients is as strictly the increment of the charitable donations it has received as would be the interest on the money given it if invested on loan. If any profit results from this source, it can only be regarded as incidental addition to the trust fund or income."

In *Powers v. Massachusetts Homeopathic Hospital*, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372, "the plaintiff was," to quote from the opinion, "what is sometimes called a 'paying patient,' the rate of her payment being fourteen dollars a week. Upon this ground her counsel has sought to distinguish her case from that of a patient in the hospital who pays nothing. In our opinion, the difference is immaterial. As has been said, the defendant was a charitable corporation; that is, a corporation organized exclusively for charity. That the ministrations of such a hospital should be confined exclusively to the indigent is not usual or desirable. Those of moderate means from necessity, and not a few rich people from choice, resort to great charitable hospitals for treatment, especially in surgical cases. Throughout the world this is the custom in these institutions, whether they are maintained by individual, religious, or municipal charity. From patients who are not indigent, a payment is commonly permitted or required. Commonly, and in the case at bar quite manifestly, this payment does not make full pecuniary compensation for the services rendered. Those who make a considerable payment not infrequently receive in some respects a more expensive service than do those who make a small payment or none at all; but the payment required is

usually calculated upon the patient's ability to pay, rather than upon the whole cost of the treatment he receives. That this was the defendant's rule appears plainly from its printed form of application, which it required all applicants to fill out alike, whether they paid something or nothing. In this form the inquiry concerning payment was stated as follows: 'How much per week applicant can pay,' thus indicating that the amount of the contribution was to be determined, not by the value or cost of the service rendered, but by the ability of the patient to aid the charitable purposes of the hospital. In our opinion, a paying patient in the defendant hospital, as well as a non-paying patient, seeks and receives the services of a public charity."

An incorporated society conducting a private hospital for the mutual benefit of its members, which treats sick members in consideration of payment of dues, and receives other sick patients for an agreed compensation, is liable to one of the latter for damages caused by the negligence of a surgeon employed at the hospital at a salary paid by the society: *Brown v. La Societe Francaise etc.*, 138 Cal. 475, 71 Pac. 516.

It has been affirmed that a medical institution does not lose its character as a charity and become responsible to patients for the negligence of surgeons and nurses because, in addition to receiving pay patients, it trains and educates nurses: *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453; or teaches medicine for tuition fees: *Collins v. New York Post Graduate Medical School*, 59 App. Div. 63, 69 N. Y. Supp. 106. But the supreme court of Kentucky takes a different and clearer view of this question, and holds that a hospital conducted by a university as an adjunct of its medical school, which exacts compensation from patients able to pay but treats others free of charge, is not a charitable institution exempt from liability for the negligence of its agents and employees: *University of Louisville v. Hammock*, 127 Ky. 564, 128 Am. St. Rep. 355, 106 S. W. 219, 14 L. R. A., N. S., 784.

Where a railway or mining corporation maintains a hospital and employs physicians for the purpose of caring for and giving medical and surgical attendance to sick or injured employees, the expense thereof being paid out of money retained from the wages of the employees, and the corporation making no profit out of the undertaking, the courts have generally held that the corporation, if it exercises due care in selecting physicians and surgeons, is not responsible for their malpractice and negligence in treating employees: *Arkansas Midland Ry. Co. v. Pearson* (Ark.), 135 S. W. 917; *Louisville & Nashville R. R. Co. v. Foard*, 104 Ky. 456, 47 S. W. 342; *Haggerty v. St. Louis etc. R. R. Co.*, 100 Mo. App. 424, 74 S. W. 456; *Barden v. Atlantic Coast Line Ry. Co.*, 152 N. C. 318, 67 S. E. 971; *Texas Central R. R. Co. v. Zumwalt* (Tex.), 132 S. W. 113; *Big Stone Gap Iron Co. v. Ketron*, 102 Va. 23, 102 Am. St. Rep. 839, 45 S. E. 740; *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648, 39 Pac. 95; *Union Pacific Ry. Co. v. Artist*, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581. But such an institution is not a charity, if the benefits it extends to employees are on a condition of relieving the employer from liability for negligence causing the injury: *Haggerty v. St. Louis etc. R. Co.*,

100 Mo. App. 424, 74 S. W. 456. And in *Phillips v. St. Louis etc. R. R. Co.*, 211 Mo. 419, 124 Am. St. Rep. 786, 111 S. W. 109, 17 L. R. A., N. S., 1167, 14 Ann. Cas. 742, it is decided that a hospital association formed to provide medical service to employees of a certain railroad company, and maintained by involuntary deductions from the wages of these employees, is not exempt from liability to patients by the mere employment of competent surgeons, but it must go further and competently treat the patients received. Such associations occupy the position of ordinary physicians and surgeons. If a railroad company maintains a hospital, and contracts for a consideration to treat its employees for injuries received, it is liable for the malpractice of a surgeon it employs, notwithstanding the exercise of due care in his selection: *Sawdey v. Spokane Falls etc. Ry. Co.*, 30 Wash. 349, 70 Pac. 972, 94 Am. St. Rep. 880, and see cases cited in the cross-reference note thereto.

b. Churches and Religious Organizations.—Gifts and trusts in favor of churches and religious organizations constitute charities: See the note to *Hoeffer v. Clogon*, 171 Ill. 462, 63 Am. St. Rep. 264. But the exemption of such institutions from liability for the torts of their agents and servants is, like the exemption of other charitable institutions, not absolute. For example, a religious corporation is liable to one injured, through the negligence of its servants in furnishing an unsafe scaffolding, while engaged in repairing its property: *Bruce v. Central M. E. Church*, 147 Mich. 230, 110 N. W. 951, 10 L. R. A., N. S., 74, 11 Ann. Cas. 150. To the same effect is *Mulchey v. Methodist Religious Society*, 125 Mass. 487. In *Chapin v. Holyoke Y. M. C. A.*, 165 Mass. 280, 42 N. E. 1130, it is decided that a Young Men's Christian Association is not a charity, and hence is liable for negligence in the construction of a floor whereby one on the premises by invitation is injured.

c. Educational Institutions.—A corporation founded and maintained for educational purposes is regarded as a charitable institution, and as such has been considered exempt from liability to students for the torts and negligence of its servants and agents, and this although the students are required to pay tuition. Thus an institution of this character has been held not liable for injury to a pupil because of failure to maintain fire-escapes as required by ordinance and statute: *Abston v. Waldon Academy*, 118 Tenn. 24, 102 S. W. 351, 11 L. R. A., N. S., 1179; and for injuries to a student occasioned by the negligence of the superintendent of college buildings in removing a chimney: *Currier v. Dartmouth College*, 105 Fed. 886, 117 Fed. 44, 54 C. C. A. 430; and for injury to a student through the negligence of a teacher in a class-room or laboratory: *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991, 2 L. R. A., N. S., 556, 4 Ann. Cas. 103.

A board of education, in the absence of statute, is not answerable in its corporate capacity for an injury to a pupil from its negligence in the erection and maintenance of a school building: *Finch v. Board of Education*, 30 Ohio St. 37, 27 Am. Rep. 414. A child attending a public school provided by a city cannot maintain an action against the city for injury suffered by reason of an unsafe staircase: *Hill v.*

Boston, 122 Mass. 344, 23 Am. Rep. 332. 'And a state industrial school, being a component part of one of the departments of the state, is within a constitutional prohibition against the state being made a party defendant to any suit: *Alabama Industrial School v. Addler*, 144 Ala. 555, 113 Am. St. Rep. 58, 42 South. 116.

d. Reformatory Institutions.—An action does not lie against a state reform school or state house of refuge for torts inflicted by its employees upon inmates: *Williamson v. Industrial School of Reform*, 95 Ky. 251, 44 Am. St. Rep. 243, 24 S. W. 1065, 23 L. R. A. 200; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495. A charitable institution which was organized to maintain an industrial school asylum for the support and education of male orphan children, and to which the statutes of the state authorize magistrates to send minors convicted of crime, has been regarded in New York as a governmental agency, entitled to the same immunity from liability for negligence as the state itself, and hence has been held exempt from responsibility to minor convicts legally committed to it for injuries from the negligence of the managers of the institution: *Corbett v. St. Vincent's Industrial School*, 177 N. Y. 16, 68 N. E. 997. But the supreme court of Michigan, with clearer vision, has decided that an institution of a charitable character, such as the "House of the Good Shepherd," maintained for the reformation and preservation of girls and women, does not take on the character of a state institution or governmental agency, with consequent immunity from private suit, by reason of a statute which permits certain magistrates and courts under some circumstances to commit offenders to the institution; that such an institution is liable in damages to a girl taken there under the false impression that a position will be found for her and thereafter unlawfully detained against her will; and that the institution cannot escape this responsibility by the plea that to pay damages for the wrong will divert the trust funds: *Gallon v. House of Good Shepherd*, 158 Mich. 361, 133 Am. St. Rep. 387, 122 N. W. 631, 24 L. R. A., N. S., 286.

e. Governmental Agencies.—An institution in the nature of a governmental agency enjoys the same immunity from liability for the torts of its agents and servants that the state itself enjoys. This rule has been applied to state hospitals: *White v. Alabama Insane Hospital*, 138 Ala. 479, 35 South. 454, 4 L. R. A., N. S., 269; *Maia's Admr. v. Eastern State Hospital*, 97 Va. 507, 34 S. E. 617, 47 L. R. A. 577; and to a state industrial school: *Alabama Industrial School v. Addler*, 144 Ala. 555, 113 Am. St. Rep. 58, 42 South. 116. An action of tort cannot be sustained against "The National Home for Disabled Volunteer Soldiers," though it has power to take, hold and convey real and personal property, and to sue and be sued in the courts of law and equity. Such an action is, in effect, against the United States, and it has not consented to be sued for torts: *Overholser v. National Home for Disabled Soldiers*, 68 Ohio St. 236, 96 Am. St. Rep. 658, 67 N. E. 487, 62 L. R. A. 936. These decisions, however, do not turn on the question of the exemption of charitable institutions from liability, but on the exemption of the state and nation and their agencies from such liability. A state, it is well understood, cannot be held responsible for the torts of its officers and agents: *Elmore*

v. Fields, 153 Ala. 345, 127 Am. St. Rep. 31, 45 South. 66; State v. Jahraus, 117 La. 286, 116 Am. St. Rep. 208, 41 South. 575; General Oil Co. v. Crain, 117 Tenn. 82, 121 Am. St. Rep. 967, 95 S. W. 824. But the officers of a state can be held responsible for a trespass or tort, although they act or assume to act under the authority of the state: Sanders v. Saxton, 182 N. Y. 477, 75 N. E. 529, 1 L. R. A., N. S., 727, 108 Am. St. Rep. 826, and note.

f. **Fire Insurance Patrol.**—In Pennsylvania an insurance patrol company is a public charity when the object of its incorporation is to protect and save life and property in and contiguous to burning buildings, it appearing that the company makes no distinction in saving and protecting property between property insured and not insured, and that it is without capital stock or moneyed capital, and no profits or dividends are made and divided among the corporators, although it is supported by the voluntary contributions of fire insurance companies: Fire Insurance Patrol v. Boyd, 120 Pa. 624, 6 Am. St. Rep. 745, 15 Atl. 553, 1 L. R. A. 417. But in Louisiana, an association which is composed of insurance companies doing business in a certain city, which is authorized to maintain a corps of men and suitable apparatus to save life and property in case of fire, and which is supported by assessments levied on all persons engaged in fire insurance business in that city, whose main purpose is to minimize the losses and promote the pecuniary interests of its members, is not a public charity, and is liable for injuries sustained by a member of the fire department as a result of the negligence of one of its servants: Coleman v. Fire Insurance Patrol of New Orleans, 122 La. 626, 48 South. 130, 21 L. R. A., N. S., 810, 16 Ann. Cas. 778; Rady v. Fire Insurance Patrol, 126 La. 273, ante, p. 511, 52 South. 491. The Massachusetts courts have come to a similar conclusion in Newcomb v. Boston Protective Department, 151 Mass. 215, 24 N. E. 39, 6 L. R. A. 778; Bates v. Worcester Protective Department, 177 Mass. 130, 58 N. E. 274.

WESTCOTT CHUCK COMPANY v. ONEIDA NATURAL CHUCK COMPANY.

[199 N. Y. 247, 92 N. E. 639.]

TRADEMARKS.—The Expiration of a Patent does not give to one thereafter manufacturing the article the right to use trademarks and names adopted by the patentee, so as to represent such articles to be those manufactured by the patentee, and the use of such marks and names may be permanently enjoined. (p. 908.)

PATENTED ARTICLES.—Expiration of Patent—Unfair Competition.—Upon the expiration of a patent the right to make the patented article passes to the public. The patentee cannot enjoin its manufacture, but he is entitled to protection against unfair competition. (pp. 908, 909.)

TRADEMARKS.—Damages for Infringement.—A Stipulation made on the trial of a suit for infringement of trademark, fixing the profits made, etc., will be treated as fixing the rule of damages in case the plaintiff is successful. (pp. 910, 911.)

Edwin H. Risley and Henry M. Love, for the appellant.

Richard R. Martin and Thomas A. Devereux, for the respondent.

249 CULLEN, C. J. The action is to restrain unfair competition in trade, for damages and for an accounting of profits. The appellant is a manufacturer of drill chucks in Oneida, Madison county, of a design and character formerly protected by certain patents. At the expiration of the patents the defendant purchased some of these chucks and entered upon the manufacture of tools exactly the same in character and style and of the same size as those made by the plaintiff, and, as found by the trial court, "advertised its said chucks in such language and manner as to convey to the trade and to intending purchasers that defendant's chucks so advertised were plaintiff's said two styles of chucks; that these acts and things **250** were done by defendant with the intent and for the purpose of deceiving dealers and users of chucks into the belief that the defendant's chucks so advertised were the plaintiff's chucks, and to thus enable the defendant to make sales of chucks and of parts of chucks which it could not otherwise make, and that defendant offered said duplicated chucks at prices lower than those which plaintiff was receiving for its chucks." It is also found that in advertising its product the defendant duplicated many of the cuts in plaintiff's advertisements and also its printed matter. The trial court held that the defendant had the right to manufacture and sell drill chucks which were duplicates of those manufactured by the plaintiff, known as "Little Giant Improved" and as "Little Giant Double Grip," but it had not the right to place on its chucks, or to use in advertising the sale thereof, the size number numerals or the names adopted by the plaintiff, and awarded a permanent injunction restraining the defendant from such use. It refused to award the plaintiff damages on the ground that no damage to its business had been proved. From this judgment an appeal was taken to the appellate division, where the judgment was affirmed by a divided court.

The appellant's first contention is that the injunction awarded was not sufficiently broad. It is contended that the defendant should not have been allowed to make chucks precisely similar to its own. We cannot say that the trial court erred in this respect. The patents having expired, the right to make the patented article passed to the public: *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. Rep. 1002, 41 L. ed. 118. Its situation was at least no better than if it had never obtained patents, and in such a case, as stated by Judge Vann in *Tabor v. Hoffman*, 118 N. Y. 30, 16 Am. St. Rep. 740, 23 N. E. 12: "As the plaintiff had placed the perfected pump upon the market, without obtaining the pro-

tection of the patent laws, he thereby published that invention to the world and no longer had any exclusive property therein." It is true that though the plaintiff had lost its exclusive right to manufacture, it was still entitled to protection against unfair competition (*Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. Rep. 1002, 41 L. ed. 118), and the defendant invaded its right in so far as it sought to induce the public to believe that its product was the product of the plaintiff. To a certain extent, however, the mere duplication of the tool or machine manufactured by another may, in some cases, produce confusion in the minds of purchasers as to what manufacturer made the tool. So far as the duplication relates to details, proper or advantageous in the use of the tool or machine, it is open to all the public, regardless of any confusion as to its source of manufacture that may be occasioned thereby. In *Cooke & Cobb Co. v. Miller*, 169 N. Y. 475, 62 N. E. 582, it was said: "In the absence of some restriction upon the defendants arising out of the patent law, . . . the defendants had the right to manufacture and sell the article in question, although it was similar in general appearance and made from the same material and upon the same plan as the article made and sold by the plaintiff." The evidence tends to show that the details of plaintiff's tool which the defendant copied were features or elements of the tool itself, and therefore within the defendant's right to reproduce. The case before us differs from those of *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. Rep. 1002, 41 L. ed. 118, and *Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.*, 208 U. S. 554, 28 Sup. Ct. Rep. 350, 52 L. ed. 616. In those cases the use of the name of the manufacturer was involved, an element not in the present case, and the injunction was directed solely against the use of the plaintiff's trade name without accompanying explanation that the articles were manufactured by the defendant.

We think, however, that the trial court erred in failing to award the plaintiff damages. The court doubtless felt controlled in this respect by the decision of the appellate division, made on an appeal from a previous trial of the case (122 App. Div. 260, 106 N. Y. Supp. 1016), in which it was held that in the absence of proof of damage, no pecuniary recovery could be had. It is possible that in an action at law for damages, proof of actual damage suffered by a plaintiff would be necessary to justify more than a nominal recovery: *Browne on Trademarks*, sec. 499; *Paul on Trademarks*, sec. 324. But this action is in equity. The plaintiff prayed as relief that the defendant ²⁵² account for the profits made by it on its sales, and the law seems well settled that equity will treat the wrongdoer as a trustee for the plaintiff so far as the former has realized profits from its acts: *Browne on Trade-*

marks, sec. 506; Paul on Trademarks, sec. 326 (see cases there cited); *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. Rep. 1002, 41 L. ed. 118. It has been held in the United States circuit court of appeals that the plaintiff is not limited to the profits realized by the defendant, but is entitled to what he would have made had the sales been made by him: *Walter Baker & Co. v. Slack*, 130 Fed. 514, 65 C. C. A. 138. Indeed, as said by Mr. Browne, after a review of the cases, it is difficult to lay down the exact rule for determining the measure of damages in the infringement of trademarks. It may depend upon the special circumstances of the case. The cases in this state on the subject are few. In *Champlin v. Stoddard*, 34 Hun, 109, plaintiffs were allowed to recover the difference between the price that defendant realized and the cost at which the plaintiffs could have made the sales. The opinion, however, contains a strong intimation that the rule of damages was too favorable to defendant; that the plaintiffs should have recovered the profits that would have been realized had the sales been made at the prices at which they sold their goods. *Gillott v. Esterbrook*, 47 Barb. 455, sustains the rule of damage upheld in the *Champlin* case (34 Hun, 109). In *Cox's Trademark Cases*, second edition, 481, it is said that in *Faber v. Hovey* it was held by the general term of the supreme court, and affirmed by this court, that the plaintiff was entitled to the profits he would have made had he manufactured and sold the articles sold by the defendant. The only report of the case is to be found in 73 N. Y. 592, where it is stated that the judgment was affirmed by a divided court without opinion. After examination of the printed record in the case we are not prepared to say that it is an authority for the broad proposition for which it is cited by Mr. Cox. The interlocutory judgment directed the defendants to account to the plaintiff for the profits realized by them together with such other damages as might appear. ²⁵³ The referee reported that the plaintiff's profits on the sale would have been a certain sum, and that as no positive evidence was given as to the profits realized by the defendants, he determined they were the same as those that would have been realized by the plaintiff. The affirmance of the judgment by this court seems at least authority to the effect that where no proof is given of the profits actually made by the defendants, the profits the plaintiff would have realized should establish the measure of damages. In the case before us, while the parties were proceeding with proof as to the cost of manufacture, this stipulation was entered into, as found by the trial court: "For the purpose of this trial only, and not to be used in any future trial of this suit, conceded that the defendant made and sold 3,672 drill chucks of the character claimed to be unfair in all or some features, and that if the plaintiff had sold

its own drill chucks in equal numbers, sizes and styles, it would have made a total profit of \$4,000 thereon. And, further, that the defendant made and sold certain parts for plaintiff's chucks, and for said alleged unfair chucks, and that if the plaintiff had made and sold an equal number of those similar parts, it would have made \$300 profit thereon. Further conceded for the purpose of this trial only, and not to be used in any future trial of this case, that if the court shall find that illegal competition of the defendant's was the sole cause of plaintiff's selling its drill chucks and parts in controversy in this case at increased discounts, then the plaintiff's loss by reason of said increase of discounts shall be taken to be the sum of \$1,800." After this stipulation was made, by consent of the defendant, the evidence on the subject of profits already taken was stricken out. Whatever may be the general rule on the subject, this state of the record seems to bring the case within the decision in *Faber v. Hovey*, 73 N. Y. 592, and we think it may further be said that by the stipulation the parties intended to establish the rule of damages in case the plaintiff was successful. There is no finding by the trial court that would justify an award to the plaintiff of the sum of \$1,800, specified in the last clause of the stipulation, but ²⁵⁴ on the findings and stipulation the plaintiff was entitled to recover the sum of \$4,300, as of the date of the judgment.

The judgment of the appellate division should be reversed and that of the special term modified, so as to award the plaintiff the sum of \$4,300, as of the 11th of December, 1908, and as modified affirmed, with costs to the appellant in the appellate division and in this court.

Gray, Haight, Vann, Willard Bartlett, Hiscock and Chase, JJ., concur.

Judgment accordingly.

As to What Words or Phrases may Constitute a Valid Trademark, see the note to *Kyle v. Perfection Mattress Co.*, 85 Am. St. Rep. 83; and as to what constitutes a trademark and what are infringements thereof, see the note to *Patridge v. Menck*, 44 Am. Dec. 284.

The Law of Trademarks and Trade Names is considered in the recent cases of *Creswill v. Grand Lodge Knights of Pythias*, 133 Ga. 837, 134 Am. St. Rep. 231; *Atlas Assur. Co. v. Atlas Ins. Co.*, 138 Iowa, 228, 128 Am. St. Rep. 189; *Johnson v. Seabury*, 71 N. J. Eq. 750, 124 Am. St. Rep. 1007; *Giragosian v. Chutjian*, 194 Mass. 504, 120 Am. St. Rep. 570; *George G. Fox Co. v. Glynn*, 191 Mass. 544, 114 Am. St. Rep. 619; *International Silver Co. v. William Rogers Corporation*, 67 N. J. Eq. 646, 110 Am. St. Rep. 506; *Armington v. Palmer*, 21 B. I. 109, 79 Am. St. Rep. 786; *Italian-Swiss Colony v. Italian Vineyard Co.*, 158 Cal. 252, 110 Pac. 913.

A Trademark, in a Qualified Sense, is Property in the hands of the owner, and may be sold and assigned with the business to which it

belongs. But in the abstract it cannot be considered property. It cannot be disassociated from the business to which it belongs: *Commonwealth v. Kentucky Distilleries etc. Co.*, 132 Ky. 521, 136 Am. St. Rep. 186; *Falk v. American West Indies Trading Co.*, 180 N. Y. 445, 105 Am. St. Rep. 778.

GRAVES v. KNIGHTS OF MACCABEES.

[199 N. Y. 397, 92 N. E. 792.]

FRATERNAL INSURANCE—Prohibiting Certain Occupations.

A fraternal insurance society has a right, in a proper manner, to adopt a by-law applicable to certificates thereafter issued which, as broadly as may be thought wise, will prohibit beneficial members directly or even indirectly to engage in the business of manufacturing or selling liquors. (p. 914.)

FRATERNAL INSURANCE—Engaging in Liquor Business—

Forfeiture.—A by-law of a fraternal insurance society providing that the certificate of a member shall become null and void upon his engaging in the manufacture or sale of liquor is violated by a member who forms a partnership with his son for the carrying on of a saloon business and personally applies for and takes out a license in the firm name, the saloon being operated in the usual manner, the member, while living in the same house, taking no active part in the business, and such violation has the effect of rendering the certificate void. (pp. 914, 915.)

FRATERNAL INSURANCE—Forfeiture.—The Issuance of a New Certificate after a forfeiture, for the sole purpose of changing the beneficiary at the request of the member, does not waive the forfeiture, the new certificate being considered but a continuance of the former one. (p. 916.)

George P. Keating, for the appellant.

Frank C. Sargent and Frank B. Lennox, for the respondent.

399 HISCOCK, J. This action was brought to recover on two certificates of insurance issued by the appellant on the life of one Graves and payable to the respondent, his wife. The sole defense is that all rights under these certificates had become forfeited because after their issue Graves became engaged in the sale of liquors in violation of one of appellant's by-laws. On the facts established in support of that defense hereafter recited, the trial court refused to hold, as matter of law, that there had been a violation, but allowed the jury to say whether there had been, and the latter having answered this question in the negative, the appellate division by a divided court have approved the course taken by the trial court and affirmed the judgment against the appellant.

We shall assume for the moment, reserving for subsequent consideration a single minor question, that the certificates on which suit is brought are subject to a regulation adopted by

the appellant in 1895 and subsequently from time to time amplified and which provided as follows:

"Sec. 142. No person shall be admitted as a beneficial member of this order who is engaged in any of the following occupations: Blasting, coal mining, submarine operations, manufacturing highly inflammable or explosive materials, nor who is an aeronaut or lineman in the employ of electric companies, either in the construction or repairing of lines over which the electric current passes, or who is engaged in any other occupation deemed extrahazardous by the supreme medical examiner, and no person shall be eligible for membership in the order who is engaged either as principal, agent ⁴⁰⁰ or servant in the manufacture or sale of spirituous, malt or vinous liquors as a beverage, and should any beneficial member of the order engage in any of the above-named prohibited occupations after his admission, his benefit certificate shall become null and void from and after the date of his so engaging in such prohibited occupation, and he shall stand suspended from all rights to participate in the benefit funds of the order, . . . and the record keeper, when any such suspension takes place, shall not receive further assessments from such suspended member."

The acts proved by the appellant as constituting a violation and working a forfeiture of the certificates were the following: Graves, the insured, formed a partnership with his son for the purpose of carrying on a saloon business. He personally applied for and took out a license in the firm name, and the saloon was owned and operated for several months by said copartnership, there being nothing to indicate that the ordinary rules of ownership and legal control of the copartnership property and business, and of sharing in profits and losses, did not prevail. It was testified to, however, that while Graves lived in the same house in which the saloon was conducted, he did not, as a matter of fact, take any part in the actual management of the business or in the sale of liquors.

Under these circumstances the courts below have permitted a recovery on the theory that the language of appellant's by-laws only prohibited an active or perhaps physical participation in, or relation to, the sale of liquors, and did not include a passive proprietary interest in the business.

No case has been cited which is controlling of the question now presented, and its decision, therefore, must be governed by the ordinary rules of construction. Applying these, we are of the opinion that, although the issue may seem somewhat close, the construction of the by-law thus far permitted is too narrow, and that it should have been held, as matter of law, that the acts of the insured were a violation of its terms and worked a forfeiture of the certificates.

It is beyond controversy that the appellant had a perfect ⁴⁰¹ right in a proper manner to adopt a by-law applicable to certificates thereafter issued which, as broadly as might be thought wise, would prohibit beneficial members from becoming engaged even indirectly in the business of manufacturing or selling liquors. In determining what it did do, we of course are mindful of the cardinal rules that when permissible a construction should be employed which will avoid forfeitures, and that the penalties for ambiguous words should be visited on him who has selected them. But necessarily before these rules can be of assistance to a party in such a case as this, it must appear that the application to words of that fair and ordinary meaning which must be presumed to have been in the minds of the parties fails to make the intent clear, and does in fact leave some uncertainty concerning whose solution intelligent men might reasonably differ and argue. We do not think that such uncertainty fairly arises from the clauses now before us for interpretation. The appellant evidently determined that there were risks incident to the liquor business which it did not care to incur under its certificates. It may have regarded them as moral or physical. While the latter especially would seem to be the greater in the case of one actually handling and passing out liquors, no one can say that they were absent in the case of one who was the owner and in legal control and possession of them, and who had the opportunity, although he did not customarily choose to exercise it, to come in contact with them. Therefore, in the first place, as it seems to us, there is no authority for assuming that the actual intent of the appellant must have been to direct its prohibition simply against those who happened for the time being to be in active physical contact with the manufacture or sale of liquors, and, in the second place, the language used does not seem to us to express such intent. Without stopping to analyze too much at length the various definitions adopted by the lexicographers, the word "engaged" used by the by-law may be regarded as the equivalent of the words "carry on," and the word "occupation" as ⁴⁰² meaning "business," so that we shall have a prohibition against carrying on the business of manufacturing or selling liquors. And when we have the clause thus formulated, it seems to us that any layman reasonably versed in the use and meaning of our language would undoubtedly conclude that a man was so carrying on such business when it appeared that he was one of two partners who owned and operated it under licenses taken out by him personally, that presumably he furnished his share of the capital, and was entitled to his share of the property and profits and to an equal voice in the control and conduct of the business, and that such conclusion would not be stayed simply because the assumed individual

dwelling at the place of business elected for a longer or shorter period, and for one reason or another, not to take that active part in the ordinary routine of business which both opportunity and legal right placed within his power.

We cannot help believing that, if we should limit the meaning of the by-law by magnifying the conclusiveness of the test of physical or active participation as desired by respondent, we should lay the foundation for many and perplexing refinements which eventually would lead far beyond what was, or reasonably should have been, anticipated when the by-law was framed.

To our mind the intent to give the by-law a broader meaning than the one thus urged, and to cover different phases of interest or participation including the present one, is emphasized by specifically making the prohibition apply to anyone who is "engaged either as principal, agent or servant." A "servant" or "agent" would not be apt to have any proprietary interest, and, therefore, his connection would be established by the physical performance of various acts in the conduct of the business. Conversely, the word "principal" with its associations naturally suggests one whose relation is that of proprietor, and who, as commonly in the case of a principal, might elect to intrust the active conduct of the business to the agents and servants already referred to.

The argument of *ex sociis noscitur* is somewhat relied on 403 to sustain the view thus far adopted by the courts. Our attention is called to the fact that in the prior clause of the by-law which contains the provision with reference to the manufacture and sale of liquor the words "engage" and "occupation" are used with reference to certain pursuits, just as in the case of the manufacture of or traffic in liquor, and inasmuch as the only objection to these other pursuits could be the risk of personal injury to one physically carrying them on, said words "engage" and "occupation" must mean a physical and active participation; that if said words have this meaning in one clause of the section, they must have the same meaning in another clause, and, therefore, in connection with the manufacture and sale of liquors, must mean active participation. We do not think that there is much force in this argument in this case. It is doubtless true that the increased risks incident to blasting, mining and the manufacture and sale of explosives would be applicable only to those who were physically engaged in conducting such operations, and when we take into account the classification of these occupations as extrahazardous, and examine the words used in this prohibition, they might, in most instances, be fairly limited to the interpretation suggested by the respondent. For instance, we can hardly conceive of the prohibition against engaging in the occupation of blasting as being reasonably applicable to

anyone else than him who was actually engaged in carrying on the occupation, and we observe that the ambiguity which might be attached to the words "coal mining," originally used in this prohibition, was removed in a subsequent law by substituting the words "coal miner," which were evidently intended to mean an actual worker in the mines. And even in this clause, in construing the prohibition against engaging in the occupation of "manufacturing highly inflammable or explosive material," we should find it difficult to say that the language did not include a partner in a firm carrying on such a business, and who by reason of his interest might be led into the physical risks of the business even if temporarily he should suspend his active participation in the management of ⁴⁰⁴ the business. And in this connection it is to be noted that while the risks of which avoidance was sought in the case of these "extrahazardous" occupations were purely physical risks, the objections which the appellant might feel to having a beneficial member engaged in the liquor business might fill a wider range, and not be limited to physical contact with the business.

As was stated at the outset, no controlling authority has been cited or found which is decisive of the meaning of this by-law as applied to such facts as the present ones. The case of *Tucker v. Knights of Maccabees*, 128 App. Div. 918, 113 N. Y. Supp. 1149, affirmed, 198 N. Y. 577, 92 N. E. 1104, however, proceeds quite a distance in the direction of determining, as claimed by appellant, that this by-law is not of the limited meaning urged by respondent. In that case it was held, as matter of law, that if it was simply established that the decedent entered into a partnership engaged in the management of a hotel containing a bar at which liquors were sold, and a liquor tax certificate was issued to the decedent and from time to time renewed for the benefit of the co-partnership, the decedent was engaged in the sale of liquors within the prohibition of a by-law similar to the present one, although expressly appearing that he never purchased supplies for the bar or sold any liquor thereat, and a request to go to the jury on the question of engagement was denied.

Evidence was given tending to establish that before the last certificate here involved was issued by the appellant, the beneficial member retired from the saloon business and turned his interest over to his son, and it is therefore claimed that for this reason said certificate was not subject to the provisions of the by-law. In this case, however, we think that it is apparent that the last certificate mentioned was simply issued in the place of a prior certificate for the purpose of designating a new beneficiary, and that on the evidence as now presented there is nothing to indicate that any greater rights were secured under the new certificate than existed under the one

taken up, or that the issue of the later certificate operated as a waiver of any forfeiture which arose while the earlier certificate ⁴⁰⁵ was outstanding. In fact, no such claim as that of waiver was made on the trial.

In accordance with these views, we think that the judgment must be reversed, and a new trial granted, costs to abide event.

Cullen, C. J., Vann, Werner, Willard Bartlett and Chase, JJ., concur.

Judgment reversed, etc.

The Features of the Law Specially Applicable to Mutual or Membership, Life or Accident Insurance, are discussed in the note to *Lake v. Minnesota Masonic Relief Assn.*, 52 Am. St. Rep. 543.

Insurance—Sale of Liquor.—One who keeps a restaurant adjacent to a saloon, between which there is an archway allowing free passage, and with whom the saloon-keeper boards, is not, though he sometimes, when the latter is at meals or temporarily absent, waits on customers at the bar, without having any interest in the business, connected with the sale of liquors, within the meaning of an application for insurance: *Collins v. Metropolitan Life Ins. Co.*, 32 Mont. 329, 108 Am. St. Rep. 578.

CASES
IN THE
CRIMINAL COURT OF APPEALS
OF
OKLAHOMA.

SMYTHE v. STATE.

[2 Okl. Cr. 286, 101 Pac. 611.]

INDICTMENT—Negating Exceptions, When Necessary.—It is only when the exception in a penal statute is so incorporated in or with the enacting clause of such statute as to constitute a material part of the definition or description of the offense that it need be negated in the information; otherwise it will be a matter of defense. (p. 926.)

INDICTMENT—Negating Exceptions, When Necessary.—A negative averment to the matter of an exception or proviso in a penal statute is not requisite in an information, unless the matter of such exception or proviso enters into, and becomes a material part of, the description of the offense. (p. 927.)

INTOXICATING LIQUORS—Constitutionality of Statute.—Senate Bill No. 61 (Sess. Laws 1907-08, c. 69, p. 594), known as the "Billups Prohibition Enforcement Act," is not violative of section 57, article 5, of Bunn's Constitution of Oklahoma. (p. 928.)

INDICTMENT—Sufficiency—Certainty and Particularity.—An information which informs the accused of the offense with which he is charged with such particularity as will enable him to prepare for his trial, and so defines and identifies the offense that the accused, if convicted or acquitted, will be able to defend himself in case he be indicted again for the same offense by pleading the record of such former conviction or acquittal, is sufficient as against demurrer. (pp. 928, 929.)

(Syllabi by the court.)

Sornberger & Williams, for the plaintiff in error.

Fred S. Caldwell, for the state.

287 **BAKER, J.** The plaintiff in error, who will, for convenience's sake, be hereinafter referred to as the accused, was, on the twenty-seventh day of June, 1908, found guilty of unlawfully selling one pint of whisky to Stanley Seymour. The prosecution was predicated upon an information, which reads as follows:

"In the name and by the authority of the state of Oklahoma, now comes L. B. Jackson, the duly qualified and acting county attorney, in and for Creek county, state of Oklahoma, and gives the county court of Creek county, state of Oklahoma, to know and be informed that C. P. Smythe did, in Creek county, and in the state of Oklahoma, on or about the 8th day of April, in the year of our Lord one thousand nine hundred and eight, and anterior to the presentment hereof, commit the crime of selling intoxicating liquor, in the manner and form as follows, to wit: Did sell to Stanley Seymour one pint of whisky, contrary to the form of the statutes, in such cases made and provided, and against the peace and dignity of the state."

To this information the accused filed a general demurrer, which was by the court overruled, to which ruling the accused saved an exception. Thereupon the jury was impaneled and sworn, and the evidence presented on behalf of the state. The accused offered no evidence. The accused was found guilty as charged in the information, and in due time filed his motion for a new trial, alleging: (1) That the court erred in its decision in overruling the demurrer to the information; (2) because the verdict is contrary to law, for the reason that the information does not charge a public offense; (3) because the verdict is not sustained by the evidence, and is contrary thereto. The motion for a new trial was overruled, to which the accused duly excepted, and the court entered judgment on the verdict, sentencing the accused to pay a fine of fifty dollars, and be imprisoned in the county jail thirty days, and thereupon the accused filed a motion in arrest of judgment, setting up, in substance, that the facts alleged in the information are not sufficient to constitute a public offense, and that said information had been demurred to by the accused, and the demurrer overruled before the trial was commenced. Said motion in arrest of judgment was overruled, to ²⁸⁸ which ruling the accused duly saved his exception, and thereafter, on the twenty-seventh day of June, 1908, the court below rendered judgment upon the verdict, and sentenced the accused to pay a fine of fifty dollars, with costs, and that he be committed in the county jail of Creek county for a period of thirty days, and that, in the event of failure to pay said fine, he be incarcerated a further period than the thirty days' sentence sufficient to liquidate said fine and costs. To said judgment and sentence accused duly excepted, and brings this case to this court on appeal for the purpose of reversing said judgment. Briefs are filed on both sides.

The only question presented in this case is the sufficiency of the information, a copy of which is contained in the statement of the case. The able counsel for the accused contend that said information is insufficient for two reasons: (1) Be-

cause the pleader neglected to negative the exceptions or provisos of the statute defining the offense in Senate Bill No. 61 (Sess. Laws 1907-08, p. 603, c. 69, art. 3), known as the "Billups Law," which reads as follows: "Section 1. It shall be unlawful for any person, individual or corporate, to manufacture, sell, barter, give away, or otherwise furnish except as in this act provided, any spirituous, vinous, fermented or malt liquors. . . . A violation of any provisions of this section shall be a misdemeanor and shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars and by imprisonment for not less than thirty days, nor more than six months. . . . " ²⁸⁹ (2) Because the said Billups law is violative of section 57, article 5, of the constitution of this state, which reads as follows: "The powers of the initiative and referendum reserved to the people by this constitution for the state at large, are hereby further reserved to the legal voters of every county and district therein, as to all local legislation, or action, in the administration of county and district government in and for their respective counties and districts."

Counsel for the accused correctly maintain that the Billups act authorizes certain persons, or class of persons to sell intoxicating liquors under the restrictions contained in the act, that under said act persons may be appointed agents for the state for the purpose of selling intoxicating liquors, and that such persons, when so appointed, are authorized to sell as much as one pint of whisky, if sold under the provisions of said act. It is also contended by the accused that under the terms of said act such persons are exempted from the penalty of the act, and that a sale of a pint of whisky is not necessarily a violation of the act, and that under the restricting or prohibiting terms of the act, which provides "it shall be unlawful for any person to . . . sell . . . except as in this act provided," and by reason thereof certain persons are excluded and excepted from the operation of said section, it is necessary for an information to contain averments negating the class or kind of persons who are exempted from prosecution for selling liquor, if sold under the provisions of said act.

The statute of this state respecting things necessary to be averred in the indictment are as follows: Section 222, Criminal Code (section 5358, Wilson's Revised and Annotated Statutes of 1903), provides: "The indictment must be direct and certain as regards: First. The party charged. Second. The offense charged. Third. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense."

The statute just quoted is in consonance with the common law. It seems a well-established rule of criminal pleading that the exceptions contained in a statutory definition of an offense must be ²⁹⁰ negated in an indictment or informa-

tion. In other words, it must appear from the indictment or information that the person charged with a statutory crime, or a crime which is not *malum in se*, but merely *malum prohibitum*, which contains a clause exempting certain designated classes, is not included in such excepted class. This rule is founded upon the general principle that the information must contain a statement of those facts which constitute an offense, under the statute defining such offense.

Justice Clifford, in delivering the opinion of the court in the case of *United States v. Cook*, found in 84 U. S. 168, 21 L. ed. 538, lays down the following rule: "(1) Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that it cannot be accurately and clearly described if the exception is omitted, an indictment founded upon the statute must allege enough to show that the accused is not within the exception. (2) Where the exception is not incorporated with the clause defining the offense, nor connected with it in any manner by words or reference, it is not a constituent part of the offense, but is a matter of defense, and must be pleaded or given in evidence by the accused."

Another general rule that seems well settled by the authorities is this: That where a statute defining an offense contains an exception in the enacting clause which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment or information founded upon the statute must allege enough to show that the accused is not within the exception; but, on the other hand, if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense, and must be shown by the accused. We are therefore confronted with the proposition: Does or does not ²⁹¹ the information in the case at bar define and charge a crime under the statute creating the offense, and does the information fully inform and point out to the accused the offense which he is called upon to defend, and is it sufficiently definite and certain?

The question under consideration in this case is not free from diversity of authorities throughout the states. To harmonize some of the decisions would be difficult. In our examination we have carefully read all the cases cited in the briefs by both parties, together with such additional cases as we were able to find. We find the cases decided by the su-

preme court of the states of Kansas, New Hampshire, Indiana, and Massachusetts practically agree upon the proposition: That if there be any exception contained in the same clause of the act which creates the offense, the indictment or information must show negatively that the defendant, or the subject of the indictment or information, does not arise within the exception. If, however, the exception or proviso be in a subsequent clause or statute, or, although in the same clause, yet, if it be not incorporated in the enacting clause by any words of reference, it is in that case matter of defense for the other party, and need not be negatived in the pleading. In the states named it is well settled that an information which charges that the defendant sold intoxicating liquor without taking out and then having a license, as provided by the statutes, such information should negative the fact that the accused did have such license; citing *State v. Thompson*, 2 Kan. 432; *State v. Pittman*, 10 Kan. 593; *State v. Pitzer*, 23 Kan. 250; *Howe v. State*, 10 Ind. 423; *Vogel v. State*, 31 Ind. 64; *Commonwealth v. Thurlow*, 24 Pick. (Mass.) 374; *Commonwealth v. Byrnes*, 126 Mass. 248; *Wendt v. State*, 32 Neb. 182, 49 N. W. 351; *State v. Ball*, 27 Neb. 601, 43 N. W. 398.

The New Hampshire cases cited by the accused differ to some extent from the doctrine laid down in the cases just cited. We find in the case of *State v. Abbott*, 31 N. H. 434, the court held: "Where the defendant was indicted for selling spirituous liquors, contrary to the statute, which provided that if any person, not being licensed, shall sell any spirituous liquor, wine, etc., he ²⁹² shall, on conviction, be fined, etc., and the exception was taken that the indictment was bad for not averring that the defendant 'willfully' sold, held that the offense consisted in the sale without license, and that the term 'willfully' not being contained in the statute, it was not necessary to be averred in the indictment. Where exceptions form a part of the enacting clause of a criminal statute, it is necessary to negative them in the indictment, in order that the description of the crime may, in all respects, correspond with the statute. But where the exceptions are contained in separate clauses or provisions of the statute, they may be omitted in the indictment, and may be shown by the defendant as matters of defense": Citing *State v. McGlynn*, 34 N. H. 422; *State v. Savage*, 48 N. H. 484.

It will be observed that the cases just cited are all in states where the sale of intoxicating liquor is lawful when made by a person holding a license authorizing traffic in, and the sale of, intoxicating liquors, and that the gist of the offense consists of a violation of the statutes making a license necessary before a lawful sale could be made. Therefore, we believe the cases do not offer controlling authority upon a state that does not license the sale of intoxicating liquor, and therefore are

not applicable to the case at bar. The state of Oklahoma, by the passage of the Billups law, makes it unlawful, except as provided in the clauses of the Billups law subsequent to the enacting clause, to sell intoxicating liquors at all.

Another class of cases is decided in states where the manufacture of intoxicating liquors is declared unlawful by all persons, except such as are duly appointed agents or officials of the state for the sale of such liquors. These cases hold that it is necessary, where an indictment charges the unlawful manufacture of liquor, that it must negative the manufacture of liquor except as authorized by the state authority; that the information must aver that the person charged is not a person authorized by state authority to manufacture intoxicating liquor. This doctrine is held in the following cases: *Davis v. State*, 39 Ala. 521; *State v. Savage*, 48 N. H. 484; *State v. McGlynn*, 34 N. H. 422; *State v. Thompson*, 2 Kan. 432; *State v. Abbott*, 31 N. H. 434. It will be observed that in these cases the ²⁹³ crime consists of manufacturing liquor without authority of law. Manufacture of liquor in the absence of authority is the crime sought to be punished, and it is therefore a part of the description of the crime to allege in the indictment that such authority was not granted the accused.

Still another class of cases, namely, where the exception or proviso contained in the statute creating the offense complained of is not in express terms found in the enacting clause, but only by reference to some subsequent or prior clause, or to some other statute; as where the words, "except as hereinafter mentioned," or other words referring to matter out of the enacting clause, are used. The rule in these cases is that all exceptions, provisos, or modifications, whether applying to the offense or to the persons which are incorporated in the enacting clause, should be negated. Obviously, if the exception in the enacting clause is a part of the description, and is an essential ingredient of the offense sought to be prosecuted by information or indictment, such exception should be pleaded, as otherwise the indictment would not present the actual statutory accusation, and would be defective for want of clearness and certainty.

This brings us to a consideration of the cases sustaining the doctrine last named, prominent among which is the case of *United States v. Cook*, 84 U. S. 168, 21 L. ed. 538, in which the court approves the early cases on this subject. Justice Clifford, writing for the court, says: First syllabus: "Where a statute defining an offense contains an exception in the enacting clause of the statute which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, an indictment found upon the statute must

allege enough to show that the accused is not within the exception."

Second syllabus: "Where the exception is not incorporated with the clause defining the offense, nor connected with it in any manner by words of reference, it is not a constituent part of the offense, but is a ²⁹⁴ matter of defense, and must be pleaded or given in evidence by the accused."

Another very instructive case in point is that of Territory v. Scott, 2 Dak. 212, 6 N. W. 435. In this case Scott was prosecuted on an indictment charging him, under the statute of said territory, with setting fire to a prairie. The statute in question being in three sections (Rev. Codes 1877, p. 803): Section 1 provides: "That if any person or persons shall set or cause to be set on fire any woods, marsh, or prairie, or any grass or stubble lands in the months of September, October, November, December, January, February, March, April, May or June, except as hereinafter provided, such person or persons shall be deemed guilty of a misdemeanor."

Second section provides: "That for the purposes of destroying any grass or stubble that may be on any piece of land at the time any person or persons commence to break or plow the same, it shall be lawful for such person or persons to set the same on fire at any time in the year: Provided, that at the time of setting such grass or stubble on fire there shall be a strip of land well plowed or burned over at least fifty feet in width, completely encompassing the place where such fire is set."

Third section provides: "That if any fire set as provided in section 2 of this act, should, by accident, and without any fault or neglect of the person or persons setting the same, get beyond his or their control, such person or persons shall be liable, as provided by section 1 of this act, for all damages done by said fire, and not otherwise. But if such fire should by negligence, carelessness, or be intentionally permitted to spread beyond the bounds of said strip of land mentioned in section 2, then the person or persons setting such fire shall be liable, both civilly and criminally, as provided in section 1 of the act."

The indictment in this case charges that Scott, on a certain day in the month of October, did willfully and unlawfully set fire to a certain stubble land, contrary to the statute, etc. To this indictment defendant demurred, claiming that the fact stated herein did not constitute a public offense, because it charges the defendant ²⁹⁵ with having willfully set on fire certain prairie and stubble land, but does not charge that said fire was set without having a strip of land well plowed or burned over at least fifty feet in width completely encompassing the place where the fire was set. The demurrer was overruled; defendant convicted and sentenced. Justice Kidder

said: "If there is an exception in the enacting clause, the party must negative the exception, and state in the indictment that the defendant is not within it; but if there be an exception in a subsequent clause or a subsequent section of the statute, it is a matter of defense, and is to be shown by the other party. The rule is founded on the general principle that the indictment must contain the statement of those facts which constitute an offense under the statute. A *prima facie* case must be stated; and it is for the other party, for whom matter of excuse exists, to bring it forward in his defense. In saying that an exception must be negated when made in the enacting clause, reference is not made to sections of the statute as they are divided in the act; nor is it meant that, because the exceptions are contained in the section containing the enactment, it must for that reason be negated. That is not the meaning of the rule. The question is whether the exception is so incorporated with, and becomes a part of, the enactment as to constitute a part of the definition or description of the offense; for it is immaterial whether the exception or proviso be contained in the enacting clause or section, or be introduced in a different manner. It is the nature of the exception, and not its location, which determines the question. Neither does the question depend upon any distinction between the words 'provided' or 'except' as they may be used in the statute."

Referring to the case of *United States v. Cook*, 84 U. S. 168, 21 L. ed. 538, this learned justice says: "In the more recent case of *United States v. Cook* this question is elaborately discussed, and all the leading cases bearing upon the question under discussion from *Jones v. Axen*, 1 *Ld. Raym.* 120, down, were examined and commented upon by the learned justice who delivered the opinion; and, in our judgment, it is decisive of the question under consideration."

In applying the rule laid down in *United States v. Cook*, 84 U. S. 168, 21 L. ed. 538, said learned justice further says: 290 "To illustrate: The offense in section 1 of the code, *supra*, is clearly defined, and it is so entirely separable from the exception in section 2 that all the ingredients constituting it may be accurately stated without reference to the exception; i. e., if any person shall set on fire any prairie lands in either of the months in the year (except July and August), he shall be deemed guilty. This is simple and easy of comprehension without reference to matters *dehors*. The second is a substantive section; i. e., any person, at the time he desires to break his land for the purpose of destroying the stubble thereon, may set the same on fire any time in the year, provided he shall then have fifty feet in width plowed or burned over encompassing the place where the fire is set. Section 3 is independent, except it refers to sections 2 and 1 as follows: If

the fire set as provided in section 2 should by negligence, etc., be permitted to spread beyond the bounds of the plowed or burned strip, then the person setting the fire shall be liable criminally as in section 1. To illustrate, further, the mode of procedure in the trial of a prosecution like the one at bar: The defendant is arraigned and pleads not guilty to the indictment. The prosecution introduces evidence which tends to prove the allegations therein. The defendant defends, against such proof, that at the time he set the fire he had some stubble land he was desirous of breaking, and, that he might lawfully set the fire, he burned over a strip of land, at least fifty feet in width, completely encompassing the place where the fire was set. The prosecution replies to this that the defendant intentionally, or by negligence or carelessness permitted the fire to spread beyond the bounds of such strip."

The indictment in this case was held sufficient, and the judgment in the court below affirmed.

To epitomize the leading and well-considered cases, the general rule can well be stated to be that, when the subject of any exception is found in the enacting or prohibitory clause, it must be excluded by averment in the information; but if it be found in a separate substantive clause, or in a subsequent statute, and is not an essential part of the description of the offense, it is matter of defense, and need not be negatived. The above doctrine is fully sustained by the supreme court of the United States in the cases above cited, and in *United States v. Clarke* (D. C.), 38 ²⁰⁷ Fed. 500; *United States v. Felderwald*, 13 Saw. 513, 36 Fed. 490; *United States v. McCormick*, 1 Cranch C. C. 593, Fed. Cas. No. 15,663; and in various states in *Mosby v. State*, 98 Ala. 50, 13 South. 148; *Davis v. State*, 39 Ala. 521; *Matthews v. State*, 24 Ark. 494; *Bone v. State*, 18 Ark. 109; *Brittin v. State*, 10 Ark. 299; *State v. Powers*, 25 Conn. 48; *Williams v. State*, 89 Ga. 483, 15 S. E. 552; *Metzker v. People*, 14 Ill. 101, and cases therein cited; *State v. Kimmerling*, 124 Ind. 382, 24 N. E. 722, and cases cited; *State v. Williams*, 20 Iowa, 98; *Commonwealth v. McClanahan*, 2 Met. (Ky.) 8; *State v. Lyons*, 3 La. Ann. 154; *State v. Gurney*, 37 Me. 149; *Commonwealth v. Maxwell*, 2 Pick. (Mass.) 139; *People v. Decarie*, 80 Mich. 578, 45 N. W. 491; *State v. Doerring*, 194 Mo. 398, 92 S. W. 489, and many cases therein cited; *State v. Price*, 71 N. J. L. 249, 58 Atl. 1015; *People v. Stedeker*, 175 N. Y. 57, 67 N. E. 132; *State v. Pool*, 106 N. C. 698, 10 S. E. 1033; *State v. Connor*, 142 N. C. 700, 55 S. E. 787; *Seville v. State*, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516; *Hirn v. State*, 1 Ohio St. 15; *Billigheimer v. State*, 32 Ohio St. 435; *State v. Paige*, 78 Vt. 236, 62 Atl. 1017, 6 Ann. Cas. 725; *State v. Norton*, 45 Vt. 258.

In the last-cited case Justice Boyce says: "If the exception is distinct from the enacting clause, or from that part of the

statute which creates and describes the offense, it becomes matter of defense, and it need not be negatived that the respondent is within the exception."

It will be seen from reading the "Billups Act" that there is no exception in the enacting clause which is descriptive of the offense charged against the accused in this case, or the omission of which would render the information insufficient to advise the accused of the exact crime he is called upon to defend. Hence the last-named class of cases, as shown by the authorities cited, apply with much force to the case at bar. The information charges that the accused "did sell Stanley Seymour one pint of whisky, contrary to the form of the statutes, in such cases made and provided, and against the peace and dignity of the state."

Counsel for accused, in support of their contention, cite the ²⁹⁸ cases of *Young v. Territory*, 8 Okl. 525, 58 Pac. 724, and *Parker v. Territory*, 9 Okl. 109, 59 Pac. 9, both rape cases. These cases hold that an indictment for rape, under the statutes of the territory of Oklahoma, must contain the averment "that the female on whom the crime was committed was not the wife of the person accused of the crime." Section 2251, Wilson's Revised and Annotated Statutes of 1903, defining the crime of rape, provides: "Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator. . . . " It requires no argument to see that the exception or proviso is clearly an ingredient part of the offense charged. The same is true of most of the cases cited by the accused. Applying the great weight of authorities to the information in the case at bar, we find the enacting clause of the statute, upon which the prosecution in this case is based, does not contain an exception or proviso which is either descriptive of the offense charged, or an ingredient part thereof. There is, therefore, no necessity for negating the same, and the contention of the accused is not sustained.

Counsel for the accused further contend and urge as a second ground of demurrer that the Billups law is violative of section 57, article 5, of the constitution of this state, and therefore void. Section 57 reads as follows: "The powers of the initiative and referendum reserved to the people by this constitution for the state at large, are hereby further reserved to the legal voters of every county and district therein, as to all local legislation, or action, in the administration of county and district government in and for their respective counties and districts."

The act of Congress enabling the people of the territory of Oklahoma and of the Indian Territory to form a constitution and state government, and be admitted into the Union, etc., provides that the manufacture, sale, barter, giving away, or otherwise furnishing intoxicating liquors within those parts of

said proposed state known as the Indian Territory and the Osage Indian Reservation, etc., is prohibited for a period of twenty-one years from the date of admission into the Union, and for the violation thereof ²⁰⁰ prescribes a penalty of not less than fifty dollars fine, and imprisonment for not less than thirty days for each offense: Act June 16, 1906, c. 3335: 34 Stat. 267. Said act also provides that the legislature of the state may provide by law for dispensing intoxicating liquors for medicinal purposes, etc. The enabling act also authorizes the constitutional convention to submit to the people of the proposed new state, for their ratification or rejection by ballot, the proposition whether or not the prohibition of the manufacture, sale, etc., of intoxicating liquors should be state-wide. Such proposition was submitted to the people of said proposed state, and by them ratified, thereby extending the prohibitory proposition over the entire state, and the same is now in full force throughout the entire state. The powers of the initiative and referendum reserved to the people under section 57, Bunn's Constitution, was not intended to delegate to the people of any county or district within the state the right to legislate by initiative and referendum upon the subject of the manufacture, sale, etc., of intoxicating liquors therein. Said section was intended to vest in the people of every county and district the right of the initiative and referendum provisions of the constitution upon all questions of a local nature only. Therefore, it does not lie within the power of any county or district in the state to contravene the provisions of the constitution applicable to the prohibition of the sale of intoxicating liquors within such county or district. This court is clearly of the opinion that the so-called "Billups Law," taken as a whole, is not violative of any of the provisions of the constitution of the state, and for that reason the second ground of demurrer in this case is not well taken.

This court does not want to be understood as holding that the information in this case is a model of perfection, by any means. On the contrary, it is loosely drawn and imperfect, and this court dislikes very much to in any way encourage careless pleading; on the contrary, it is the desire that prosecuting officers, in the framing of informations and indictments, should exercise the greatest care, and incorporate therein all the legal requirements, ³⁰⁰ and to the extent that they do so they will reflect their legal learning and ability as prosecutors. The information in the case at bar does inform the accused of the offense with which he is charged with sufficient particularity to enable him to prepare for his trial. It also defines the offense to such an extent that, if the accused is convicted or acquitted, he will be able to defend himself, in case he be indicted again for the same offense, by pleading the record of such conviction or acquittal. Therefore, as

against demurrer, we are compelled to hold the information sufficient. Bearing in mind that the statute of this state prohibits this court from reversing the judgment of the court below for technical reasons, we do not go to the extent of abridging the substantial rights of the accused.

Failing to find in the record that the substantial rights of the accused in the case at bar have been disregarded, the judgment of the court below is affirmed, and the sheriff of Creek county is ordered to execute the judgment of the court below without unnecessary delay.

Furman, Presiding Judge, and Doyle, Judge, concur.

An Indictment Following the Language of the Statute is generally regarded as sufficient, unless the statute does not contain all the essential elements of the crime: Reed v. Territory, 1 Okl. Cr. 481, 129 Am. St. Rep. 861; Caldwell v. State, 73 Ark. 139, 108 Am. St. Rep. 28; State v. Doran, 99 Me. 329, 105 Am. St. Rep. 278; State v. Williamson, 22 Utah, 248, 83 Am. St. Rep. 780; Kelly v. People, 192 Ill. 119, 85 Am. St. Rep. 323, and see note to State v. Campbell, 94 Am. Dec. 253.

In Charging a Statutory Crime, Only Such Exceptions and Provisos Need be Negated as are descriptive of the offense, without regard to their position or location in the statute: Johnson v. People, 33 Colo. 224, 108 Am. St. Rep. 85.

If a Statute Defining an Offense Contains an Exception in its enacting clause which is so incorporated with the language defining the offense that the ingredients thereof cannot be accurately and clearly described if the exception is omitted, an indictment founded upon the statute must allege enough to show that the accused is not within the exception. If the language clearly defining the offense is entirely separable from the exception, the indictment may omit any reference to the exception: State v. Williamson, 22 Utah, 248, 83 Am. St. Rep. 780. In alleging a statutory offense only such exceptions and provisos need be negated as are descriptive of the offense: State v. Bouknight, 55 S. C. 353, 74 Am. St. Rep. 751; Poole v. People, 24 Colo. 510, 65 Am. St. Rep. 245. An indictment under one section of a statute need not negative an exception contained in a subsequent section: State v. Shiflett, 20 Mo. 415, 64 Am. Dec. 190. Where an offense is created by statute and there is an exception in the enacting clause, an indictment must negative the exception; but if there is a proviso therein which furnishes matter of excuse for the defendant, the indictment need not negative it, but he must plead it: State v. Godfrey, 24 Me. 232, 41 Am. Dec. 382.

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PRICE v. UNITED STATES.

[2 Okl. Cr. 449, 101 Pac. 1036.]

HOMICIDE—Expert Evidence as to Manner of Receiving Wound.—It is error to allow physicians to testify to their opinions, as experts, as to the position of the arm of the deceased at the time that he received the fatal wound, which opinions are based upon the range of the bullet after it entered the body of the deceased. (p. 932.)

INSTRUCTIONS—Weight of Evidence.—It is Error for the court to single the defendant out and instruct the jury upon the weight of his evidence. (p. 934.)

APPEAL—Briefs.—Counsel for the Defendant in their briefs must clearly present the grounds upon which they rely for a reversal. (p. 934.)

(Syllabi by the court.)

Ralls Bros., for the appellant.

Charles West, attorney general, and E. G. Spilman, assistant attorney general, for the state.

449 FURMAN, P. J. On November 13, 1906, Dan Price (hereinafter called the defendant) was indicted by the grand jury of the central district of the United States court for the Indian Territory, sitting at Atoka, for the murder of one Naith Dillingham, alleged to have been committed on the third day of July, 1906. The defendant was arraigned, and pleaded not guilty. On the twenty-sixth day of April, 1907, the defendant was placed on trial upon said indictment, and was by the jury found guilty of the offense of manslaughter. A motion for a new trial was made by the defendant, and was overruled by the court, to which the defendant reserved an exception. Sentence was then pronounced by the court upon the verdict of the jury. Defendant prayed an appeal, as provided by law. An appeal was taken to the United States court of appeals for the Indian Territory. Upon the incoming of statehood this case was **450** transferred, as directed by law, to the supreme court of the state of Oklahoma; and, upon the creation of the criminal court of appeals, the case was transferred to this court, and is now regularly before us for decision.

For a proper understanding of one of the questions involved, a brief statement of the evidence is necessary. On the evening of the homicide the deceased received a box containing several bottles of whisky and became intoxicated. The undisputed fact is that the deceased fired a shot in his own home, which caused the wife of deceased to leave home in great fear of her life. She remained at the home of a neighbor until after her husband had been shot by the defendant, and only returned home when she became satisfied that he was power-

less to harm her. The defendant was in the employ of the deceased. There had been no previous trouble or ill-will between the defendant and the deceased. To make a long story short, the evidence tended to show that, after the wife of the deceased had fled from her home, the deceased with two bottles of whisky in his left hand and a pistol in his right hand, went to where the defendant was at the barn, and abused and threatened the defendant and assaulted him with the pistol. The defendant procured a pistol, and returned to the discharge of his duties in caring for the stock of the deceased. He states that he had drawn a bucket of water, and was going to give it to an animal of the deceased, when the deceased approached him and attempted to shoot him, and snapped his pistol at the defendant, and that he shot the deceased in self-defense. When others came to where the deceased had fallen, they found two bottles of whisky on the ground by him, and the pistol of deceased was within a few inches of his right hand. There were two freshly fired cartridges in the pistol, and one loaded cartridge, which indicated it had been snapped in an attempt to fire it. The state attempted to prove that the statement made by the defendant that the deceased had attempted to shoot him at the time of the homicide was false, by the introduction of the testimony of two physicians as to their opinion as to the position of the arm of the ⁴⁵¹ deceased at the time he received the fatal wound, based upon the range of the bullet after it entered his body. The killing occurred after dark, and no witness except the defendant testified to the position of either party at the time.

1. The second and third assignments of error relate to the same subject matter, and are as follows: "(2) The court erred in overruling the objections of the defendant to the evidence of the witness Dr. G. R. Ellis, who was a witness for the prosecution, and which evidence was offered by the prosecution and permitted to go to the jury, and was as follows, to wit: 'Q. What would it indicate when a probe could not be introduced into the wound with the arm in that position, but would be with the arm lying against the body—what would that indicate at the time the wound was inflicted? A. That would indicate that the arm was down to the side when the wound was inflicted. To which question the defendant objected, for the reason that said question called for the opinion of the doctor as to matters to be determined by the jury, and which matters the jury were as entitled to determine as the doctor.' (3) The court erred in overruling the objections of the defendant to the evidence of E. L. Mead, a witness for the prosecution, which evidence was offered by the prosecution, and was permitted to go to the jury, and was as follows, to wit: 'Q. If a probe would not enter when the arm was in this position, horizontal to the body, but would enter when the arm

was lying against the body, what would that indicate as to the position of the arm when the wound was inflicted? A. The arm would necessarily be down, it would have to be down. Q. It would necessarily be down? A. Yes, sir; it would have to be down. To each of which questions the defendant objected, for the reason that the said question called for a matter of opinion that was exclusively for the jury to determine.' "

⁴⁵² Medical science does not undertake to decide what range a bullet, fired from a gun or pistol, will take after coming in contact with, or entering, the human body. The reports of army surgeons and of army hospitals prove that there is no rule upon this subject. They present the most astonishing, contradictory, and apparently impossible results. Therefore, it has been uniformly held by the courts that this is not a proper subject for expert evidence. From this it necessarily follows that a physician should not be permitted to testify as an expert to the position of the body of the deceased when the wound was received, based upon the range of the bullet after it entered his body. This is a matter of speculation, with reference to which the opinion of one man is as good as that of another. It was entirely proper for the physician to describe fully the location, character and range of the wound, but it was error to permit the physicians to go further and give their opinion as to the position of the arm of the deceased at the time the fatal wound was received. But it is not every error in the admission or rejection of testimony which constitutes ground for the reversal of a conviction. For our views on this question, where the improper admission of expert evidence was held to constitute harmless error, see *Byers v. Territory*, 1 Okl. Cr. 677, 100 Pac. 261, 103 Pac. 532.

The pivotal question in this case was the position of the arm of the deceased at the time that the defendant fired the fatal shot. If it was hanging down by his side, then the jury would be authorized to believe that the defendant has testified falsely, as to the most material point in his defense, and, believing this, they would be bound to convict him. The issue was clear-cut and decisive of the case.

We have a case by the supreme court of California (*People v. Smith*, 93 Cal. 445, 29 Pac. 64), which so clearly expresses our views as to the injurious effects of this testimony, that we shall quote and adopt it in full. In that case the court, speaking through Justice De Haven, said:

"The defendant was charged with the crime of murder, and ⁴⁵³ was convicted of manslaughter. The defendant was himself shot by the deceased during the difficulty which resulted in the homicide, and it was a contested question upon the trial as to whether the defendant or the deceased fired first, the contention of the defendant being that he acted in self-defense,

and did not shoot until after he himself was wounded; and, in the determination of this question, it became material to ascertain the position in which the defendant was at the time when he was shot. Upon the trial Dr. Hayden, a physician and surgeon, was called as a witness on behalf of the people, and was asked: 'Will you state, if you can, from your examination of this man's arm and your familiarity with gunshot wounds, if you are familiar with them, in what position, in your judgment, this man's arm was at the time that wound was received?' The question was objected to by defendant as incompetent, which objection was overruled, and the witness in giving his opinion stated that the defendant when shot was in one of two positions: First, standing with his side toward the discharged weapon, with the forearm flexed almost to a right angle to the upper arm, and the arm and elbow curved in front of, and well toward, the right side of the trunk, the trunk being inclined to the right of a perpendicular; or, second, 'the arm may have been only partially flexed in the upper arm, and hanging at the side, the wounded party having his back toward the party firing the shot.' But the general tenor of his testimony was to the effect that it was his opinion rather that the wound was received while the defendant was in this latter position. The court erred in the admission of this evidence. The subject matter of the inquiry was not one in relation to which the opinion of an expert can be properly received. The position of the wound being given, and the course taken by the bullet known, the jury was fully as competent to determine the relative positions of the parties to the difficulty as was the witness: *Kennedy v. People*, 39 N. Y. 245; *Cooper v. State*, 23 Tex. 331; *People v. Westlake*, 62 Cal. 303.

"Nor can we agree with the attorney general and associate counsel for the people that the admission of this incompetent evidence was a harmless error, and therefore without prejudice to the appellant. It went to sustain the theory of the people in relation to the pivotal point in the case and at the same time to discredit the testimony of the defendant. The defendant testified, in effect, that he did not draw his weapon or fire until after he had been shot by the deceased; that after firing the first time he ⁴⁵⁴ continued to face the deceased, at the same time backing to and against the door, and, while thus backing, he shot at the deceased again. On the other hand, the theory of the prosecution seems to have been that the defendant fired the first shot, and then turned and ran, and, while running toward the door, was shot by the deceased; and, in this connection, Brown, a witness for the people, who was present and engaged in the difficulty, and was himself knocked down by the defendant, testified: 'I don't know who drew his pistol first. I know that during the shooting Mr. Smith

started to run, and ran fast. Q. Did he turn his back, or back out? A. Turned his back.' If the testimony of this witness is true, then the deceased must have received his mortal wound before the defendant turned his back upon him and started to run away; and, if the defendant was shot, as Dr. Hayden seems to think more probable, while his arm was hanging down by his side, and his back turned toward the deceased, the inference would be that he was himself shot while running away, in the manner described by the witness Brown, and that the testimony of the defendant that he did not fire his weapon until after he was himself shot was therefore untrue. In this state of the case we do not think it can be said with any certainty that this incompetent evidence did not have any influence upon the minds of the jurors in reaching a verdict; and, for the error in admitting it, the judgment must be reversed. Judgment and order reversed."

We therefore hold that the admission of the testimony complained of under the second and third assignments of error was injurious to the defendant, and that for this cause the conviction of defendant was illegal.

2. There are fifteen assignments of error, but the second and third assignments are the only ones so presented in the brief as to call for the judgment of this court. We repeat what we have often heretofore said with reference to the manner of presenting questions to this court for review: Counsel must clearly point out the alleged errors upon which they rely, and must give this court the benefit of the arguments and authorities which support their contentions, or this court will treat their assignments as abandoned unless they relate to fundamental questions. But in view of the fact that this case will probably be ⁴⁵⁵ tried again, we desire to say that we do not approve the action of the trial court in singling out the defendant as a witness, and charging upon the weight of his evidence. For our views upon this question, see *Green v. United States*, 2 Okl. Cr. 55, 101 Pac. 112; *Fletcher v. State*, 2 Okl. Cr. 300, 101 Pac. 599, 23 L. R. A., N. S., 581; *Banks v. State*, 2 Okl. Cr. 339, 101 Pac. 610.

For error in permitting experts to give their opinion as to the position of the arm of the deceased at the time that the fatal shot was fired, the conviction of the defendant is set aside, and the cause is remanded for a new trial.

Baker and Doyle, Judges, concur.

Expert Opinion as to the Relative Attitude of the Deceased and the instrument or person inflicting the wound is properly rejected; it relates to an inference of fact to be drawn by the jury: *Dumas v. State*, 159 Ala. 42, 133 Am. St. Rep. 17. Where the question is whether a person came to his death through murder or suicide, a witness is not competent to give his opinion or conclusion from the condition of the snow in which the body was found lying, the condition

of the body, and the surroundings, as to whether the body fell or was placed in such position, or whether a man shot while in a certain position could have fallen in the position in which the body was found: *Furbush v. Maryland Casualty Co.*, 131 Mich. 234, 100 Am. St. Rep. 605.

The Subjects of Expert Testimony and Its Admissibility are considered in the note to *Hammond v. Woodman*, 66 Am. Dec. 228.

Hypothetical Questions which may be put to an expert witness are discussed in the note to *Quinn v. Higgins*, 53 Am. Rep. 307.

Instructions—Weight of Evidence.—It is not proper for a court in instructing a jury to call attention to an isolated fact, and by making it prominent suggest to the jury that it is of greater significance and weight than other unmentioned facts in the case which are of no less importance: *State v. Tawney*, 81 Kan. 162, 135 Am. St. Rep. 355; *First National Bank v. Union Trust Co.*, 158 Mich. 94, 133 Am. St. Rep. 362; *Strause v. Richmond Woodworking Co.*, 109 Va. 724, 132 Am. St. Rep. 937. Any language, gestures, remarks, facial expressions or tones of voice which might seem even to hint at what the court thinks of the merits of the case should always be avoided at a trial of issues before a jury: *State v. Bartlett*, 50 Or. 440, 126 Am. St. Rep. 751. Whatever may be the views entertained by the court as to the truth or falsity of evidence adduced, it is incumbent on it to charge the jury, by appropriate instructions, on the law applicable to every phase of the testimony adduced at the trial: *Tilmyer v. State*, 58 Tex. Cr. 582, 137 Am. St. Rep. 982; *Jones v. State*, 36 Tex. Cr. Rep. 492, 47 Am. St. Rep. 46.

SALTER v. STATE.

[2 Okl. Cr. 464, 102 Pac. 719.]

CONSTITUTIONAL LAW—Security of Personal Liberty.—In the constitution of Oklahoma, the utmost pains have been taken to preserve all the securities of individual liberty, and all provisions of the constitution designed to safeguard the liberty and security of the citizen should be liberally construed by the courts. (p. 946.)

CONSTITUTIONAL LAW—Presumption in Favor of Statutes. While it is the duty of the courts to uphold any statute enacted in the ordinary exercise of the legislative power, unless the constitutional objections to it are clear and indisputable, yet when it is proposed by a statute to deny, modify or diminish a right or immunity secured to the people by a clear and explicit constitutional provision, then the presumption is against the validity of the statute, and the courts should enforce the constitutional provision. (p. 947.)

INFORMATION—Verification on Information and Belief.—The constitution of the state of Oklahoma, being section 30 (Bunn's edition, section 39) of the Bill of Rights, provides that: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized." Therefore, a statute of Oklahoma territory, which provides that in misdemeanor cases a warrant may issue upon information, which has been verified only on information and belief, and without any other evidence, is repugnant

to the foregoing provision of the constitution, and is null and void. (p. 943.)

INFORMATION—Verification on Information and Belief.—A verification to an information, charging a misdemeanor and stating that affiant "declares that the statements set forth in the above information are true, as he is informed and verily believes," is nothing more than the expression of an opinion, and is not sufficient to justify the issuance of a warrant of arrest; and an information so verified is insufficient to support a judgment of conviction. (p. 944.)

INFORMATION—Necessity of Verification.—In Oklahoma an information charging a misdemeanor must be verified by oath of the prosecuting attorney, or by the oath or affirmation of some person competent to testify, presenting the facts to the magistrate, before a warrant for the party charged may issue. (p. 944.)

(Syllabi by the court.)

R. F. Turner and H. H. Brown, for the plaintiff in error.

Fred S. Caldwell, for the state.

⁴⁶⁵ **DOYLE, J.** The plaintiff in error, N. J. (Doc.) Salter (hereinafter designated defendant), was, at the January, 1908, term of the county court of Carter county, tried and convicted of violating a provision of the prohibition ordinance, and sentenced to pay a fine of one hundred dollars, and that he be imprisoned in the county jail of Carter county for a period of sixty days. This conviction was had on an information filed in the county court of Carter county by the county attorney of said county, on the twenty-sixth day of December, 1907, wherein defendant was charged with "unlawfully selling to one C. S. Holt certain intoxicating liquor, to wit, one pint of whisky for the price and sum of one dollar." The information was verified as follows, on information and belief, and the county attorney did not verify the same by his own oath:

"State of Oklahoma,
Carter County—ss.:

"J. H. Akers being duly sworn on oath declares that the statements set forth in the above information are true as he is informed and verily believes.

[Signed] "J. H. AKERS.

"Subscribed and sworn to before me this 26th day of December, 1907.

"I. R. MASON,
"County Judge."

On January 24, 1908, defendant waived arraignment, and ⁴⁶⁶ entered a plea of not guilty; the case was called for trial; defendant demanded a jury. C. S. Holt, being sworn, was called as the first witness for the state, whereupon defendant by his counsel interposed the following objection: "Now comes the defendant, and objects to the introduction of testimony in this case, for the reason that this complaint is not suffi-

ciently verified to put defendant upon trial." Which motion was overruled by the court, to which ruling defendant excepted. After hearing the evidence and receiving the instructions of the court, the jury retired, and returned their verdict, finding defendant guilty as charged. On January 25, 1908, defendant filed his motion for a new trial, which motion, omitting the formal parts, reads as follows:

"MOTION FOR NEW TRIAL.

"Now comes the defendant, Doc. Salter, and moves the court to grant him a new trial, for the reason that the information on which he was tried was not sufficiently verified in this: That it was not positively sworn to, same being sworn to on information and belief contrary to article 4 of the amendments of the Constitution of the United States, which reads as follows: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.' Also section 30 (Bunn's Ed. § 39) of the Constitution of the state of Oklahoma, which reads as follows: 'The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized.'

[Signed] "BROWN & TURNER,
Attorneys for Defendant."

On January 27, 1908, before judgment, defendant filed his motion in arrest of judgment, which motion set forth the same grounds that are set forth in defendant's motion for a new trial. The court overruled the motion for new trial; also the motion in arrest of judgment. Exceptions were taken to each ruling, ⁴⁶⁷ and the court pronounced judgment. On March 6, 1908, defendant's petition in error and case-made were filed in the supreme court. Upon the organization of the criminal court of appeals said cause was duly transferred, as by law provided, to this court. At the March term, said cause was submitted, and is now before this court for review.

This case involves an apparent incompatibility between that clause of the constitution contained in Bill of Rights, section 30 (Bunn's edition, section 39): "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; and no warrants shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized,"

and the proviso in that provision of Procedure, Criminal, section 5306 (Wilson's Revised and Annotated Statutes), which provides, in part, that: "All informations shall be verified by the oath of the prosecuting attorney, complainant or some other person: Provided, that when an information in any case is verified by the county attorney, it shall be sufficient if the verification be upon information and belief." The record shows that upon the information, verified only on information and belief, and without ⁴⁶⁸ any further or other evidence that an offense had been committed, or that the defendant was probably guilty of any violation of law, a warrant was issued out of the county court of Carter county, commanding the arrest of defendant, and that he be brought before the court to answer this information. When the state offered its proof, at the outset an objection was interposed, and after the verdict, and before judgment, the motions for a new trial and in arrest of judgment were made. The assignments of error are predicated upon the rulings of the court on the objection interposed and the two motions, and present but one proposition to be considered by the court.

The constitution of this state authorizes the prosecution of crimes by information, but with the following restrictions as to felonies: Section 17, Bill of Rights, declares: "No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination. Prosecutions may be instituted in courts not of record upon a duly verified complaint."

Our statutes provide (section 5239, Wilson's Revised and Annotated Statutes): "When an information, verified by oath or affirmation, is laid before a magistrate, of the commission of a public offense, he must, if satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, issue a warrant of arrest."

And section 5305, Wilson's Revised and Annotated Statutes: "If the offense be a misdemeanor punishable by a fine of more than one hundred dollars, or by imprisonment for more than thirty days, or by both fine and imprisonment, it shall be prosecuted by information."

The office of an information charging a misdemeanor under the criminal procedure of Oklahoma is not only to give the county court jurisdiction to issue the warrant of arrest, but it is also the pleading, on the part of the state, informing the defendant of what offense he is charged with, for the purpose of the trial. The question presented is, Does the verification of an information in ⁴⁶⁹ a misdemeanor case, on information and belief, furnish such probable cause and is it supported

by such an oath or affirmation as is required by section 30 of the Bill of Rights?

Before considering this constitutional provision of the Bill of Rights, which is almost identical with article 4 of the amendments to the constitution of the United States, the construction which has been given by the supreme court of the United States and the other federal courts to said article 4 will be pertinent and material in passing on the question raised in this case.

The first case in which there was any consideration of this constitutional amendment is *Ex parte Burford*, 3 Cranch, 448, 2 L. ed. 495. That great jurist, Chief Justice Marshall, speaking for the court in *arguendo*, said: "If the charge against him was malicious, or grounded on perjury, whom could he sue for the malicious prosecution, or whom could he indict for perjury?"

And he concludes that: "The judges of this court were unanimously of the opinion that the warrant of commitment was illegal, for want of some good cause certain, supported by oath."

In the case of *United States v. Tureaud*, 20 Fed. 621, Billings, Judge, says: "The affidavits, the sufficiency of which are to be determined, are identical, and are as follows:

" 'Geo. A. Dice, being duly sworn, says: All the statements and averments in the foregoing information are true, as he verily believes.

" 'GEO. A. DICE.

" 'Sworn to and subscribed before me this twentieth day of May, 1884.

" 'E. R. HUNT, U. S. Commissioner.'

"The point, and the sole point, to be passed upon is whether this affidavit furnishes such a 'probable cause,' and is supported by such an oath, as is required by the fourth amendment of the constitution. It is true it is an affidavit subjoined to and made the basis of an information. It is also true that under the usages of the government of Great Britain this information belongs to the class of formal accusations which could be made by the king in his courts without any evidence, and against all evidence. But the ⁴⁷⁰ adoption of the fourth amendment affected all kinds and modes of prosecution for crimes or offenses; for there can be no legal pursuit of accused persons without apprehension. All prosecutions require warrants. An information, a suggestion of a criminal charge to a court, is a vain thing, unless it is followed by a *capias*. The procedure by information, therefore, after it was acted upon by this amendment, lost its prerogative function or quality. It could not thereafter be the vehicle of preferring any arbitrary accusation—not by the king, because we have in the department of criminal law no successor to him, so far as he

represented a right to institute, if it pleased him, unsupported incriminations; nor by the district attorney, nor by any other officer of the United States, for the constitution has said, in effect, that in no way nor manner shall magistrates or courts issue warrants, except upon proof, which are to be upon oath and make probable excuse. See *State v. Mitchell*, 1 Bay (S. C.), 267, and 1 Op. Attys. Gen. 229, where Mr. Attorney General Wirt holds that even the President is controlled by this amendment. All arbitrary informations, all informations which spring into existence simply because the king and his attorney elected to present them, indeed all informations, except those supported by proof upon oath, which constitute probable cause, by this constitutional provision were expunged from permissible procedure, and the learning about informations was left valuable only as showing what proofs were considered adequate, in cases where proofs had to be presented in order to have them acted upon by the judicial discretion or mind.

"The master of the crown, whose duties with regard to informations to be sustained by proofs corresponded with district attorneys of the United States in the courts of the Union, was required to produce to the court 'such legal evidence of the offense having been committed by the defendant as would warrant a grand jury in finding a true bill against the defendant; otherwise he will be left to his ordinary remedy by action or indictment': *Cole, Crim. Inf.*, marg. p. 15, 54 Law Library. This is the measure of proof which is held to be requisite by the courts of the United States under the fourth amendment: See *Ex parte Burford*, 1 Cranch C. C. 276, Fed. Cas. No. 2148. Cranch, J., whose dissenting opinion was adopted by the supreme court, said: 'It [the warrant] ought to have stated the names of the persons on whose testimony it was granted, and the nature ⁴⁷¹ of the testimony, so that this court may know what kind of ill-fame it was, and whether the justices have exercised their discretion properly.' When the case reached the supreme court (3 Cranch, 448, 2 L. ed. 495), 'the judges of that court were unanimously of opinion that the warrant of commitment was illegal for want of stating some good cause certain, supported by affidavit.'

"The rule which must govern this court, and all magistrates who authorize arrests under the constitution of the United States, as to the foundation for the issuance of warrants, is uniform, and is thus stated by Mr. Justice Bradley in the matter of a rule of court upon the subject (3 Wood, 502, Fed. Cas. No. 12,126): 'After an examination of the subject, we have come to the conclusion that such an affidavit does not meet the requirements of the constitution, which, by the fourth article of the amendments, declares that the right of the people to be secure in their persons, houses, papers, and ef-

facts against unreasonable searches and seizures shall not be violated, and that no warrants shall issue but upon probable cause, supported by oath or affirmation, describing the place to be searched and the persons to be seized. It is plain from this fundamental enunciation, as well as from the books of authority on criminal matters in the common law, that the probable cause referred to, and which must be supported by oath or affirmation, must be submitted to the committing magistrate himself, and not merely to an official accuser, so that he, the magistrate, may exercise his own judgment on the sufficiency of the ground for believing the accused person guilty; and this ground must amount to a probable cause of belief or suspicion of the party's guilt. In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit, or taken down by himself on a personal examination, exhibiting the facts on which the charge is based, and on which the belief or suspicion of guilt is founded.'

"The rule which was established was that the warrant should issue 'only upon probable cause, supported by oath or affirmation of the person making the charge, in which should be stated the facts within his own knowledge constituting the grounds of such belief or suspicion.' In New York the statute required the warrant to contain, in the very words of the fourth amendment, a recital of 'probable cause, supported by oath or affirmation.' In *Blythe v. Tompkins*, 2 Abb. Pr. (N. Y.) 468, Abb. N. Y. Dig., verbo, 'Arrest' (section 324), the warrant recited a complaint on ⁴⁷² oath by A and B that on or about a certain day, D, 'as the said witnesses had good reason to believe, and do believe,' committed the offense. The court held the warrant on its face void, and that 'the mere belief of witnesses was insufficient.' In *Vannatta v. State*, 31 Ind. 210, it was held that an information, in which the district attorney charges the offense, 'as he verily believes,' is bad on a motion to quash. In this last case the court, in effect, say that a verdict of guilty would not establish probable cause, for they say (page 211): 'A verdict that the defendant is guilty as charged would amount to nothing. It would only show that the district attorney believed that the offense had been committed.' The 'probable cause supported by oath or affirmation,' prescribed by the fundamental law of the United States, is, then, the oaths or affidavits of those persons who, of their own knowledge, depose to the facts which constitute the offense."

This question arose in *State v. Gleason*, 32 Kan. 245, 4 Pac. 363. The Criminal Code of Kansas contained a provision permitting county attorneys to verify complaints on information and belief. Chief Justice Horton, delivering the opinion of the court, in part says:

"Of course, it must be conceded that the constitution is the superior and paramount law, and that said paragraph 15 is declaratory of the fundamental rights of the citizen, and is intended to protect him in his liberty and property against the arbitrary action of those in authority. So long as this section is in force, the principles therein declared are to remain absolute and unchangeable rules of action and decision. The legislature cannot infringe thereon, and the courts must yield implicit obedience thereto. If no warrant shall issue but upon probable cause supported by oath or affirmation, the support must be something more than hearsay or belief. Where a person or officer states upon oath 'that the several allegations and facts set forth in the foregoing information are true, as he has been informed and verily believes,' he may have no knowledge of, or information upon, the subject, except mere hearsay, and yet he can conscientiously make such declaration: *Atchison v. Bartholow*, 4 Kan. 124. A complaint thus verified proves nothing. It does not state facts, but only the affiant's hearsay knowledge and belief. It is not a complaint, an information, or a declaration supported by an oath or ⁴⁷³affirmation: *Atchison v. Bartholow*, 4 Kan. 124; *Thompson v. Higginbotham*, 18 Kan. 42.

"At common law an information might be filed under the English practice against persons charged with misdemeanors, yet no rule was granted in regard to such cases, except upon such evidence as would, uncontradicted, make out the offense beyond a doubt: *Archibold on Criminal Pleadings*, 76; *Rex v. Willett*, 6 Term Rep. 204; *Rex v. Williamson*, 3 Barn. & Ald. 582; *Rex v. Bull*, 1 Wils. 93; *Rex v. Hilbers*, 2 Chit. 163; *Regina v. Baldwin*, 8 Ad. & E. 168; *Ex parte Williams*, cited 1 Har. Dig. 2268; 1 Chitty's Criminal Law, 856, 857.

"Said paragraph 15 is little more than the affirmation of the great constitutional doctrine of the common law. Article 4 of the amendments to the constitution of the United States is almost identical with paragraph 15; and Story says that: 'This provision seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property . . . and its introduction into the amendments was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants, almost upon the eve of the American Revolution': 2 Story on the Constitution, par. 1902. If a warrant, in the first instance, may issue upon mere hearsay or belief, then all the guards of the common law and of the Bill of Rights of our own constitution to protect the liberty and property of the citizen against arbitrary power are swept away. There is no necessity for going so far, and the constitution warrants no such conclusion. The expressions of the Bill of Rights are very plain and very comprehensive, and cannot be misunder-

stood. The oath or affirmation of a complaint or information upon which a defendant is arrested in the first instance must set forth that the allegations and facts therein contained are true."

In the case of *People v. Heffron*, 53 Mich. 527, 19 N. W. 170, it was held that: "An affidavit, alleging that the affiant has good reason to believe, and does believe, that a certain person has committed an offense, is not sufficient to authorize a justice to issue a warrant for his arrest. The affidavit must be upon knowledge, and not mere conjecture."

In the opinion of the court it is said: "This affidavit, within the repeated rulings of this court, as well as the most elementary principles of criminal law, is entirely ⁴⁷⁴ insufficient to confer any jurisdiction upon a justice to issue a warrant for the arrest of the respondent. The complaint must set up the facts constituting the offense on the knowledge of the person making the complaint, and if he does not know them, other witnesses must be examined who do know them; and no person can be arrested on the mere belief of the person making the complaint. The liberty of the citizen is not held upon so slender a tenure as that."

In the case of *Miller v. United States*, 8 Okl. 315, 57 Pac. 836, Justice McAttee, expressing the opinion of the court, in part says: "It has been repeatedly and invariably held by the supreme court of the United States, and by the supreme courts of the various states, so far as we have been able to find, that the provisions of guaranty that warrants shall not issue but upon probable cause, supported by oath or affirmation, is not meant to be an oath which is made upon information and belief, and that such an affidavit merely expresses the private opinion of the informant."

After citing numerous cases the learned justice concludes by saying on the authority of the fourth article of the amendments to the constitution of the United States, and of opinions of the supreme courts, which we have cited, together with the opinions which have been cited in those cases, that the legislature had no power to make this provision, and that an arrest upon a criminal information must be supported by an oath or affirmation from someone who knows of the matter charged, and not upon an oath which is no stronger than information and belief.

In the case of *Monroe v. State*, 137 Ala. 88, 34 South. 382, McClellan, Chief Justice, delivered the opinion of the court as follows: "The affirmation of reasons to believe, and belief, in a complaint, is not the equivalent of the affirmation of the existence of probable cause to believe and belief that a designated offense was committed by a party named. It is of easy conception that a person might have reasons to believe that a fact exists, and therefore believe that it does exist, without

having that probable cause for belief of its existence, the affirmation of which is the necessary basis, under the constitution and statute, for a warrant of arrest and prosecution to conviction. The complaint in this case affirms ⁴⁷⁵ only that the affiant 'has reason to believe, and does believe,' that the defendant committed a designated offense. It did not authorize the issuance of the warrant of arrest, it does not support the judgment of conviction, and no valid judgment can be rendered upon it. The judgment will therefore be reversed, and a judgment will be here entered discharging the defendant: *Johnson v. State*, 82 Ala. 29, 2 South. 466; *Miles v. State*, 94 Ala. 106, 11 South. 403; *Butler v. State*, 130 Ala. 127, 30 South. 338."

In the case of *Swart v. Kimball*, 43 Mich. 451, 5 N. W. 640, Justice Cooley characterizes this form of accusation as follows: "Charges are not verified by an affidavit that somebody is informed and believes they are true. This is mere evasion of the law. The most improbable stories may be believed of anyone, and the man most free from any reasonable suspicion of guilt is not safe if he holds his freedom at the mercy of any man, miles off, who will swear that he has been informed and believes in his guilt. It is easy to tell falsehoods, and those who are least fitted to judge of their credibility are generally the very persons who will believe them because they are told. But to substantiate charges within the meaning of the law evidence is required, and not merely suspicions or information or belief": See, also, *Mulkins v. United States*, 10 Okl. 288, 61 Pac. 925; *United States v. Polite*, 35 Fed. 58; *In re Dana*, 68 Fed. 886; *United States v. Collins*, 79 Fed. 65; *United States v. Sapinkow*, 90 Fed. 654; *Johnston v. United States*, 87 Fed. 187, 30 C. C. A. 612; *State v. Wimbush*, 9 S. C. 309; *People v. Heffron*, 53 Mich. 527, 19 N. W. 170; *Ex parte Dimmig*, 74 Cal. 164, 15 Pac. 619; *State v. Boulter*, 5 Wyo. 236, 39 Pac. 883; *Lippman v. People*, 175 Ill. 101, 51 N. E. 872.

In the light of the opinions herein quoted, it must be conceded, as a settled principle of American law, that a complaint or information, verified only on information and belief, is insufficient to authorize the issuance of a warrant of arrest; and a warrant so issued is without authority of law, and is wholly void. And a provision of the Criminal Code of Oklahoma territory that purports to authorize county attorneys to verify informations in misdemeanor cases on information and belief is repugnant to ⁴⁷⁶ the constitution of Oklahoma, and is in contravention of said section 30 of the Bill of Rights. The liberties of the people do not rest upon such uncertain and insecure basis as the belief, opinion, or surmise of a prosecuting officer that a misdemeanor has been committed. If so, it would be, in effect, a revival of the odious general warrants,

which placed the liberty of every man in the hands of every petty officer, and which long ago received judicial condemnation. To prevent their use and exercise of such arbitrary power, at the discretion of an officer, "it has not been deemed unwise to repeat in the state constitutions, as well as in the constitution of the United States, the principles already settled in the common law upon this vital point in civil liberty": Cooley on Constitutional Limitations, 364, and notes.

The fundamental requirements of the ordinance of the Bill of Rights are that the facts and circumstances tending to show criminality should be made to appear to a magistrate himself, by affidavits, complaint or information positively verified by oath or affirmation, and that the magistrate must himself find in the facts thus shown probable cause and reasonable belief that the defendant has committed an offense before a warrant of arrest shall issue. Section 5306, Wilson's Revised and Annotated Statutes, requires that: "All informations shall be verified by the oath of the prosecuting attorney, complainant, or some other person," etc. We do not wish, however, to be understood as holding that the information must be sworn to by persons having actual knowledge of the offense charged: See *Ex parte Flowers*, 2 Okl. Cr. 430, 101 Pac. 860. The evidence of probable cause, however, must be made upon oath or affirmation setting forth the facts constituting the offense, or facts and circumstances showing that a misdemeanor has been committed, and that there is probable cause for believing that the accused is guilty, and making it appear to the court that the complaint is based on something more than mere information, belief, or suspicion.

Counsel for the state in his brief contends that: "Under the constitution of this state the information filed ⁴⁷⁷ in this case, and upon which the defendant was prosecuted, is amply sufficient in all respects. Said information begins as follows: 'Comes now James H. Mathers, the duly qualified and acting county attorney in and for Carter county, state of Oklahoma. and on his official oath gives the county court in and for said Carter county and state of Oklahoma to know and be informed that the above-named Doc. Salters,' etc. An information of this sort filed by a prosecuting attorney of this state, requires no verification other than the official oath of the public prosecutor"; citing and quoting copiously from the case of *State v. Guglielmo*, 46 Or. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466, 7 Ann. Cas. 976; also, 22 Cyc. 281.

This contention is obviously without merit. The error of the argument is so self-evident as to require only a passing notice. Counsel overlooks the fact that by the adoption of the fourth amendment of the federal constitution the procedure by information lost is prerogative function or quality. It could not thereafter be the vehicle of preferring any arbitrary

accusation: *United States v. Tureaud*, 20 Fed. 621. The constitutional provision in the Bill of Rights is but a reiteration of this essential safeguard of the liberty and security of the citizen against the arbitrary action of those in authority. Such pernicious practice may suit the purpose of despotic power, but is alien to the pure atmosphere of political liberty and personal freedom. The constitution expressly requires a showing of cause before a warrant shall issue, and the constitutional safeguards for security and liberty cannot in this manner be abrogated or abridged. They must stand as adopted by the people.

Counsel for the state further contends that: "Without conceding that said information is on its face defective, in that it is not properly and sufficiently verified, I submit that defendant has waived any such defects or irregularities, in that he did not demur to the information at the proper time."

We cannot agree with counsel for the state; and while some authorities hold that, where a plea of not guilty is entered, and no objection is made to the insufficiency of the information, and competent evidence is received, supporting the averments thereof, the court acquires jurisdiction, however, in this case while the better ⁴⁷⁸ practice would have been to have filed a motion to quash, or a demurrer to the information, the objection as made was to a fundamental defect, and not to a matter of form, and was therefore sufficient: See *Mulkins v. United States*, 10 Okl. 288, 61 Pac. 925.

We have a constitution in which the utmost pains have been taken to preserve all the securities of individual liberty, and the courts cannot refuse obedience to its mandates. The legislature cannot alter, annul or avoid the constitutional safeguards of person and property set forth in the Bill of Rights. They are beyond the reach of any legislative enactment. And the argument that defendant's failure to comply with a statutory provision of procedure is a waiver of his constitutional rights is fallacious. Expediency has no force as an argument in a court of justice. To countenance such a theory would be to strike a fatal blow to constitutional safeguards. The abuses and perversions of sound principles which would creep into the law by yielding to arguments like these—to what is supposed to be necessary for the public good—cannot be better stated than it was by Justice Bradley in *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. Rep. 524, 29 L. ed. 746. After reviewing those famous landmarks of liberty and law, the *Wilkes* case, and the case of *Intick v. Farrington and Three Other King's Messengers*, 19 How. St. 1029, and the history of the fourth and fifth amendments to the constitution of the United States, the learned justice continues as follows: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their

first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half of their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than substance. It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon. Their motto should be 'obsta principiis.' "

⁴⁷⁹ And the same great and learned justice adds: "The freedom of thought, of speech, and of the press; the right to bear arms; exemptions from military dictations; security of the person and of the home; the right to speedy and public trial by jury; protection against oppressive bail and cruel punishment—are, together with exemption from self-crimination, the essential and inseparable features of English liberty. Each one of these features has been involved in the struggle above referred to in England within the century and a half immediately preceding the adoption of the constitution, and the contests were fresh in the memories and traditions of the people at that time."

It is sometimes said that, if the validity of a statute is merely doubtful, if its unconstitutionality is not plainly obvious, the courts should not be ready to defeat the action of the legislative branch of the government; and it must be conceded that, when such questions arise, under the ordinary exercise of the legislative power, it is plainly the duty of the courts not to dispense with the operation of laws formerly enacted, unless the constitutional objections are clear and indisputable. On the other hand, when the courts are confronted with a clear and explicit provision of the constitution, and when it is proposed to avoid or modify or alter the same by a legislative act, it is their plain duty to enforce the constitutional provision, unless it is clear that such legislative act does not infringe it in letter or spirit.

Section 2, article 24, of the schedule of the constitution of Oklahoma provides: "Sec. 2. All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma, until they expire by their own limitation or are altered or repealed by law."

The pertinent provision of the Criminal Code of Oklahoma territory has been by the supreme court of Oklahoma territory declared unconstitutional and void in the cases of *Miller v. United States*, 8 Okl. 315, 57 Pac. 836, and *Mulkins v. United States*, 10 Okl. 228, 61 Pac. 925, and under the fore-

going clause of said schedule we believe said provision to be clearly repugnant ⁴⁸⁰ to the constitution. It is manifestly in conflict with one of the plainest provisions of the Bill of Rights. It, therefore, did not become a part of the adopted laws of this state.

As the question presented is not only important in the determination of the present case, but is a very grave question of constitutional law, involving the right of personal liberty and the security of the citizen, we have reviewed and carefully considered all the adjudications on this question; and, believing that the conclusion reached in the case quoted is supported by reason and authority, we adhere to, and reaffirm, the legal principles thus announced. But we limit the decision to informations charging misdemeanors. Informations in felony cases are to be tested, as near as may be, by the statutes regulating indictments, and we do not wish to indicate in advance what we should hold in a case where the information charges a felony. It is our opinion, therefore, that the information did not authorize the issuance of the warrant of arrest. It does not support the judgment of conviction, and no valid judgment can be rendered upon it.

The judgment will therefore be reversed, and the cause remanded to the county court of Carter county, with directions to dismiss the case.

Baker, Judge, concurs, and Furman, Presiding Judge, concurs in the conclusion only.

The Requirement That an Information Charging a Misdemeanor shall be verified in positive terms before a warrant of arrest may issue thereon is intended for the preservation of the personal security and liberty of the individual, by forbidding the issuance of a warrant for his arrest except upon probable cause shown under oath, and by preventing the institution of baseless and unfounded prosecutions: In re Talley, 4 Okl. Cr. 398, 112 Pac. 36, 31 L. R. A., N. S., 805. Where an information in legal form is verified as true in positive terms, such verification constitutes a sufficient showing of probable cause to authorize the issuance of a warrant of arrest and to put the defendant on trial; and on a motion to quash the information no issue can be made as to the knowledge or want of knowledge of the facts charged on the part of the person who verified the information; nor can the information be set aside on the ground that the person who verified it had no personal knowledge of the facts alleged: Moss v. State, 4 Okl. Cr. 247, 111 Pac. 950.

Whether an Affidavit to Support an Information States the facts required by the statute must be determined by the affidavit itself. Its statements cannot be attacked by extraneous evidence nor upon the ground that the testimony may disclose that the person who verified the information did not have the knowledge relative to the offense charged which the statute required: Overland Cotton-mill Co. v. People, 32 Colo. 263, 105 Am. St. Rep. 74.

CANARD v. STATE.

[2 Okl. Cr. 505, 103 Pac. 737, 881.]

INFORMATION.—A Felony may be Prosecuted by information. For opinion of this court see *In re McNaught*, 1 Okl. Cr. 528, 99 Pac. 241, which is here approved. (p. 949.)

INFORMATION—Allegation of Preliminary Hearing.—In the prosecution of a defendant by information for a felony, it is not necessary that the information should allege that there was a preliminary hearing before a committing magistrate, or a waiver of the same, although such facts must exist in order to authorize the filing of such information. (p. 950.)

INFORMATION—Presumption in Favor of.—When the information is filed in court by the county attorney, the presumption of law is that it is legal; that the examination of the defendant has been had or waived. (p. 950.)

INFORMATION — Preliminary Examination.—Whether an examination has or has not been had is not a question of pleading, but a question of fact, to be raised by the defendant or not at his option, by a motion to quash, supported by affidavits. (p. 950.)

(Syllabi by the court.)

Cook & De Graffenreid, for the plaintiffs in error.

Chas. West, attorney general, and Chas. L. Moore, assistant attorney general, for the state.

505 OWEN, J. This is a prosecution by information, filed by the county attorney in the district court in Muskogee county, charging the plaintiffs in error (herein referred to as the defendants) with the crime of forgery. To this information the defendant interposed a demurrer. This demurrer was overruled. Trial was had, which resulted in a verdict of guilty. The defendants in due time filed motion for new trial, which was overruled, to which an exception was reserved, and the case is in this court on appeal.

506 Two questions are presented by the record in this case: 1. Can a felony be prosecuted by information? 2. Is it necessary to allege, in an information charging a felony, that defendant has had a preliminary examination before a magistrate, or that such preliminary examination was waived?

The first question presented was settled by this court in the case of *In re McNaught*, 1 Okl. Cr. 528, 99 Pac. 241. The opinion in that case decides this question, and is approved here.

As to the second question, section 26, Bunn's Constitution of Oklahoma, is as follows: "No person shall be prosecuted criminally in courts of record for felony or misdemeanor otherwise than by presentment or indictment or by information. No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate or having waived such preliminary examination."

Counsel for defendants urge with much force that the trial court acquires no jurisdiction of a felony charge prosecuted by information, unless the defendant has had a preliminary examining trial, or has waived the same, and that the information ⁵⁰⁷ must allege one or the other. We agree with counsel that there must be an examination or a waiver, but do not agree with their contention that it is necessary to plead this examination or waiver in order to give the court jurisdiction. We understand the rules governing prosecutions by information to be identical with those governing prosecutions by indictment. When the information is filed in court by the prosecuting attorney, the presumption of law is that it is legally done; that the examination of the defendant has been had or waived, and consequently the court has jurisdiction the same as when an indictment has been returned by a grand jury in open court. When an indictment is presented by a grand jury in open court, the presumption is that it is legally presented; that the jurors were properly summoned, legally qualified, and competent, and that the required number, at least, concurred in the finding. These facts, though essential to the lawful finding and presentment, are not necessary to be set forth in the indictment: *Washburn v. People*, 10 Mich. 372. Whether an examination has or has not been had is not a question of pleading, but a question of fact to be raised by the defendant or not at his option, which fact is always within the knowledge of the defendant. If he claims that this right or privilege has been denied to him, and will insist on his right to it, he can and should do so when he is arraigned on the information. The fact that a prisoner has not been given an examination before an examining magistrate before the filing of an information against him is a matter that may be properly pleaded in abatement, or by motion to quash, which is in the nature of a plea in abatement, founded on affidavits or such other proofs as the court may permit. If it were necessary to allege a preliminary hearing, it would be necessary to prove it. Would this not work prejudice to the defendant? Would not proof that the examining magistrate had believed the defendant guilty on examining trial influence the jury against him? Would it not put upon the defendant an additional burden to permit the prosecuting attorney to argue as a circumstance tending to establish defendant's guilt that the examining ⁵⁰⁸ magistrate who held the examination immediately after the commission of the alleged crime believed the defendant guilty?

We find that the courts of Iowa, Delaware, Idaho, Michigan, Washington, Kansas and California have passed on the question at issue here under similar constitutional provisions and statutes, and have all held against the contention of counsel for defendant.

The constitution of the state of Delaware (article 5, section 7) provides that prosecutions upon informations shall only be had after examination and commitment, and held to bail by a judge or justice of the peace. The supreme court of that state, in construing this provision of the constitution, in the case of *State v. Moore*, 2 Penne. (Del.) 299, 46 Atl. 669, held: "It is not necessary, in order to give the court jurisdiction, to aver in the information an examination and commitment or holding to bail of the defendant. It is a matter of defense, and defendant may avail himself of the failure to proceed by examination and commitment or holding to bail by a plea in abatement."

Under the provisions of the constitution and statutes of Idaho, before a defendant can be prosecuted for a criminal offense, such defendant must either have had a preliminary examination or have waived the same. The supreme court of that state in the case of *State v. Farris*, 5 Idaho, 666, 51 Pac. 772, in construing these provisions, held: "We do not think the first objection is well taken. There is nothing in either the constitution or the statutes which, directly or by implication, requires that the fact of there having been a preliminary examination should be set forth in the information."

The court in that case held, and we think properly, that an information filed without such preliminary examination or waiver thereof confers no jurisdiction upon the trial court.

In the state of Michigan the statute provides that: "No information shall be filed against any person, for any offense, until such person shall have had a preliminary examination therefor, as provided by law before a justice of the peace, or other examining magistrate or officer, unless such person shall ~~may~~ waive his right to such examination": Laws 1859, p. 393, No. 138, sec. 8.

The supreme court, in construing this section in *Washburn v. People*, 10 Mich. 372, says: "It is not doubted that a defendant . . . has a right to insist upon such examination before he can be put upon his trial, or called upon to answer the information. But the statute is express that he may waive his right; and we think he may waive it when called upon to plead to the information, as well as when brought before the magistrate for examination. It is not a matter which goes to the merits of the trial, but to the regularity of the previous proceedings. If he make no objection on the ground that such examination has not been had or waived, he must be understood to admit that it has been had, or that he has waived or now intends to waive it. If he intends to insist upon the want of the examination, we think he should, by plea in abatement, set up the fact that it has not been had, upon which the prosecuting attorney might take issue, or reply a waiver; or he must, upon a proper showing by affi-

davit, move to quash the information. The latter is the simpler course. The circuit court is a court of general criminal jurisdiction, and the proceeding by information instead of indictment is not, under this statute, an exceptional or special one, but the general mode provided for the prosecution of offenses. We can therefore see no more satisfactory reason for requiring this preliminary examination or its waiver to be set out in the information than for averring in an indictment that the grand jury was composed of at least sixteen competent jurors, or that the indictment was found by at least twelve, or any other fact essential to the constitution of a legal grand jury. We cannot think it necessary, on the trial for an offense, to prove the fact of such examination or waiver more than on the trial under indictment to prove the preliminary matters referred to. The same rule should apply to both. . . . If not necessary to be proved, it need not be alleged."

The supreme court of the state of Washington, in passing on this question in the case of *State v. Anderson*, 5 Wash. 350, 31 Pac. 969, held it was not necessary to allege that the accused had had a preliminary hearing, or that he had waived the same. The syllabus is as follows: ⁵¹⁰ "In the prosecution of a defendant by information for a criminal offense it is not necessary that the information should allege that there was no grand jury in session, and that defendant had been committed on said charge by a magistrate, although such facts must exist in order to authorize the filing of an information." This case was approved by the same court in the case of *State v. Boyce*, 24 Wash. 514, 64 Pac. 719, and again in the case of *State v. Lewis*, 31 Wash. 515, 72 Pac. 121.

In the state of Kansas the law provides: "No information shall be filed against any person for any offense, until such person shall have had a preliminary examination therefor as provided by law . . . unless such person shall waive his right to such examination": Laws 1864, p. 113, c. 64, sec. 8.

The supreme court of that state, in the case of *State v. Barnett*, 3 Kan. 250, 87 Am. Dec. 471, in construing that section of the law, says: "A defendant not coming within the exceptions named in that act is entitled under it to a preliminary examination and may plead its omission, but it is not necessary that the information should allege such examination or waiver of it; that being a matter which goes, not to the merits of the trial, but to the regularity of the previous proceedings."

The same court, in the case of *State v. Finley*, 6 Kan. 366, in passing on this question, says: "It is true that, before the county attorney is authorized to file an information in a criminal action in the district court, there must have been a preliminary examination, unless defendant has first waived such

examination. . . . But it is not necessary that the information itself should show these facts. . . . All that is required of the information is that it charge the offense sufficiently, and show that it is prosecuted by the proper officer. If there had been in fact no preliminary examination in this case, and no sufficient cause existed for filing the information without a preliminary examination, the defendant should have raised the question in the court below, in a proper manner, as by a plea in abatement."

Before a prosecution by information for a felony can legally ⁵¹¹ be had in this state, it must be preceded by a preliminary examination before an examining magistrate, or the accused must have waived such examination. In the case at bar the information is silent as to whether or not such preliminary examination was had, or whether or not the same was waived by the defendants. The question, having been raised by demurrer, depends upon matter apparent on the face of the information. Under the presumption of law that when an information is filed by the prosecuting attorney of the county, it is legally done, and that the examination of the defendant has been had or waived, we must presume in this case that the defendants did have their preliminary hearing, and that the trial court had jurisdiction.

Therefore, we are of the opinion that the demurrer was properly overruled, and there was no error in the action of the court in overruling the motion for new trial, which raised the same question, and the judgment of the court below is affirmed.

Furman, Presiding Judge, and Doyle, Judge, concur.

ON PETITION FOR REHEARING.

PER CURIAM. The decision in this case, affirming the judgment of the district court, was filed the twenty-seventh day of July, 1909. On July 30, 1909, plaintiffs in error filed their petition asking for a rehearing. The reasons assigned in the petition are as follows:

"First. Because the court erred in holding that the plaintiffs in error could be prosecuted for felony by information which did not allege and affirmatively show that the plaintiffs in error had previous to the filing of the information an examining trial or waived such.

"Second. Because the court erred in the opinion in holding that the district court had jurisdiction of the offense charged, ⁵¹² without showing that an examining trial or a waiver of such had been had.

"Third. Because the court erred in holding that it was not necessary to allege, in an information charging felony, that defendant had had a preliminary examination before a magistrate, or that such an examination had been waived."

Rule 9, adopted by this court July 1, 1909, with reference to petitions for rehearing, provides as follows: "Such petition shall briefly state the grounds upon which counsel relies for a rehearing, and show either that some question decisive of the case and duly submitted by the counsel has been overlooked by the court, or that the decision is in conflict with an express statute or controlling decision, to which the attention of the court was not called, either in brief or oral argument, or which has been overlooked by the court, and the question, statute, or decision so overlooked must be distinctly and particularly set forth in the petition."

The petition filed in this case does not comply with this rule. There is no contention made that this court has overlooked any decisive question in this case, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not called in brief or oral argument, and no contention that this court has overlooked any controlling decision or express statute, and no additional authorities have been called to the attention of the court on the questions raised in the original hearing.

The petition for rehearing will be denied.

It is not Necessary for an Information Charging a Felony to allege that the defendant has had a preliminary examination before an officer authorized by law to hear the same, and has been bound over to await final trial thereon, or has waived such examination. If these things have not been done, the defendant can present this question to the court by plea in abatement: Caples v. State, 3 Okl. Cr. 72, 104 Pac. 493, 26 L. R. A., N. S., 1033; Wood v. State, 3 Okl. Cr. 553, 107 Pac. 937.

When an Information is Filed Charging a Defendant With the Commission of a felony, the law presumes that the defendant has had a preliminary examination or has waived the same, and the information need not allege that fact. If the defendant contends that no preliminary examination has been had or waived, and he desires to raise the question, he must do so by a motion to set aside the information on that ground, and the burden of proof is on him: Blair v. State, 4 Okl. Cr. 359, 111 Pac. 1003.

REA v. STATE.

[3 Okl. Cr. 276, 105 Pac. 384.]

CHANGE OF JUDGES—Motion for on Account of Bias or Prejudice.—Under section 6647, Snyder's Compiled Laws of 1909, and section 15, Bunn's Constitution, a motion for a change of judge on account of the bias or prejudice of a county judge is in time if presented before the trial begins. (p. 957.)

CHANGE OF JUDGES—Constitutional Right in Case of Bias. Section 15, Bunn's Constitution, provides that right and justice shall be administered without prejudice. Under this provision, when a

motion, properly verified, is made before the trial begins for a change of judge upon the ground of the bias or prejudice of the trial judge, it is the constitutional right of the party making it that it shall be granted. (p. 957.)

(Syllabi by the court.)

Appeal from a judgment of the county court sentencing the appellant to sixty days in jail and to pay a fine of two hundred and fifty dollars upon a conviction of unlawfully selling intoxicating liquor.

Crawford & Bolen, B. C. King and Galbraith & McKeown, for the appellant.

277 FURMAN, P. J. 1. On the twenty-first day of February, 1908, the defendant filed the following motion in the county court of Pontotoc county:

"THE STATE OF OKLAHOMA
v.
WILL REA.

"Comes now the defendant Will Rea, in the above entitled cause, and states upon his oath that by reason of the bias and prejudice of the presiding judge, Joel Terrel, he cannot obtain a fair and impartial trial, and respectfully asks for a change of judge in this cause.

"W. C. REA.

"Subscribed and sworn to before me this 21st day of February, 1908.

"W. H. BRALEY, Notary Public."

This motion was overruled by the court, to which ruling an exception was reserved. Section 6647, Snyder's Compiled Laws of Oklahoma of 1909, is as follows: "If the defendant shall, before witnesses are subpoenaed, make affidavit that he cannot have a fair and impartial trial before the county judge by reason of the bias or prejudice of the judge or that the judge is a material witness in the cause, or is related to the party in interest, such county judge shall thereby be disqualified to try such cause, and when the county judge is disqualified to try any criminal cause pending in the county court the county attorney and defendant may agree on a special judge to preside in his stead; but if they fail so to do, the disqualified judge shall proceed to select a special judge as follows: He shall nominate an odd number of persons not less than three, having the qualifications of a county judge, if there be so many qualified to hold such office residing in the county, or in attendance upon the court, and the parties may alternately challenge such nominees until they are reduced to one, who shall be the special judge, and shall preside in the cause or other matter with authority to do any act that the regular judge, if not disqualified, might have done in such case; but if

there be not so many as three qualified persons residing in the county or in attendance upon the court who may be nominated by the disqualified judge, he shall appoint a qualified person to act in his stead, and such person shall have full power to perform the duties of county judge in such cause."

The record is silent as to the ground upon which the motion for a change of judge was overruled, but we presume that it was ²⁷⁸ because the motion was filed after the witnesses in the case had been summoned. This requires a consideration of section 15 of Bunn's Constitution of Oklahoma, which is as follows: "The courts of justice of the state shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

Substantially the same clause is contained in the constitution of Idaho. This provision came before the supreme court of that state for consideration in the case of *Day v. Day*, 12 Idaho, 556, 86 Pac. 531, 10 Ann. Cas. 260, and the court said: "It is contended by counsel for appellant that under the provision of section 18, article 1, of the constitution of Idaho, 'the people have prohibited a court from trying a case in which he is prejudiced by or for either party.' Said section is as follows: 'Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay or prejudice.' They also cite paragraph 40 of the Magna Charta, which reads: 'To none will we sell; to none will we deny or delay right or justice.' They contend through that constitutional provision that the people have declared that justice shall be administered, not only without sale, without denial, and without delay, but also without prejudice, and contend that the legislative power to pass laws regulating the change of venue is limited by constitutional provisions respecting the subject: 4 Ency. of Pl. & Pr. 377. It is contended that said section of the constitution is self-acting, self-executing, and requires no legislative provision for its enforcement, and cannot be abridged or modified by any legislative or judicial act. There is no question but that said provision is self-operating, and it is regarded as settled in this country that all negative or prohibitive clauses in a constitution are self-executing: *Law v. People*, 87 Ill. 385; *Davis v. Burke*, 179 U. S. 399, 21 Sup. Ct. Rep. 210, 45 L. ed. 249; *Cooley on Constitutional Law*, p. 98; *Willis v. Mabon*, 48 Minn. 140, 31 Am. St. Rep. 626, 50 N. W. 1110, 16 L. R. A. 281; *State v. Kyle*, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115. The legislature neither by neglect to act nor by legislation can nullify a mandatory provision of the constitution. . . . Can it be contended, in the face of the com-

mand of said provision of our constitution, that the ²⁷⁹ legislature could legally declare that the bias and prejudice of a judge should be no cause for a change of venue? I think not. And if, in the face of that provision, the legislature neglects to specify in a statute that the prejudice of the judge is a ground for a change of the place of trial, then the very object and purpose of that provision of the constitution may be nullified and set at naught. Regardless of the statutory provision, where such a state of facts appears as in the case at bar, and a change of place of trial is demanded because of the prejudice of a judge, a change of venue, or at least of judges, should be granted to preserve from discredit the judiciary of the state."

The action of the lower court was reversed, and the cause was remanded. We regard the views expressed by the supreme court of Idaho as sound, and we therefore hold that under this statute, if a motion for a change of judge, supported by affidavit, upon the ground that the defendant cannot have a fair and impartial trial before the county judge by reason of the bias and prejudice of the judge, is made at any time before the trial begins, it comes in time, and should be granted. The limitation contained in the statute that the motion for a change of judge, on the ground of the bias or prejudice or relationship of the judge to a party in interest, must be made before the witnesses are summoned is, by itself, of doubtful validity. Would a judge who was personally interested in the result of a cause, or who was related to one of the parties to the cause, become qualified to try the cause merely because an objection to his doing so was not made before witnesses were summoned? If so, then subpoenas for the witnesses might be issued and served before the defendant had opportunity to make the objection, and thus defeat the mandate of the law. But be this as it may, under section 15, Bunn's Constitution of Oklahoma, providing that justice shall be administered without prejudice, motion for a change of judge upon this ground is in time if made before the trial begins, and the limitation requiring the motion to be made before the witnesses are summoned is in conflict with this provision of our constitution, and therefore void.

In an able and exhaustive opinion by Judge Irwin, in the ²⁸⁰ case of *Lincoln v. Territory*, 8 Okl. 546, 58 Pac. 730, the supreme court of Oklahoma territory said: "So it seems to us that the course of procedure established by the judicial system of the states and the federal government is the law of the land for Oklahoma, and, thus tested, the plaintiff in error was denied a fair and impartial trial. And by an almost unbroken line of judicial decisions it is held that when one accused of crime complies with the provisions of the statute mandatory in its terms, as in the statute in question in the case at bar, the judge is divested of all discretion, and loses all

jurisdiction, except to make the order granting the change, and all his subsequent actions are absolutely void. It follows, then, as a matter of course, that the judge who would proceed with the trial after the making and filing of such an affidavit would do so without power or authority, and the trial would be a nullity. Therefore, we think that, not only measured by the weight of reliable authority, but by the principles of equity, justice, and sound law—measured by the rule of reason—the refusal of a change of judge in this case by the trial court was error which substantially affected the rights of the defendant, and deprived him of the protection which the law throws around every defendant, and took from him certain constitutional rights.”

In the case of *Buchanan v. State*, 2 Okl. Cr. 126, 101 Pac. 295, this court, in an opinion by Judge Baker, said: “Upon the filing by the accused of an affidavit in proper time, stating positively that he cannot have a fair and impartial trial on account of the bias and prejudice of the presiding judge of the court where the indictment or information is pending, such judge cannot thereafter perform any official act in such case binding upon the accused, except the allowance of such change of judge.”

We are therefore of the opinion that the trial judge erred in refusing to sustain the motion for a change of judge. There are a number of other questions presented in the record; but as they were all, so far as deemed material, passed upon in another case against the defendant (3 Okl. Cr. 269, 105 Pac. 381), they will not be discussed here.

For the error of the trial court in not granting a change of judge, as well as for the other errors which are pointed out in ²⁸¹ said cause No. A—95, the judgment against the defendant is reversed and remanded.

Doyle and Owen, Judges, concur.

Public Confidence in Our Judicial system and courts of justice demands that causes be tried by *unprejudiced* and unbiased judges, and a denial of a change of judge, applied for on the ground of prejudice, will be presumed to be a denial of justice: *Ex parte Ellis*, 3 Okl. Cr. 220, 105 Pac. 184, 25 L. R. A., N. S., 653.

Perjury or Subornation of Perjury cannot be Assigned upon an affidavit of prejudice, made to secure a change of judge on the ground of prejudice: *Ex parte Ellis*, 3 Okl. Cr. 220, 105 Pac. 184, 25 L. R. A., N. S., 653.

O'BARR v. UNITED STATES.

[3 Okl. Cr. 319, 105 Pac. 988.]

CRIMINAL LAW—What Law Governs—Change from Territory to State.—Under an indictment for murder returned prior to statehood, the defendant should be tried and punished under the law as it existed at the time of the commission of the offense. (pp. 960, 961.)

HOMICIDE—Willfully.—An Instruction Defining Manslaughter under the United States statute (U. S. Rev. Stats., sec. 5341 [U. S. Comp. Stats. 1901, p. 3628]), in force in the Indian Territory prior to statehood, which omits the word "willfully," is improper. (p. 961.)

HOMICIDE.—The Word "Willfully," as Used in the United States statute defining manslaughter, is synonymous with "intentionally" or "designedly." (p. 961.)

WEAPONS—Care in Handling.—The Law Imposes upon persons handling deadly weapons the duty of exercising such care as an ordinarily cautious and prudent person would exercise under similar circumstances. (p. 962.)

HOMICIDE—Negligence in Handling Weapons.—The court in this case instructed the jury: "The law imposes upon people controlling or handling dangerous instruments or agencies the duty of exercising some care or caution in the manner of using the dangerous agency, and in case of gross or culpable neglect of this duty the law imposes criminal as well as civil liability." Held, error for the reason that it does not define the degree of care or caution to be used, or gross neglect, such as would render the defendant guilty of criminal negligence. (p. 962.)

CRIMINAL TRIAL—Conduct of Counsel in Argument.—The defendant being on trial for murder, it was improper for the prosecuting attorney, in his closing argument, to make use of the statement: "It is your duty to punish this defendant, who by the means of whisky given the poor girl, weakened her will and dulled her senses, and has been her ruin." (p. 963.)

(Syllabi by the court.)

W. B. Buckley and Day & DuBois, for the plaintiff in error.

Chas. West, attorney general, and E. G. Spilman, assistant attorney general, for the United States.

820 OWEN, J. The proof on part of the state, in substance, is to the effect: That the defendant was a married man with a family of children. The deceased, who was a girl between seventeen and eighteen years of age, on the day of the shooting, met the defendant by appointment away from home, got into his buggy, and they were driving over the country at the time of the shooting. That defendant had, at different times during the day, given her whisky. That he had been in her company on the night before at a church-house and had there given her whisky. She was found in his buggy on the roadside with a gunshot wound through her neck, and a short time thereafter died.

The evidence offered on part of the defendant was in perfect harmony with the evidence on part of the state, and, in addi-

tion thereto, was to the effect: That at the time of the shooting the girl was lying on his lap, with his hand under her neck; that his pistol had been lying on the seat of the buggy; that he and the deceased began playing with it, when it was accidentally discharged, the ball passing through the girl's neck and through his hand; that he immediately started for the doctor at the nearest town; but that before he reached there the tugs of his harness became unhitched; that he got out of the buggy to re hitch them, and, thinking the deceased was dead, left her in the buggy and ³²¹ went to a mining camp, and there engaged one of the miners to take him to the county seat, where he surrendered to the officers.

Among the persons who first saw the girl on the roadside after she was wounded was a deputy marshal, who testified that the girl told him the shooting was accidental, and that she did not wish the defendant to be in any way harmed for it. There is no evidence in the record which tends in the slightest degree to contradict the defendant's testimony that the shooting was accidental. The case seems to have been tried on the theory that the defendant was guilty of such degree of carelessness as would make the accidental killing criminal.

In the motion for new trial, counsel for the defendant assign eleven reasons for setting aside the verdict. We deem it unnecessary to consider all of them. The three upon which counsel seem to rely, and which are well taken, are as follows:

"Third. Because the court misdirected the jury in a matter of law, in this, to wit: 'Manslaughter is the unlawful killing of a human being without malice, express or implied, and without deliberation. It may occur upon a sudden heat of passion caused by provocation apparently sufficient to make the passion irresistible.'

"Fourth. Because the court misdirected the jury in a matter of law, in this, to wit: 'The law imposes upon people controlling or handling dangerous instruments or agencies the duty of exercising some care or caution in the manner of using the dangerous agency, and, in case of gross or culpable neglect of this duty, the law imposes criminal as well as civil liability.'

"Fifth. Because the court erred in its decision in a question of law, in this, to wit: In permitting the attorney for the United States in his closing argument to use the following language over the objection and exception of the defendant: 'It is your duty to punish this defendant, who, by the means of whisky given the poor girl, weakened her will and dulled her senses, and has been her ruin.' "

The date of the commission of the alleged crime in this case was the twentieth day of March, 1907, prior to statehood. The defendant was tried in April, 1908, after statehood. The case should have been tried under the law as it existed in the

Indian ³²² Territory at the time of the commission of the offense: *Sharp v. State*, 3 Okl. Cr. 24, 104 Pac. 71.

Act of Congress of May 2, 1890, chapter 182 (26 Stat. 96), which put the criminal laws of Arkansas into effect in the Indian Territory, contained the following proviso: "That in all cases where the laws of the United States and said criminal laws of Arkansas have provided for the punishment of the same offenses, the laws of the United States shall govern as to such offenses": *Ind. Ter. Ann. Stats.* 1899, sec. 33.

At the time this act of Congress went into effect, the law of the United States defining murder and manslaughter and providing a punishment therefor was in full force and effect in Indian Territory. Therefore, the offense committed in this case should have been tried and the punishment assessed under the laws of the United States. "Manslaughter," as defined by the United States statute (U. S. Rev. Stats., sec. 5341 [U. S. Comp. Stats. 1901, p. 3628]), is as follows: "Every person who unlawfully and willfully, but without malice strikes, stabs, wounds, or shoots at, or otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such other person dies, is guilty of the crime of manslaughter."

The defendant was entitled to an instruction defining manslaughter as defined in this statute. The instruction of the trial court was: "Manslaughter is the unlawful killing of a human being without malice, express or implied, and without deliberation."

It will be noted that this differs from the United States statute by omitting the word "willfully." The word "willfully," in the sense in which it is used in this statute, means not merely voluntarily, but with a bad purpose. It is a synonymous term with "intentionally," "designedly," "without lawful excuse"; that is, not accidentally: *Thompson on Trials*, sec. 2209; *Commonwealth v. Brooks*, 9 Gray (Mass.), 299; *Commonwealth v. McLaughlin*, 105 Mass. 460; *Roberts v. United States*, 126 Fed. 897, 61 C. C. A. 427.

In the last-named case the United States circuit court of appeals, in defining the word "willfully," as used in section 5341, ³²³ Revised Statutes of United States, the section under which this prosecution was had, said: "In a penal statute the word 'willful' means more than it does in common parlance. It means with evil intent or legal malice, or without reasonable ground for believing the act to be lawful": Citing *State v. Preston*, 34 Wis. 675; *State v. Clark*, 29 N. J. L. 96; *Savage v. Tuller*, *Brayt.* (Vt.) 223; *United States v. Three Railroad Cars*, 1 Abb. U. S. 196, Fed. Cas. No. 16,513; *Thomas v. State*, 14 Tex. App. 200; *Lane v. State*, 16 Tex. App. 172.

This court, in the case of *Thurman v. State*, 2 Okl. Cr. 718, 104 Pac. 67, defines the word "willfully," citing *Harrison v.*

State, 37 Ala. 154, and *Felton v. United States*, 96 U. S. 699, 24 L. ed. 875, and quoting from *Felton v. United States*, as follows: "Doing or omitting to do a thing, knowingly and willfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it. 'The word "willfully,"' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely voluntarily, but with a bad purpose': *Commonwealth v. Kneeland*, 20 Pick. (Mass.) 206. 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.'"

The instruction of the trial court, as quoted in the fourth assignment of error, did not state the law, for the reason that it fails to define the degree of care or caution to be used, or the failure to use such care as would constitute carelessness, and render the shooting criminal. The law imposes upon persons handling dangerous instruments, or deadly weapons, the duty of exercising ordinary care, or such care as an ordinarily prudent and cautious person would exercise under similar circumstances. Carelessness is the failure to use such care as an ordinarily prudent person would use under similar circumstances. Under the proof in this case, the only theory on which the jury could have found this defendant guilty of manslaughter was that the shooting was accidental.

If defendant's handling the pistol was with the same caution that an ordinarily prudent person would have used, under the same circumstances, the accidental shooting of the girl would not ³²⁴ make him guilty of manslaughter. On the other hand, although the shooting was accidental, yet done by defendant in the careless use or handling of the pistol, he would be guilty of manslaughter. This court said, in the case of *Tyner v. United States*, 2 Okl. Cr. 689, 103 Pac. 1057: "If one fires a gun recklessly or heedlessly, he will not be excused; and his offense will be at least manslaughter, though the weapon was pointed in range of the deceased by accident, with no intention or design of killing the deceased. . . . The law infers guilty intention from reckless conduct, and, where the recklessness is of such a character as to justify this inference, it is the same as if the defendant had deliberately intended the act committed. When, therefore, one recklessly fires a pistol with criminal indifference as to the consequences, and another is killed, it is not necessary, in order to constitute this killing murder, that the accused should, at the time of the firing, have been engaged in the commission of some unlawful act, independent of, and in addition to, the reckless firing itself."

In the case of *Roberts v. United States*, 126 Fed. 897, 61 C. C. A. 427, the court said: "In the definition of 'manslaughter' contained in the statute, the killing must be done unlawfully and willfully. The term 'unlawfully,' as here

used, means without legal excuse. The term 'willfully' here means done wrongfully, with evil intent. It means any act which a person of reasonable knowledge and ability must know to be contrary to duty, and, while the act must be done with evil design, and knowingly, as herein stated, still a killing which takes place under circumstances showing a reckless disregard for the life of another, and the reckless and negligent use of means reasonably calculated to take the life of another, such killing would be willfully done, as the term is herein defined."

The instruction complained of informed the jury that, in case of gross or culpable neglect, the law imposed on the defendant a criminal liability, but left the jury to determine what would constitute gross neglect. What constituted carelessness and gross neglect should have been defined by the court: *York v. Commonwealth*, 82 Ky. 360; *Flesh v. Lindsay*, 115 Mo. 1, 37 Am. St. Rep. 374, 21 S. W. 907; *Lago v. Walsh*, 98 Wis. 348, 74 N. W. 212; 1 Words and Phrases.

The language used by the attorney for the state in closing 325 the argument, as set out in the fifth assignment, was improper. The defendant in this case was charged with murder. He was not charged with having improper relations with the young girl, or with having seduced her, and there was no evidence offered proving any improper relation, or that the girl had been ruined. An argument along the line as indicated by this language was calculated to arouse the prejudice of the jury against the defendant. When this language is considered in connection with the lack of the evidence to disclose any motive for the killing, it cannot be ignored. Everyone will admit that the conduct of the defendant in administering whisky to that young girl at the church-house, giving her whisky at different times, meeting her by appointment, taking her into his buggy, and driving across the country, he being a married man with a family of children, was reprehensible; but however reprehensible such conduct, and however severely the same is to be condemned, the courts must not lose sight of the fact that the defendant is not on trial for that conduct. The sole charge for which the defendant was on trial here was the unlawful killing. When the evidence discloses such reprehensible conduct on the part of a defendant, such conduct as is calculated to arouse the prejudices of an ordinary juror against a defendant, the trial court should be all the more careful to confine the argument of attorneys to the material facts as proven. Everyone must agree that the defendant deserves to be punished for such conduct; but that was not at issue in this case. There being no evidence that the defendant had caused the girl's ruin, or that the girl had in fact been guilty of improper conduct other than drinking whisky and driving in a buggy with a married man, there was noth-

ing to warrant the statement of counsel. The statement amounted to his opinion, an officer of the court, that defendant should be convicted of the crime charged because of acts for which he was not on trial. The jury is sworn to try the case according to the law and evidence. They are not permitted to communicate with persons in or outside of the courtroom after they are selected as jurors, for the reason that perchance they might learn the opinions of others as to the weight of ³²⁶ the evidence and be improperly influenced. The law throws around the jury every safeguard that the verdict may be the result of the sworn testimony alone. It is the province of attorneys in the argument to apply the law to the facts as disclosed by the evidence, not to assert as facts things not in evidence. The argument is presumed to influence the jury. The law provides for argument. It is one of the most effective means of arriving at the truth. Why have any argument if the jury is not expected to be influenced by it? The state is given the closing of the argument because it has the burden of proof, and the argument is as much a part of the trial as the taking of testimony. It should be governed by the same rules of fairness, be confined to facts material to the issue, and based upon the competent testimony. We would not be understood as intending to abridge the power of prosecuting attorneys in arguing all the facts brought out in the testimony, but it is certainly error to argue facts which are not brought out. The state cannot convict a defendant of one crime by proving him guilty of another. This is true of the argument as well as the proof. It is extremely difficult to formulate rules by which to determine when the statement of counsel will justify the court in granting a new trial. It may be regarded as an established rule that it is error, sufficient to reverse a judgment, for counsel to state facts pertinent to the issue, calculated to prejudice the jury, and not in evidence, or to assume in argument that such facts are in the case, when they are not.

Many of the courts have announced a more rigid rule than this, and have even gone further in reversing cases on statements made by prosecuting officers than we would be willing to go. In this case we are following the rule of the more conservative courts.

In the case of *Dunmore v. State*, 115 Ala. 69, 22 South. 541, the supreme court of Alabama said: "Counsel must not, in argument to the jury, state as a matter of fact that of which there is no evidence. Such statements are not within the latitude of discussion the law accords the counsel, and is of itself of evil tendency."

³²⁷ In the case of *Tucker v. Henniker*, 41 N. H. 317, the court said: "Every person against whom an accusation is made or a suit is brought is entitled to be tried by a jury and

according to the laws of the land. This was the greatest of all privileges conferred by Magna Charta, and is guaranteed by our own fundamental law. This privilege is substantially violated, if counsel are permitted to state facts and comment upon them in argument against the adverse party, which are not before the jury by proofs regularly submitted. . . . An essential element in the trial by jury is that the verdict shall be rendered according to the facts of the case, legally produced before the jurors. . . . When counsel are permitted to state facts in argument, and to comment upon them, the usage of courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury denied. It may be said, in answer to these views, that the statements of counsel are not evidence, that the court is bound so to instruct the jury, and that they are sworn to render their verdict only according to evidence. All this is true, yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances, and, if they in the slightest degree influence the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. If not evidence, then manifestly the jury have nothing to do with them, and the advocate has no right to make them."

In the case of *Brow v. State*, 103 Ind. 133, 2 N. E. 296, the prosecuting attorney said: "I know personally the saloon-keeper in this case, and he is guilty of this and I am sure of other crimes." This was held to be sufficient to justify reversal.

In the case of *Martin v. State*, 63 Miss. 505, 56 Am. Rep. 813, the prosecuting attorney said: "Martin, the defendant, is a man of bad, dangerous and desperate character; but I am not afraid to denounce the butcher boy, although I may, on returning to my home, find it in ashes over the heads of my defenseless wife and children." The supreme court held that it was the duty of the presiding judge to interfere in such case of his own motion, and for his failure to do so gave the defendant a new trial.

³²⁸ The following excerpts are a fair sample of the rebukes administered to statements made by prosecuting attorneys by courts following the more rigid rule. In *Perkins v. Burley*, 64 N. H. 524, 15 Atl. 21, counsel for the plaintiff in his closing argument said: "That if they [the jury] knew how the plaintiff and his father and brother were regarded in the vicinity in which they lived, he would be willing to submit the case without argument." This was held to be sufficient ground for setting aside the verdict.

The case of *State v. Thompson*, 106 La. 362, 30 South. 895, is one where the defendant was convicted of murder and sentenced to death. The only error assigned was a statement by

the prosecuting attorney in his closing argument, "I will say nothing to you of her six fatherless little children." There was no proof that the widow of the deceased had six children. The supreme court held this language was calculated to prejudice the jury against the defendant and reversed the case. The case of Long v. State, 81 Miss. 448, 33 South. 224, is one where the defendant was on trial for burglary. The evidence was to the effect the defendant entered the house of one Lawson at night. Lawson's daughter, a girl about sixteen years old, was awakened by cold hands on her face, looked up, and saw the defendant standing by her bed. The district attorney, in his argument to the jury, made use of the following remarks: "The defendant was in the house on the occasion when his offense was committed, not for the purpose of committing the crime which he is charged with alone, but for the purpose of committing another crime, one of the vilest known." The supreme court of Mississippi held that this statement was calculated to inflame the jury and arouse their prejudices, and for this error reversed the case.

For the reasons mentioned, we do not believe the defendant in this case had a fair and impartial trial. Therefore, the judgment of the trial court is reversed and ³²⁹ the cause is remanded, with directions to grant the defendant's motion for new trial.

Furman, Presiding Judge, and Doyle, Judge, concur.

Homicide in the Reckless Use of Firearms is discussed in the note to Johnson v. State, 90 Am. St. Rep. 581.

Misconduct of Counsel in Argument, error predicated thereon, and reversal of judgments therefor, are considered in the notes to Cleveland etc. R. R. Co. v. Pretschan, 100 Am. St. Rep. 682; McDonald v. People, 9 Am. St. Rep. 559; McConnell v. State, 58 Am. Rep. 648; Martin v. State, 56 Am. Rep. 814, and Cleveland Paper Co. v. Banks, 48 Am. Rep. 336.

As to Whether the Refusal of a Witness to Testify can be Referred to in the Argument as evidence of defendant's guilt, see the note to Powers v. State, 121 Am. St. Rep. 806.

If the Appellate Court is Satisfied That Prejudice to the Defendant Resulted from the Misconduct of Counsel in the argument of the case, it constitutes reversible error: Powers v. State, 75 Neb. 226, 121 Am. St. Rep. 801. See the following cases for a further consideration of the subject and illustrations of what has been held to amount to misconduct: Hutcherson v. State, 165 Ala. 16, 138 Am. St. Rep. 17; Wyatt v. State, 58 Tex. Cr. 115, 137 Am. St. Rep. 926; State v. Matheson, 142 Iowa, 414, 134 Am. St. Rep. 426; State v. Montgomery, 56 Wash. 443, 134 Am. St. Rep. 1119; Hare v. State, 56 Tex. Cr. 6, 133 Am. St. Rep. 950; People v. Strauch, 240 Ill. 60, 130 Am. St. Rep. 255; Sample v. State, 52 Tex. Cr. 505, 124 Am. St. Rep. 1103; King v. State, 51 Tex. Cr. 208, 123 Am. St. Rep. 881; Smith v. State, 90 Miss. 111, 122 Am. St. Rep. 313; Powers v. State, 75 Neb. 226, 121 Am. St. Rep. 801.

Where the Subject of the Remarks or Argument is a Close Question, the withdrawal thereof will not cure the error: Toledo etc. R. R. Co. v. Burr & Jealke, 82 Ohio St. 129, 137 Am. St. Rep. 771.

Improper Demonstrations or Remarks by Spectators as ground for mistrial or new trial are considered in the note to *State v. Wimby*, 121 Am. St. Rep. 511; and see *Aabel v. State*, 86 Neb. 711, 136 Am. St. Rep. 719; *Commonwealth v. Hoover*, 227 Pa. 116, 13 Am. St. Rep. 719.

EX PARTE ELDRIDGE.

[3 Okl. Cr. 499, 106 Pac. 980.]

CRIMINAL LAW—Sentence.—The Time Fixed for Execution of a sentence, or for the commencement of its execution, is not one of its essential elements, and, strictly speaking, forms no part of the judgment and sentence, which is the penalty of the law as declared by the court; while the direction with respect to the time of carrying it into effect is in the nature of an award of execution, so that, where the penalty is imprisonment, the sentence may be satisfied only by the actual suffering of the imprisonment imposed, unless remitted by death or some legal authority. (p. 970.)

CRIMINAL LAW—Sentence—Arrest of Convict at Large.—Where a convicted defendant is at liberty and has not served his sentence, and the same is not stayed as provided by law, he may be arrested as an escape and ordered into custody on the unexecuted judgment. (p. 970.)

CRIMINAL LAW—Sentence.—Expiration of Time Without Imprisonment is in no sense an execution of the sentence. (p. 970.)

(Syllabi by the court.)

J. R. Scott and P. W. Cress, for the petitioner.

Fred S. Caldwell, counsel to the governor, and Chas. R. Bostick, county attorney, for the state.

⁴⁹⁹ DOYLE, J. Petitioner, John Eldridge, on December 23, 1909, filed in this court a petition wherein he avers that he is unlawfully restrained of his liberty by one A. C. Nicewander, sheriff of Noble county, at and in the common jail of said county.

The petition sets forth that petitioner was tried and convicted in the county court of Noble county for a violation of the prohibition law. The judgment entered in part recites: ⁵⁰⁰ "It is therefore by the court considered, ordered, and adjudged that the said defendant, John Eldridge, for said offense by him committed, be confined in the county jail of Noble county, Oklahoma, at hard labor, for the period of thirty days, and that he pay a fine of fifty dollars and the costs of prosecution, taxed at the sum of nineteen dollars and twenty-five cents, and, if said fine and costs be not paid, that said defendant be confined in said county jail of Noble county for an additional period of thirty-nine days, until said fine and costs be fully satisfied, and execution issue for said fine and costs. It is further ordered by the court that said term

of imprisonment shall begin and date from the date of his, defendant's, surrender to or arrest by the sheriff of Noble county, for the purpose of such imprisonment."

The defendant prayed an appeal. The court fixed the amount of bail bond at five hundred dollars, which bond was given and approved, and the court extended the time for making and serving a case-made ninety days, the same to be filed in the criminal court of appeals within one hundred and twenty days. Thereafter, on March 1st, for good cause shown, the court allowed a further extension of sixty days in which to make and serve a case-made. Said case-made was not served within the time allowed, and no appeal was taken. On the ninth day of December, 1909, the county court made the following order in said cause:

"Now on this 9th day of December, 1909, Chas. R. Bostick, county attorney, appears for the state, and it is made to appear to the court that judgment and sentence in this case was pronounced against the defendant on the 4th day of December, 1908, and that on said date an appeal to the Criminal Court of Appeals of Oklahoma was granted to the defendant on his request, and that subsequent to said time, to wit, on the 16th day of December, 1908, said defendant filed in this court his bond for stay of execution of judgment as fixed by the court, which was duly approved, and the defendant duly released thereon. And it further appearing to the court that the time for taking an appeal to the Criminal Court of Appeals, to wit, a period of one year from date of judgment, has expired, and that said defendant has not perfected his appeal to said court, and that he has not surrendered himself to the sheriff or any other officer of this court for the fulfilment of said judgment and sentence, and that he has not paid or satisfied the same in any manner ⁵⁰¹ whatever, it is therefore considered, ordered and adjudged by the court that the sheriff of Noble county arrest said defendant, and detain him in the county jail of Noble county in accordance with the judgment and sentence pronounced against said defendant, and that the clerk of this court forthwith deliver to the sheriff of Noble county a duly certified copy of said judgment and sentence, and of this order, and that said certified copies shall be full warrant and authority to the said sheriff for the arrest and detention of said defendant.

"H. E. ST. CLAIR, County Judge."

Upon this order of the court a commitment issued and the defendant was on said day taken into custody.

It is further averred that said county court was without jurisdiction to issue said order of commitment, for the reason that the time for perfecting said appeal expired June 4, 1909, and that defendant was within the jurisdiction of said court at all times, and that by operation of law his sentence began

upon the expiration of time allowed to file a petition in error with case-made attached in this court or at the furthest the maximum time, one hundred and twenty days, from June 11, 1909, at which time the act fixing the time in which an appeal must be taken took effect, in which event his sentence began to run October 10, 1909, and continued to be in full force and operation from that day until December 19, 1909, at which time the judgment and sentence of the court had been fully satisfied. Copies of all the proceedings and of the judgment and order of the court and of the commitment were attached to and made a part of the petition.

Counsel for the state filed a general demurrer on the ground that said petition does not state facts sufficient to entitle petitioner to the relief prayed for.

Counsel for petitioner rely upon the doctrine declared by the supreme court in the case of *Ex parte Clendenning*, 1 Okl. Cr. 227, 97 Pac. 650, 19 L. R. A., N. S., 1041. As we view it, the doctrine of that case is not applicable to the case at bar. In the *Clendenning* case the judgment was that the defendant pay a fine of seventy-five dollars and costs, and be imprisoned thirty days in jail. After judgment the court suspended the jail sentence during good behavior, and the defendant on this condition was discharged. ⁵⁰² Some six months later, at a subsequent term of the court, the suspension of the jail sentence was set aside and annulled, and the judgment and sentence ordered enforced. The question there presented was: "Whether or not a court after delivering its judgment and sentence in a criminal case may stay the same, in the absence of appeal or other legal proceedings taken, looking to its modification, and after the term at which it was rendered had expired, and after the time embraced therein has elapsed, whether it has jurisdiction to then issue commitment in execution of its judgment, and incarcerate the defendant thereunder."

The supreme court in an elaborate and instructive opinion by Justice Dunn held that: "The court has no power or jurisdiction after the expiration of time of the sentence and of the term of court when rendered to call it back and issue a commitment thereunder."

Let us assume a void bail bond is given and approved as a supersedeas in a criminal case—a common occurrence—and after the expiration of the period of time fixed by the sentence this defect is discovered, under the doctrine of the *Clendenning* case, would the defendant be entitled to his discharge? We think not. Such is not the law.

In the case at bar an appeal was attempted to be taken to this court and a recognizance was taken after conviction for the appearance of the defendant to answer any judgment rendered by the criminal court of appeals of Oklahoma, or of the

county court of Noble county in the further progress of said cause. The judgment itself specifically provides: "That said term of imprisonment shall begin and date from the date of his, defendant's, surrender to or arrest by the sheriff of Noble county for the purpose of such imprisonment."

The date fixed by a sentence for the punishment to commence is directory merely, and forms no part of the sentence itself; hence, if from any cause it is not carried into effect at the period named, the party may be brought before the court again upon motion, and a new period be prescribed. It was held by ⁵⁰³ this court in the case of *Ridley v. State*, 3 Okl. Cr. 350, 106 Pac. 553, 26 L. R. A., N. S., 110, that: "Under the provisions of Procedure Criminal, article 14, chapter 89, Snyder's Compiled Statutes of 1909, after a plea or verdict of guilty, the court must render judgment, and assess the punishment or penalty prescribed by law. The time fixed for executing a judgment and sentence or for the commencement of its execution is not one of its essential elements, and, strictly speaking, is not a part of the judgment and sentence. The essential part of the judgment is the punishment, and the amount thereof, without reference to the time when it shall be executed. Except in cases where the defendant has been convicted of two or more offenses before judgment on either, the order of the court in reference to the time when the sentence shall be executed is not material."

Our statute on the subject is simply declaratory of the common law, and where the judgment and sentence is imprisonment for a certain term, and from any cause the time elapses without the imprisonment being endured, it would still be a valid, subsisting unexecuted judgment.

"The judgment is the penalty of the law, as declared by the court, while the direction with respect to the time of carrying it into effect is in the nature of an award of execution. Where the penalty is imprisonment, the sentence of the law is to be satisfied only by the actual suffering of the imprisonment imposed, unless remitted by death or by some legal authority. The expiration of time without imprisonment is in no sense an execution of the sentence": *Ex parte Collins*, 8 Cal. App. 367, 97 Pac. 188; *State v. Cockerham*, 24 N. C. 204; *In re Dolan*, 101 Mass. 219.

"Where the convicted defendant is at liberty and has not served his sentence, if there be no statute to the contrary, he may be rearrested as an escape, and ordered into custody upon the unexecuted judgment": 1 *Bishop's New Criminal Procedure*, par. 1384; *In re Shaw*, 31 Minn. 44, 16 N. W. 461; *Ex parte Vance*, 90 Cal. 208, 27 Pac. 209, 13 L. R. A. 574; *People v. Patrich*, 118 Cal. 332, 50 Pac. 425.

When the county court of Noble county issued the order of commitment, there was a valid, subsisting, unexecuted judg-

ment against the defendant, and while the defendant was at all times within the jurisdiction of the court, upon his failure to perfect ⁵⁰⁴ his appeal, he did not demand that the judgment and sentence be carried into execution. The judgment being valid and the sentence unserved, the commitment of the defendant in execution of the judgment was a legal and valid imprisonment.

For the reasons stated, the demurrer is sustained, and the application for writ of habeas corpus is denied.

Furman, Presiding Judge, and Owen, Judge, concur.

The Time When a Sentence of Imprisonment is to be Carried Out is usually merely directory and forms no part of the judgment of the court. And the failure of officers to enforce a sentence, due either to delay in issuing the execution or in taking the defendant into custody after it issues, does not prevent his subsequent arrest and imprisonment: *Miller v. Evans*, 115 Iowa, 101, 91 Am. St. Rep. 143. Where a defendant was sentenced to twelve months' imprisonment at hard labor, but had actually suffered only about two months' imprisonment at the expiration of the twelve months, being at large the rest of the time by his own request or consent, he is not entitled to his discharge at the end of the twelve months: *Terrell v. Wiggins*, 55 Fla. 596, 127 Am. St. Rep. 196. Where not controlled by statute, the date for the beginning of service of a term of imprisonment, not fixed by the sentence, is the day of the sentence, when not legally stayed, and the defendant should forthwith be committed to the proper officer. Where this is not done, and the court makes an order under which the defendant is discharged from custody, it has no power or jurisdiction after the lapse of the time involved in the sentence, and after the term, to issue a commitment on such judgment: *Ex parte Clendenning*, 22 Okl. 108, 132 Am. St. Rep. 628; *In re Flint*, 25 Utah, 338, 95 Am. St. Rep. 853. An unexplained delay intervening between the release of a defendant on his own recognizance while a motion for a new trial is pending and the final disposition of that motion and his remandment to custody, deprives the court of jurisdiction to pronounce sentence, and that the delay was by the consent of the defendant is immaterial: *People v. Barrett*, 202 Ill. 287, 95 Am. St. Rep. 230.

Trial Courts cannot Suspend Indefinitely the Sentence of one convicted of crime and permit him to go at large upon his own recognizance or upon parole: *Ex parte Clendenning*, 22 Okl. 108, 132 Am. St. Rep. 628, and cases cited in the cross-reference note thereto. Both the judgment and stay are without validity in a case where, through an understanding with the judge and the district attorney, a woman charged with keeping a bawdy-house pleads guilty, is sentenced to jail, and a stay of execution is granted on condition that she leave the place and not again offend the law: *Ex parte Cornwall*, 223 Mo. 259, 135 Am. St. Rep. 507.

HUMPHREY v. STATE.

[3 Okl. Cr. 504, 106 Pac. 978.]

APPEAL—Authentication of Case-made.—The Statute Requiring the case-made to be attested by the clerk, and the seal of the court thereto attached, is mandatory, and without such authentication the case made is not properly presented to this court. (p. 973.)

CRIMINAL TRIAL—Presence of Accused in Felony Case.—In a criminal prosecution for a felony, the defendant must be present, in person, during the trial, and the record must affirmatively show this fact. (p. 973.)

(Syllabi by the court.)

Crump & Rogers, for the plaintiff in error.

Charles West, attorney general, and Chas. L. Moore, assistant attorney general, for the state.

508 OWEN, J. The plaintiff in error was tried in the district court of Seminole county. The judgment of the court in passing sentence was on the seventeenth day of June, 1908. The certificate of the trial judge attached to the case-made is as follows:

"I, A. T. West, judge of the district court of Seminole county, Oklahoma, and the judge before whom the case of the State of Oklahoma, Plaintiff, v. Jess Humphrey, Defendant, was tried, do hereby certify the foregoing to be a full, true, and complete bill of exceptions tendered to me by the said defendant in said case, and I do now sign and settle the same as a correct and true bill of exceptions and do hereby direct the clerk of this court to file the same as a part of the record in said cause.

"A. T. WEST,
"Judge of District Court of Seminole County, Oklahoma."

The certificate is not attested by the clerk, nor was the seal of the court attached. Section 6951, Snyder's Compiled Laws of 1909 (section 5612, Wilson's Revised and Annotated Statutes of 1903), among other things provides as follows: "The case and amendments shall be submitted to the judge, who shall settle and sign the same and cause it to be attested by the clerk or the probate judge, and the seal of the court to be thereto attached. It shall then be filed with the papers in the case. The original case-made shall be filed with the petition in error."

This court has repeatedly held such provisions of the statute mandatory. The case-made and record must be authenticated as required by statute: *Chandler v. State*, 3 Okl. Cr. 254, 105 Pac. 375, 107 Pac. 735; *Bradford v. State*, 3 Okl. Cr. 367, 106 Pac. 535. The motion to strike the case-made must be sustained.

Attached to the record filed in this court appears the certificate of the clerk of the district court, bearing the imprint of the seal, as follows:

"I, J. E. Lawhead, clerk of the district court of Seminole county, Oklahoma, do hereby certify that the above and foregoing is a correct, true, and complete transcript in the case of the State of Oklahoma, Plaintiff, v. Jess Humphrey, Defendant.

J. E. LAWHEAD,

"District Clerk."

⁵⁰⁶ This is a proper authentication of the transcript of the record. As was said by this court in the case of Reed v. United States, 2 Okl. 652, 103 Pac. 371, the record proper, under our statute, includes the information, the plea of the defendant, the verdict of the jury, the sentence of the court, instructions given by the court, and those requested by the defendant, together with all indorsements made thereon. This record is properly before the court for review. By the provisions of section 6919, Snyder's Compiled Laws of 1909 (section 5580, Wilson's Revised and Annotated Statutes), the clerk's minutes of the trial are also made a part of the record. The transcript of the clerk's minutes filed in this case fails to disclose the presence of the defendant in court during the argument of the counsel, and when the verdict was returned and received by the court. Section 6775, Snyder's Compiled Laws of 1909 (section 5436, Wilson's Revised and Annotated Statutes), is as follows: "If the indictment is for a felony, the defendant must be personally present at the trial."

This question was presented in the supreme court of Oklahoma in the case of Day v. Territory, 2 Okl. 409, 37 Pac. 806. and again in the case of Le Roy v. Territory, 3 Okl. 596, 41 Pac. 612. In construing the statute, in the case of Day v. Territory, the court said: "A leading principle that pervades the entire law of criminal procedure is that after an indictment is found, nothing shall be done in the absence of the prisoner. While this rule has, at times, in cases of misdemeanor, been somewhat relaxed, yet in felonies it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial. It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him, by inclining the hearts of the jurors to listen to his defense with indulgence. And it appears to be well settled that where the personal presence is necessary in point of law, the record must show the fact. Thus in a Virginia case the records showed that on two occasions during the trial the prisoner appeared by attorney, and there was nothing to show that he was personally present on either day in court. This was probably the result of mere inadvertence in making up the record, yet the court ⁵⁰⁷ must look only to the record as it is.

It is the right of anyone, when prosecuted on a capital or criminal charge, to be confronted with his accusers and witnesses, and it is within the scope of this right that he be present, not only when the jury are hearing his case, but any subsequent stage, when anything may be done in the prosecution by which he is to be affected. And in a Pennsylvania case it was held that the record must show affirmatively the prisoner's presence in court, and that it was not allowable to indulge the presumption that everything was rightly done until the contrary appears: *Lewis v. United States*, 146 U. S. 370, 13 Sup. Ct. Rep. 136, 36 L. ed. 1011; *Prine v. Commonwealth*, 18 Pa. 103; *Dunn v. Commonwealth*, 6 Pa. 384; *Ball v. United States*, 140 U. S. 118, 11 Sup. Ct. Rep. 761, 35 L. ed. 377. From the record, it does not appear affirmatively, that the defendant has been afforded his constitutional right of presence during the trial. It may be, and more than likely is, true that the defendant was in fact present at all times, and that the error is an inadvertence in making up the record when his case was called for consideration; but it would be a dangerous precedent to establish, for the court to assume such to be truth, and thus give its assent to a conviction where the records fail to show that the defendant was actually present on his trial, thereby saying to the world that the trial of a defendant may take place, in this territory, in his absence, in violation of a sacred and humane constitutional, as well as a statutory, immunity."

It may appear technical to reverse the case for the failure of the record to show the presence of the defendant, when in all probability the defendant was present at each step taken during the trial. Courts of last resort must establish precedents under which innocent men are to be tried. The law presumes every man innocent, and this presumption clings to him until overcome by competent evidence in a fair trial conducted according to law. Even though the evidence in this case is sufficient to warrant the verdict of guilty, yet we must not declare a rule in this case that would deprive an innocent man of any substantial right. It is not the fault of appellate courts when such a precedent must be declared in a case where the proof shows the defendant guilty. The fault, if any there be, is with the trial court, the clerk, and the prosecuting attorney in their failure to have the record speak the truth.

⁵⁰⁸ For the failure of the record to affirmatively show the presence of the defendant during the argument in the case, and when the verdict was returned in open court against him, the case must be reversed and remanded, with directions to grant a new trial.

Furman, Presiding Judge, and Doyle, Judge, concur.

The Necessity of the Personal Presence of the Accused in Criminal Proceedings is the subject of a note to *Warren v. State*, 68 Am. Dec. 219; and when a trial may be had in the absence of the accused is the subject of a note to *Fight v. State*, 28 Am. Dec. 627. The right of one accused of crime to be confronted with the witnesses against him and to be present at every stage of the proceeding is discussed in the note to *Wray v. State*, 129 Am. St. Rep. 43. In a felony case the accused must be present when the verdict is received, unless his absence is voluntary or willful. The absence must be from choice or the exercise of the will. An unavoidable absence is not voluntary, nor is an unintentional absence where, under the circumstances, his presence could not be reasonably required. Even an absence, though in somewhat serious negligence, which is neither purposeful, deliberate, nor under circumstances from which an intention can be presumed, is not voluntary: *Derden v. State*, 54 Tex. Cr. 396, 133 Am. St. Rep. 986; and the record must show that the defendant was present during his trial and sentence. There is no presumption of his presence, and the failure of the record to show it is fatal: *French v. State*, 85 Wis. 400, 39 Am. St. Rep. 855, and see earlier cases cited in cross-reference note thereto.

If the Accused in a Felony Case Absents Himself during the trial, the subsequent proceedings and judgment therein are without jurisdiction and void: *Emery v. State*, 57 Tex. Cr. 423, 136 Am. St. Rep. 988.

If a Defendant Absconds Before Verdict Returned in a trial for felony, no legal verdict can be received or rendered during his absence, and a judgment entered subsequently upon a verdict so received is null and void, and renders the whole proceeding a mistrial. In such case the court should declare a mistrial and discharge the jury without verdict: *Summeralls v. State*, 37 Fla. 162, 53 Am. St. Rep. 247. In capital cases the defendant must be personally present at all times in the course of his trial, and when anything is said or done affecting him as to the charge against him in any material respect: *State v. Kelly*, 97 N. C. 404, 2 Am. St. Rep. 299.

The Presumption of the Continuance of a Fact or state of things, shown to exist, applies to a record showing the presence of the prisoner in court at the commencement of each day's proceedings in the trial: *State v. Gibson*, 67 W. Va. 548, 68 S. E. 295, 28 L. R. A., N. S., 965.

Waiver of Right.—In felonies less than capital, the defendant has the right to be present at all times, but he may personally waive this right. His counsel cannot waive it for him: *State v. Kelly*, 97 N. C. 404, 2 Am. St. Rep. 299; and one who is on recognizance for his appearance on a charge of felony less than capital, and who is present when the trial begins, but flees the court while it is pending, waives his right to be present during the remainder of the trial, and is not entitled to be discharged or to have a new trial on account of his absence: *State v. Kelly*, 97 N. C. 404, 2 Am. St. Rep. 299. To grant a change of venue in a felony case at the request of the defendant, but in his absence, is not reversible error: *Bond v. State*, 63 Ark. 504, 58 Am. St. Rep. 129.

On a Trial for a Misdemeanor, where the defendant and his counsel, without leave, voluntarily retire from the court after the case has been submitted to the jury and before the court adjourned, such leaving operates as a waiver of their right to be present at the rendition of the verdict, and authorizes the court to receive it in their absence: *State v. Waymire*, 52 Or. 281, 132 Am. St. Rep. 699.

The Necessity of the Personal Presence of the Accused extends only to the proceedings in the trial court. His presence is not necessary at the hearing or determination of an appeal: *State v. Jacobs*, 107 N. C. 908, 22 Am. St. Rep. 912.

Absence of the Judge During the Trial is the subject of a note to *Scott v. State*, 122 Am. St. Rep. 721. If the judge is absent from the courtroom and out of sight and hearing of the jury during an important part of the trial of a criminal case, it is a ground for setting aside a verdict of conviction: *Carney v. State*, 47 Tex. Cr. Rep. 566, 122 Am. St. Rep. 715; but the mere momentary absence of the judge from the courtroom during a criminal trial, without proof that he lost control of the proceedings, or that anything occurred during his absence which could militate against the rights of the accused, is not ground for setting aside a verdict of conviction: *Scott v. State*, 47 Tex. Cr. 568, 122 Am. St. Rep. 717.

TEGLER v. STATE.

[3 Okl. Cr. 595, 107 Pac. 949.]

NEW TRIAL—Death of Judge Before Settlement of Case-made.—Under the provisions of the law in force at the date of this trial, the judge who presided at the trial was the only person authorized to settle and sign a case-made, and, such judge having died after the completion of the trial and before the case-made had been settled and signed, the defendant, without fault on his part, was thereby deprived of his constitutional right to present a complete appeal to this court, and is thereby entitled to a new trial. (p. 978.)

(Syllabus by the court.)

J. W. Johnson and A. N. Munden, for the appellant.

Charles L. Moore, assistant attorney general, and S. H. Harris, for the state.

595 FURMAN, P. J. On the eleventh day of April, 1908, Rudolph Tegler, the defendant, after having been indicted and tried, was by the judgment and sentence of the thirteenth judicial district court of the state of Oklahoma adjudged guilty of the crime of murder, and sentenced to imprisonment in the penitentiary for the term of his natural life. Motions for a new trial and in arrest of judgment ⁵⁹⁶ had been previously made and overruled and exceptions saved, and time had been given to make and serve a case-made. The trial was presided over by Honorable J. G. Lowe, one of the regular judges of the said district court, but before the case-made was prepared, served, settled and allowed, Judge Lowe departed this life. Subsequently to the death of Judge Lowe, Honorable Jno. J. Carney attempted to allow, settle and sign the case-made, as the successor in office of Judge Lowe. The record shows that this attempted settlement of the case-made was done with the consent of counsel who represented the state in the lower court. The appeal is now before us on transcript of the record and the attempted case-made.

Counsel for the state insist that this court cannot consider the attempted case-made contained in the record upon the ground that "Judge Lowe, who presided at the trial, was the only person authorized by law to settle and sign the case-made, and that the purported case-made is a mere nullity, and is no part of the record, and cannot be considered for the purpose of determining the alleged errors sought to be presented by it for review." In the case of *Spray v. Territory*, 6 Okl. 1, 37 Pac. 1074, the supreme court of the territory of Oklahoma said: "When a criminal cause is brought here upon writ of error or appeal in such a manner that the court cannot pass upon the substantial rights of the parties, the provisions of the statute relating thereto must be strictly complied with. An agreement of attorneys, prescribing the time or manner of taking such appeal or bringing such writ of error here, cannot be substituted in lieu of the provisions of the statute."

In *Bailey v. Territory*, 9 Okl. 461, 60 Pac. 117, the supreme court of the territory said: "An appeal is a right conferred by the organic act, but the manner of perfecting an appeal is a matter of statutory regulation. ⁵⁹⁷ The criminal procedure act makes specific and definite provisions for the mode of taking appeals in criminal causes."

Section 4742, Wilson's Revised and Annotated Statutes, in force at the time of the trial in this case, is as follows: "The court or judge may, upon good cause shown, extend time for making a case and the time in which the case may be served; and may also direct notice to be given of the time when a case may be presented for settlement after the same has been made and served, and amendments suggested, which when so made and presented shall be settled, certified and signed by the judge who tried the cause, and the case so settled and made shall thereupon be filed with the papers in the cause; and in all causes heretofore or hereafter tried, when the term of office of the trial judge shall have expired, or may hereafter expire before the time fixed for making or settling and signing a case, it shall be his duty to certify, sign or settle the case in all respects, as if his term had not expired; and if no amendments are suggested by the opposing party, as above provided, said case shall be taken as true and containing a full record of the cause and certified accordingly."

This statute in plain and mandatory terms provides that the case-made "shall be settled, certified and signed by the judge who tried the cause." There was then no provision of law permitting any other judge to perform his duty. It is therefore plain that a case-made attempted to be settled by any other judge would be void, and could not be regarded otherwise than a nullity. It is true that the special session of the legislature of 1910 did amend the law in this respect, and that in the future, in the event of the death of the judge who

tried a case, the case-made may be settled and signed by his successor in office. But this amendment has no application to the case before us. This case must be determined by the law in force at the time that the present case-made was settled. The attorney general is therefore correct in his contention, and we are unable to consider for any purposes the attempted case-made contained in the record.

If the failure to have a case-made incorporated in the record in the manner required by law is the result of the neglect or fault of a defendant, or of those who represent him, then the ⁵⁹⁸ defendant could not be heard to complain; neither would this court have power to relieve him against the consequences of such failure. But this is not the state of facts which is now before us. Here there is no case-made in the record, owing to facts for which the defendant and his counsel are in no manner responsible, and which rendered it impossible to comply with the mandates of the law. Our constitution recognizes the right of appeal in criminal cases, but leaves it to the legislature to provide the means and method of exercising this right. We are bound by the provisions of law regulating appeals provided by the legislature. Shall a constitutional privilege conferring a substantial right be denied because some unavoidable accident renders the provision of law inadequate? Is it not the sworn duty of this court to secure to each citizen of Oklahoma the full and unimpaired enjoyment of all of his constitutional rights, it matters not how humble, poor and penniless such citizen may be? It would be a contemptible farce to say that the defendant in this case had been granted the full enjoyment and exercise of his right of an appeal to this court, when, owing to the death of Judge Lowe, it had become out of the power of the defendant to present to this court a case-made as provided by law, containing all that transpired at the trial, except those matters which constitute the record proper. We cannot pass intelligently upon the questions presented to this court by the record proper, unless we can consider the facts transpiring at the trial and the testimony of the witnesses. This we cannot do without the case-made. This defendant has the constitutional right to have this court consider the facts of this case, and the legal questions involved in the light of these facts, and of all that transpired at the trial, and he cannot be deprived of this right by the death of the judge who tried the case.

The record shows that counsel for the defendant did more than the law required or provided for in attempting to secure a case-made. This certainly should not be charged against them as a waiver of the constitutional rights of their client. In *Bailey* ⁵⁹⁹ v. *United States*, 3 Okl. Cr. 175, 104 Pac. 917, 25 L. R. A., N. S., 860, Judge Doyle, speaking for this court.

said: "It seems to be well established, as a general rule, that where a defendant has done all that the law requires in perfecting his appeal, and where the record necessary for a review of the case is lost or destroyed while in the custody of an officer of the court, in order to prevent a possible miscarriage of justice by depriving the defendant of his legal right of appeal, a new trial will be granted. In *Crittenden v. Schermerhorn*, 35 Mich. 370, Chief Justice Cooley said: 'Where a party has lost the benefit of his exceptions from causes beyond his control, it is proper to give him a new trial, and this we have done in some cases where the judge's term of office expired before exceptions could be settled.' In *Borrowdale v. Bosworth*, 98 Mass. 34, it was said: 'We can have no doubt that where a party has regularly taken exceptions in a cause, and has lost the benefit of them without fault of his own, a new trial may be granted. He has a right by law to the judgment of the higher court upon the decision by which he feels himself to be aggrieved, and a new trial may be his only remedy.' In the case of *Hume v. Bowie*, 148 U. S. 245, 13 Sup. Ct. Rep. 582, 37 L. ed. 438, the supreme court of the United States recognized the general rule, and said: 'Ordinarily, where a party, without laches on his part, loses the benefit of his exceptions through the death or illness of the judge, a new trial will be granted.' In the case of *State v. Reed*, 67 Mo. 36, it appeared that the record of the case was defective, and upon a suggestion by the appellant of a diminution of the record, a certiorari was awarded, to which a return was made to the effect that the office of the clerk of the court had been broken open, and nearly all of the papers in the case stolen. The record sent up in obedience to the certiorari was therefore more defective than the first. In consequence of the inability to obtain a perfect record, a motion filed to reverse the judgment on that ground was sustained. In the case of *Ruston v. State*, 15 Tex. App. 336, the court said: 'It appears that the defendant, without any fault or negligence upon his part, or on the part of his counsel, has been deprived of a most important legal right; and, such being the case, the judgment of conviction will be reversed, and the case remanded.' In the case of *Fire Assn. v. McNerney*, 54 S. W. 1053, a case decided by the court of civil appeals of Texas, it appears that the court's instructions to the jury had been destroyed by fire subsequent to the trial, and a motion was made and heard to substitute ⁶⁰⁰ an instruction in place of one destroyed as a basis for an exception to such charge by the appellant. There was a dispute between the parties as to the correctness of the substituted copy. The trial court refused to substitute the charge as requested, on the ground that it had no recollection of having given such a charge as was contended for by the defendant in error, and that the

proof offered did not establish the charge contended for by plaintiff in error. The court said with reference to that motion: 'We are of the opinion that if the court, upon a hearing of such motion, finds it impossible to supply the lost papers (if the loss is not due to appellant's fault or negligence), a new trial should be granted. A party should not be deprived of his right of appeal by loss of the record due to an accident not chargeable to him.' In *State v. Gaslin*, 32 Neb. 291, 49 N. W. 353, the court said: 'A litigant should not be deprived of the right to have his case heard in a court of last resort on account of the failure of the official stenographer to furnish him a copy of the testimony.' In *Sanders v. Norris*, 82 N. C. 243, the court said: 'The defendant is entitled to his appeal, and has lost it by no laches on his part; and in such cases it has been the established practice in this court to order a new trial.' In the case of *Richardson v. State*, 15 Wyo. 465, 89 Pac. 1027, 12 Ann. Cas. 1048, Chief Justice Potter, in an able opinion, after reviewing the authorities, said: 'Incidental to the power to compel a correct record to be sent up, or a bill of exceptions to be settled, is the power, as it seems to us, of ordering a new trial of the cause, where it is made to appear that the only record in the cause has been destroyed without possibility of substitution through no fault on the part of the appellant, or where, without fault on the part of the appellant or his counsel, but solely because of the neglect or delay of some court official, or some accident or act of Providence for which no one is responsible, it has become impossible for a bill of exceptions to be settled, without which the errors complained of cannot be considered.' "

The judgment against the defendant is reversed solely upon the ground that, owing to the death of Judge Lowe, the defendant has been deprived of the exercise of his constitutional right to have his appeal fully considered by this court.

The instructions given to the jury which constitute a part of the record proper are open to a number of criticisms, but we cannot intelligently determine these matters unless we could consider them in connection with the facts of the case. An erroneous instruction ⁶⁰¹ which might become material and result in reversal, under one state of facts, might be harmless, and not be ground for reversal under a different state of facts. Hence the importance, or rather necessity, of a case-made in determining appeals; and as there is no case-made in this case, through no fault of the defendant or his counsel, manifest justice requires that the judgment of conviction be reversed and the cause remanded for a new trial.

Doyle and Owen, Judges, concur.

Loss of Record on Appeal.—Where a convicted defendant perfects his appeal to a court of last resort, and the record in the cause becomes lost or destroyed without fault on the part of the defendant or his

counsel, and the record cannot be substituted, a motion to reverse the judgment and grant a new trial is properly awarded to prevent a miscarriage of justice or the deprivation of the legal right of appeal: *Bailey v. United States*, 3 Okl. Cr. 175, 104 Pac. 917, 25 L. R. A., N. S., 860, citing *Crittenden v. Schermerhorn*, 35 Mich. 370; *Borrowscale v. Bosworth*, 98 Mass. 34; *State v. Reed*, 67 Mo. 36; *Ruston v. State*, 15 Tex. App. 336; *Fire Assn. v. McNerney* (Tex. Civ. App.), 54 S. W. 1053; *State v. Gaslin*, 32 Neb. 291, 49 N. W. 353; *Sanders v. Norris*, 82 N. C. 243; *Richardson v. State*, 15 Wyo. 465, 89 Pac. 1027, 12 Ann. Cas. 1048.

Death of Judge.—Ordinarily, where a party, without laches on his part, loses the benefit of his exceptions through the death or illness of the judge, a new trial will be granted: *Hume v. Bowie*, 148 U. S. 245, 13 Sup. Ct. Rep. 582, 37 L. ed. 438.

GILMORE v. STATE.

[3 Okl. Cr. 639, 108 Pac. 416.]

PARDON—Grant Pending Appeal.—A Pardon Granted and accepted after conviction and pending an appeal in the criminal court of appeals is valid under constitution, article 6, section 10, wherein the governor is empowered to grant, after conviction, reprieves, commutations, paroles and pardons. (pp. 982, 984.)

PARDON.—The Term "Conviction," in Article 6, section 10, of the constitution, denotes the final judgment of the trial court, upon a plea of or verdict of guilty. (pp. 982, 984.)

APPEAL—Dismissal.—Where a Pardon is Granted and accepted, and brought to the attention of this court pending an appeal, the appeal will be dismissed. (pp. 982, 983, 984.)

(Syllabi by the court.)

R. B. Forrest, for the appellant.

Chas. West, attorney general, and Chas. L. Moore, assistant attorney general, for the state.

639 DOYLE, J. Plaintiff in error was convicted in the county court of Canadian county for the crime of conducting a public gambling house, and was sentenced to pay a fine of five hundred dollars, and to serve a term of thirty days in the county jail, from which judgment he appealed to this court.

While the case was still pending in this court, the acting governor granted an unconditional pardon to the plaintiff in error, and he has filed a certified copy of said pardon in this court, the material part of which reads as follows:

"Whereas, it appears from the court records that the said Hollis Gilmore was indicted by the grand jury on his own testimony in violation of his constitutional rights, and pardon has 640 been recommended by Judge John J. Carney and Hon. B. W. Riley: Now, therefore, I, George W. Bellamy, acting Governor of the state of Oklahoma, by virtue of the

authority vested in me by law, do hereby grant unto the said Hollis Gilmore a pardon of the said offense, to take effect immediately, restoring unto the said Hollis Gilmore all of the rights of citizenship. In witness whereof, I have hereunto set my hand and caused to be affixed the great seal of the state of Oklahoma, at Guthrie, this 1st day of April, A. D. 1910."

The question now presented in this case is, Has there been a conviction of the plaintiff in error within the meaning of the constitution, so that executive clemency may be invoked?

Section 10, article 6, of the constitution, provides: "The governor shall have power to grant, after conviction, reprieves, commutations, paroles, and pardons for all offenses, except cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to such regulations as may be prescribed by law. He shall communicate to the legislature at each regular session each case of reprieve, commutation, parole or pardon, granted, stating the name of the convict, the crime of which he was convicted, the date and place of conviction and the date of commutation, pardon, parole, or reprieve."

As we view it, an appeal pending in this court does not deprive the governor of the power to grant a pardon to the appellant. In its ordinary sense, the term "conviction" is used to designate that particular stage of a criminal prosecution, when a plea of guilty is entered in open court, or a verdict of guilty is returned by a jury. But in a strict legal sense, it denotes the final judgment of the court. Chief Justice Marshall defines "conviction" as "a technical term applicable to judgment in a criminal prosecution." A conviction within the meaning of the constitution is an adjudication that the accused is guilty. It imports the final consummation of the prosecution, from the complaint to the judgment of the court by sentence. And where an appeal is taken to this court, and, pending appeal, a pardon is granted and accepted, the appellant thereby waives all his rights ⁶⁴¹ upon the appeal, and when brought to the attention of this court the appeal will be dismissed.

In the case of *Commonwealth v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699, Justice Gray, concluding a very learned and elaborate discussion of the question, wherein he cites many instances where the pardoning power has been invoked after conviction, and while the cases were pending in the court of review, said: "It was argued for the commonwealth that the defendant could not be said to be convicted at the time when this pardon was granted, because a bill of exceptions was then pending in this court to the rulings under which he had been found guilty, and that, after pleading the pardon, he might still prosecute his exceptions, and, if they should be sustained,

have the verdict set aside. But it is within the election of the defendant whether he will avail himself of a pardon from the executive—be the pardon absolute or conditional. If he does not plead the pardon at the first opportunity, he waives all benefit of the pardon; if he does so plead it, he waives all other grounds of defense: Staunf. P. C. 150; J. Kelying, 25; 4 Blackstone's Commentaries, 402; United States v. Wilson, 7 Pet. 150, 8 L. ed. 640. The pleading of the pardon in the superior court would therefore be ipso facto a waiver of his exceptions."

In the case of *State v. Alexander*, 76 N. C. 231, 22 Am. Rep. 675, the court said: "At common law the crown exercised the power of pardon at any time. The consequence was that crimes were smothered. The facts were not brought to light. The person charged was not brought before the public and required to answer the charge, and, of course, the public were dissatisfied. But under our constitution and statute, the person charged must be brought before the public in a public trial and face his accusers, and all the facts must appear, and the jury must find him guilty, and the court must sentence him. If then he will ask for pardon, he cannot deceive the pardoning power. The public are in possession of the facts and can resist his application. Nor is the pardoning power any longer irresponsible to the public, because he has to report the facts and his reasons for exercising the power. It is not denied that a pardon granted under these circumstances is valid; but the objection made is that these prerequisites do not exist in this case, for although the defendant has ⁶⁴² been regularly charged, tried, found guilty by the jury, and sentenced by the court, thereby bringing his case within the constitutional provisions, yet he took it out of the provision by appealing to the supreme court, which appeal vacated the sentence or judgment; and so there was no 'conviction' remaining, and therefore the pardon is invalid as wanting a 'conviction' to support it. And this brings us to the construction of the constitution as to what is meant by 'conviction.' Does it mean the verdict of the jury, or the sentence of the court, or the verdict and sentence both? The word is ordinarily used to denote the verdict of the jury, guilty. How did the jury find? Guilty; or, they convicted him. What did the judge do? Sentenced him to be hanged. This is the language ordinarily used in such matters, both in conversation and in books, law and literary. It is never said that the jury sentenced him, nor that the judge convicted him. . . . Nothing can be a conviction but the verdict of the jury. Take that to be so, still, inasmuch as the constitution, in the same section in which it authorizes the governor to pardon 'after conviction,' requires him to report to the General Assembly not only the conviction but the sentence, is it not intended

that there shall be a sentence to report, else how can he report it? And if the appeal vacates the sentence, then there is no sentence to report; and so there is no sentence to support the pardon. Technically, that would seem to be so; but it is a refinement merely. Suppose the defendant in his application for pardon should say: 'I was convicted of murder and sentenced to be hanged. I appealed to the supreme court, but I abandon the appeal and pray for a pardon.' Might not the governor pardon him and in his report say that the applicant had been convicted of murder and sentenced to be hanged and appealed to the supreme court, but abandoned his appeal and prayed for pardon, and that he had pardoned him because he was satisfied that he was innocent? Would not that substantially comply with the constitution to say that he had been convicted and that he had been sentenced? It is insisted that the object is not to pardon him while he is making defense, nor until he surrenders and begs for mercy. If that were true, still does he not surrender and beg for mercy when he abandons his appeal and prays for pardon? But it is not always true that the defendant ought to be expected to surrender and beg for mercy. There are cases where he has been improperly convicted and asks, not for mercy, but for justice": See, also, *Commonwealth v. Kiley*, 150 Mass. 325, 23 N. E. 55; *Smith* ⁶⁴³ v. *State*, 6 Lea (74 Tenn.), 637; *Hackett v. Freeman*, 103 Iowa, 296, 72 N. W. 528; *Manlove v. State*, 153 Ind. 80, 53 N. E. 385; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366.

Applying the principles of law stated in the foregoing cases to the questions involved, we are of opinion that the restriction imposed in the constitutional provision upon the exercise of the pardoning power does not apply to cases where there has been a conviction in the trial court and an appeal taken therefrom.

The language of the statute providing for appeal is (section 6951, Snyder's Statutes): "If the crime of which the defendant is convicted be a bailable one, the court shall at the time of entering judgment notify the defendant of his right to an appeal," etc.

There manifestly the judgment and sentence is considered to be the conviction.

Therefore, it is considered that the appeal be, and the same is hereby, dismissed, and the cause remanded to the county court of Canadian county.

Furman, Presiding Judge, and Richardson, Judge, concur.

A Pardon can be Granted Only After Conviction by the judgment of a court: *Campion v. Gillan*, 79 Neb. 364, 126 Am. St. Rep. 667. A pardon may be granted after conviction and before sentence while a review by the supreme court is pending on exceptions, as the

acceptance of the pardon by the defendant is an admission of guilt and a waiver of his exceptions: *People v. Marsh*, 125 Mich. 410, 84 Am. St. Rep. 584; *State v. Alexander*, 76 N. C. 231, 22 Am. Rep. 675; or after a verdict of guilty and before sentence: *Commonwealth v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699.

A *Statutory Provision for Pardon* may be made, although the power to grant pardons is vested in the governor, as that one who, as a witness for the state, testifies regarding a lynching shall be altogether pardoned of any and all participation therein: *State v. Bowman*, 145 N. C. 452, 122 Am. St. Rep. 464.

The Offenses Subject to the Pardoning Power by the governor are considered in the notes to *State v. McIntyre*, 59 Am. Dec. 573; *State v. Nichols*, 7 Am. Rep. 600.

JACOBS v. STATE.

[3 Okl. Cr. 648, 108 Pac. 429.]

APPEAL—Escape of Prisoner Pending—Right to Review.—Where a defendant has been convicted of murder and sentenced to imprisonment for life at hard labor in the state penitentiary, and perfects an appeal to this court, and while said appeal is pending makes his escape from the custody of the law, he thereby waives his right of having said conviction reviewed by this court. (pp. 986, 987.)

APPEAL—Escape of Prisoner Pending—Dismissal of Appeal. The criminal court of appeals will not consider an appeal, unless the defendant is where he can be made to respond to any judgment or order which may be rendered in the case, and where the defendant makes his escape from the custody of the law, or is at large, as a fugitive from justice, this court will on motion dismiss his appeal. (p. 987.)

(Syllabi by the court.)

Geo. W. Partridge, for the plaintiff in error.

Chas. West, attorney general, and Chas. L. Moore, assistant attorney general, for the state.

649 DOYLE, J. Melvin M. Jacobs, plaintiff in error, was convicted of murder. His conviction was had upon an indictment returned at the March, 1909, term of the district court of the twentieth judicial district, held within and for Alfalfa county, wherein said indictment charged that he did on the first day of February, 1909, with malice aforethought, kill and murder one Arthur L. Strole, by shooting him with a pistol. Upon this trial the jury returned a verdict of guilty and assessed the penalty at imprisonment for life at hard labor in the state penitentiary. April 1, 1909, the court pronounced judgment and sentence in accordance with the verdict. From which judgment and sentence an appeal was taken by filing in this court petition in error, with case-made attached, July 28, 1909. In the meantime plaintiff in error was committed to the county jail of Garfield county. At this,

the March term of this court, said cause was orally argued and submitted on briefs and argument. On April 4, 1910, there was filed in the case a motion of the attorney general on behalf of the state to dismiss the appeal, which motion, omitting the formal parts, is as follows:

"Comes now the Attorney General for and upon behalf of the state of Oklahoma, and informs the court that heretofore, to wit, on April 1, 1910, the plaintiff in error, Melvin M. Jacobs, being confined in the county jail of Garfield county, Okla., for safe-keeping, awaiting the disposition of his appeal herein, did then and there wilfully and unlawfully effect his escape from said jail by forcibly breaking therefrom, and is now at large, a fugitive from justice, all of which appears from the affidavit of the sheriff of said Garfield county, the keeper of said jail, and having at the time the lawful custody of the accused, which said affidavit is hereto attached, marked 'Exhibit A,' and made a part of this motion. Wherefore the Attorney General says that, under the law and the rulings of this court, the plaintiff in error has forfeited his right to an appeal, and in legal effect has abandoned the same, in that he now refuses to submit himself to undergo such judgment as may be rendered herein."

Attached to said motion, as "Exhibit A" is the affidavit of S. C. Campbell, sheriff of Garfield county, the material part of which is as follows:

§50 "S. C. Campbell, of lawful age, being first duly sworn, on his oath state: That he is the duly elected, qualified, and acting sheriff of Garfield county, Okla., and has been such at all times hereinafter mentioned. That on the 1st day of April, 1909, one Melvin M. Jacobs was sentenced to life imprisonment by the district court of Alfalfa county, Okla., and thereafter was committed to the custody of affiant as sheriff of Garfield county, pending the appeal of said Melvin M. Jacobs. That on the 1st day of April, 1910, the said Melvin M. Jacobs by sawing the clasp off of the window bars, escaped from the Garfield county jail and is now at large and has not yet by affiant been apprehended. That a copy of the commitment under which affiant has held the said Melvin M. Jacobs is hereto attached and made a part of this affidavit."

Upon the facts stated the principles of law are the same as in the case of *Tyler v. State*, 3 Okl. Cr. 179, 104 Pac. 919, 26 L. R. A., N. S., 921, wherein this court said: "From a review of the authorities we are convinced that it is no part of our duty as an appellate court to consider or review the judgment, orders and rulings of which he complains, while he is at large as an escaped convict. Such has been the uniform holding of the courts of last resort in other jurisdictions, and it meets our full approval. . . . The appellant, by escaping from jail, where he was being held pending a de-

termination of his appeal to this court, has voluntarily withdrawn himself from the jurisdiction of the court. So far as he has any right to be heard under the constitution and the statute before this court, he must be deemed to have waived it by escaping from the custody of the law. Where a person convicted of a felony has escaped from the custody of the law, no order or judgment, if any should be made, can be enforced against him, and appellate courts will not give their time to proceedings which, for their effectiveness, must depend upon the consent of an escaped convict. While we find no express provision of our statute authorizing a dismissal of an appeal in a criminal case for the reason stated in the present motion, we are of opinion that the appellant by his own act has waived the right to have his case considered and determined. In this conclusion we are sustained by the authorities quoted, and many others."

The doctrine of the Tyler case is approved, and on the authority of that case the motion of the attorney general to ⁶⁵¹ dismiss the appeal is sustained and the case remanded to the district court of Alfalfa county, with direction to have the judgment and sentence carried into execution.

Furman, Presiding Judge, and Richardson, Judge, concur.

A Prisoner's Right to Appeal While a Fugitive from Justice is the subject of a note to *State v. Plazencia*, 41 Am. Dec. 271. The authorities are not entirely harmonious on the question whether a fugitive from justice loses his right of appeal. It has been held that the court will not hear the appeal of one who has been convicted and has escaped: *Warwick v. State*, 73 Ala. 486, 49 Am. Rep. 59; *McGowan v. People*, 104 Ill. 100, 44 Am. Rep. 87; *Wilson v. Commonwealth*, 10 Bush, 526, 19 Am. Rep. 76; *People v. Genet*, 59 N. Y. 80, 17 Am. Rep. 315; and see *Brouk v. Brouk*, 46 Fla. 474, 110 Am. St. Rep. 101. On the other hand, it has been held that fleeing from justice neither destroys nor impairs a party's right to appeal from a judgment against him: *State v. Plazencia*, 6 Rob. 441, 41 Am. Dec. 271; and in other cases that the appellate court may, at its discretion, either dismiss or hear the appeal: *State v. Cedy*, 119 N. C. 908, 56 Am. St. Rep. 692; *State v. Jacobs*, 107 N. C. 772, 22 Am. St. Rep. 912.

A Statute Which Provides That upon Conviction and Sentence for a crime punishable by death or imprisonment for life the crime is not bailable, and that in all cases where the sentence is for a crime not bailable the appeal shall suspend execution until the matter is determined, and the defendant in the meantime shall be confined to the state prison, is not unconstitutional: *Ex parte Mingle*, 2 Okl. Cr. 708, 104 Pac. 68; *Ex parte Haikey*, 3 Okl. Cr. 66, 104 Pac. 377.

IN RE FRALEY.

[3 OKL. CR. 719, 109 PAC. 295.]

HOMICIDE—Reduction to Manslaughter—Cooling Time.—In determining whether a homicide is reduced from murder to manslaughter, the question is not only, Did the defendant's passion engendered by a sufficient provocation in fact cool? But also, Was the time intervening between the giving of the provocation and the killing sufficient for the passion of a reasonable man to cool? An affirmative answer to either question precludes a reduction of the homicide to manslaughter. (p. 990.)

HOMICIDE—Reduction to Manslaughter—Cooling Time.—If a fatal wound be inflicted immediately following a sufficient provocation given, then the question as to whether the defendant's passion thereby aroused had in fact cooled, or as to whether a sufficient time had elapsed in which the passion of a reasonable man would have cooled, is a question of fact to be determined upon a consideration of all the facts and circumstances in evidence; but when an unreasonable period of time has elapsed between the provocation and the killing, the court is authorized to say as a matter of law that the cooling time was sufficient. (pp. 990, 991.)

HOMICIDE—Revenge.—A Deliberate Killing Committed in revenge for an injury inflicted in the past, either near or remote, is murder. (p. 991.)

BAIL—Right to on Habeas Corpus—Burden of Proof.—Upon an application for bail by writ of habeas corpus after commitment for a capital offense, the burden is upon the petitioner to show facts sufficient to entitle him to bail when those facts do not appear from the evidence adduced on the part of the prosecution. (p. 991.)

BAIL—Presumption.—When the Homicide is Proven or admitted, the court on an application for bail will not presume for the prisoner either justification or mitigation merely because the evidence for the prosecution fails to show their absence. Unless the evidence for the prosecution shows the presence of facts tending to justify, excuse or mitigate the offense, the burden is on the petitioner to show them. (p. 991.)

BAIL—Injury from Confinement—Opinion of Physicians.—Affidavits of physicians stating that in their opinion confinement in jail will result disastrously to the petitioner, and which state no facts upon which such opinion is based, make no sufficient showing for the admission of the prisoner to bail. (p. 992.)

BAIL—Evidence Examined and held to justify the refusal of bail. (p. 992.)

(Syllabi by the court.)

D. A. McDougal and Boone, Leahy & McDonald, for the petitioner.

Chas. West, attorney general, Smith G. Matson, assistant attorney general, and L. F. Roberts, for the state.

720 RICHARDSON, J. This is an original application in this court by M. F. Fraley for a writ of habeas corpus, by which he seeks to be let to bail pending the final hearing and determination of a charge of murder filed against him in Osage county. The writ was allowed, and was made return-

able on May 6, 1910, on which day the respondent, R. A. Correll, sheriff of Osage county, filed his return thereto. On said day written stipulations were also filed in this court by the attorneys for the petitioner and the state stipulating and agreeing that on April 11, 1910, a complaint was filed against petitioner before E. L. McCain, a justice of the peace in and for Osage county, charging petitioner with the murder of one Dan Parker, upon which complaint a warrant of arrest was duly issued and served; that on April 22, 1910, petitioner's examining trial was held before said justice of the peace, upon the conclusion of which petitioner was committed without bail to answer a charge of murder in the district court; that the presence of the petitioner before this court is waived; and that this court shall hear and determine this application upon a transcript of the testimony taken at the preliminary hearing and upon certain affidavits here presented.

Petitioner contends that he should be let to bail, first, because the proof of his guilt of a capital offense is not evident or the presumption thereof great; and second, that if his guilt is ⁷²¹ evident, the circumstances are such that the court should nevertheless exercise its discretion and admit the petitioner to bail.

Petitioner did not testify in the examining trial, nor were any witnesses introduced in his behalf. The testimony taken, which is uncontradicted in this court, shows that the deceased, Dan Parker, on April 11, 1910, was sitting upon or leaning against a railing in front of a drug-store in the city of Pawhuska; that he had been in that position for some ten or fifteen minutes engaged in conversation with some gentleman beside him in regard to the sale of certain walnut timber; that the petitioner came around the corner, walked up in front of the deceased, said "Hello, Dan," and without further warning immediately fired two shots into the deceased in quick succession; that the deceased jumped up, threw up his hands, staggered, and fell off the sidewalk. The petitioner thereupon walked around an obstruction and fired four more shots into the deceased; that the petitioner then walked off, and after going some distance, turned and came back, and putting his pistol close to the head of the deceased, snapped it a time or two and said: "You damned son of a bitch, I told you I'd kill you; you killed my boy." The substance of the foregoing facts are testified to positively by seven eye-witnesses, and they stand in the record undisputed. It is further shown that after the deceased fell off the sidewalk his pistol fell out of his pocket; but the evidence nowhere tends to show that the deceased ever at any time had his pistol in his hand, or that he ever made any effort or demonstration to draw it. No previous conversation or difficulty of any kind

or character between the petitioner and the deceased was shown or intimated.

The testimony does not show it, but it was stated by counsel for the petitioner in presenting this case that the deceased, some nine or ten months previously, had shot and killed the son of the petitioner, and that the deceased had been tried for the offense and had been acquitted; and it is urged here that when the petitioner saw the deceased on this occasion, the recollection of that event must have engendered in him a passion which overcame ⁷²³ him; that the killing was committed in the heat of such passion, was without premeditation, and therefore not murder. To this we cannot assent, even if we could take the statement of counsel as a proper substitute for testimony tending to prove the facts stated. In *Ragland v. State*, 125 Ala. 12, 27 South. 983, four hours intervening between the provocation and the killing was held as a matter of law to be sufficient cooling time to preclude the reduction of a homicide to manslaughter. *Perry v. State*, 102 Ga. 365, 30 S. E. 903, and *Rockmore v. State*, 93 Ga. 123, 19 S. E. 32, each hold three days as a matter of law sufficient cooling time. *Commonwealth v. Aiello*, 180 Pa. 597, 36 Atl. 1097, holds from one to two hours sufficient, and *State v. Williams*, 141 N. C. 827, 53 S. E. 823, holds fifteen minutes sufficient. And the authorities are all agreed that the question is not alone whether the defendant's passion in fact cooled, but also was there sufficient time in which the passion of a reasonable man would cool. If, in fact, the defendant's passion did cool, which may be shown by circumstances, such as the transaction of other business in the meantime, rational conversations upon other subjects, evidence of preparation for the killing, etc., then the length of time intervening is immaterial. But if, in fact, it did not cool, yet if such time intervened between the provocation and the killing that the passion of the average man would have cooled and his reason have resumed its sway, then still there is no reduction of the homicide to manslaughter: *Savary v. State*, 62 Neb. 166, 87 N. W. 34; *Hurst v. State*, 40 Tex. Cr. 378, 46 S. W. 635, 50 S. W. 719; *People v. Bush*, 65 Cal. 129, 3 Pac. 590; *Reese v. State*, 90 Ala. 624, 8 South. 818; *McNeil v. State*, 102 Ala. 121, 48 Am. St. Rep. 17, 15 South. 352; *People v. Sanches*, 24 Cal. 17; *State v. Holmes*, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887; *Ex parte Brown*, 65 Ala. 446; *Smith v. State*, 103 Ala. 4, 15 South. 843; *Hawkins v. State*, 25 Ga. 207, 71 Am. Dec. 166; *State v. Yarbrough*, 39 Kan. 581, 18 Pac. 474; *Sparks v. Commonwealth (Ky.)*, 14 S. W. 417. If the fatal wound be inflicted immediately following a sufficient provocation given, then the question as to whether the defendant's passion thereby aroused had in fact cooled, or as to whether or not such time had elapsed that the passion of a reasonable man would ⁷²³ have

cooled, is a question of fact to be determined upon a consideration of all the facts and circumstances in evidence; but when an unreasonable period of time has elapsed between the provocation and the killing, then the court is authorized to say as a matter of law that the cooling time was sufficient.

Ordinarily, one day, or even half a day, is in law much more than a sufficient time for one's passion to cool; and a killing committed upon a provocation given some nine or ten months before is not, on account of that provocation or any passion engendered thereby, reduced to manslaughter. A deliberate killing committed in revenge for an injury inflicted in the past, however near or remote, is murder.

The uncontradicted testimony in this case convinces us that the proof of the petitioner's guilt of a capital offense is evident, and that he is not therefore entitled to bail as a matter of right. The rule was laid down by the supreme court of this state in the case of *In re Thomas*, 1 Okl. Cr. 15, 93 Pac. 980, to the effect that, upon an application for bail by writ of habeas corpus after commitment for a capital offense, the burden is upon the petitioner to show that he is illegally deprived of his liberty; that is, the burden is upon the petitioner to show facts sufficient to entitle him to bail, where those facts are not shown by the evidence adduced on the part of the prosecution. This is a just and salutary rule, and has been uniformly followed in this state: *Ex parte Johnson*, 1 Okl. Cr. 414, 98 Pac. 461; *Ex parte Smith*, 2 Okl. Cr. 24, 99 Pac. 893. We are not permitted to presume for the prisoner either justification or mitigation merely because the evidence for the prosecution fails to show their absence. On the contrary, unless the evidence for the prosecution shows the presence of facts or circumstances tending to justify, excuse or mitigate the offense, then the burden is upon the petitioner to make that showing by evidence at least sufficient to generate a reasonable doubt in that respect. It is the law in this jurisdiction that even in the trial of the case, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation that justify or excuse it devolves upon him, unless ⁷²⁴ the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable: *Snyder's Compiled Laws of Oklahoma*, sec. 6854. That being true in the ultimate trial of the case where the question of the defendant's guilt or innocence, with all its momentous consequences to him, is to be passed upon, why should a different rule prevail on an application for bail, whose only purpose is to procure a release from custody during the short period of time intervening before the trial? We find in this record nothing from which it could be inferred that the petitioner acted in his necessary self-defense, either

real or apparent; or that the homicide was anything else than murder. What may be disclosed upon the final trial we do not know.

The petitioner's next contention, that the circumstances are such that the court should exercise its discretion and admit him to bail, is based upon the written unverified statements of two physicians, which, however, by agreement of the attorneys on each side, we here treat as affidavits, and which are as follows:

"I, Ira Mullins (a regular practicing physician of Hominy, Oklahoma), have been personally acquainted with M. F. Fraley for the last five years. And knowing his make up both mentally and physically as I do, I think that to keep Mr. Fraley in jail for any length of time will destroy his mind permanently or cause his death.

"(Signed) IRA MULLINS, M. D."

"I, Thomas M. Berry (a regular practicing physician), do hereby declare that after being personally acquainted with M. F. Fraley for some time know him to be seriously endangered both mentally and physically by being confined in prison at this time.

"(Signed) THOS. M. BERRY."

Treating these statements as affidavits, they are wholly insufficient upon which to exercise a discretionary power to admit the petitioner to bail. Neither of them undertake to state any facts whatsoever, but state only opinions and mere general conclusions. The facts upon which these opinions and conclusions are based are not before us. They should be stated in order that we may draw our own conclusions. We have a proper deference for the opinion of reputable physicians ⁷²⁵ upon matters pertaining to their profession, but when we are called upon in a judicial capacity to act upon their opinions, we must insist upon having a statement of the facts upon which they are based. We cannot be expected to adopt their opinions without knowing the facts and circumstances which induce them.

Bail is denied, the writ is discharged, and petitioner is remanded to the custody of the sheriff of Osage county to await his trial in due course.

Furman, Presiding Judge, and Doyle, Judge, concur.

The Condition of Mind of the Slayer Which Reduces Murder to Manslaughter is the subject of a note to *People v. Poole*, 134 Am. St. Rep. 726; and see *State v. Driggers*, 84 S. C. 526, 137 Am. St. Rep. 856.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

STRADLEY v. BATH PORTLAND CEMENT COMPANY.

[228 Pa. 108, 77 Atl. 242.]

JUDGMENTS—Res Judicata.—When a Matter has Once properly passed to final judgment, it has become *res adjudicata* and, as between the same parties, cannot be reopened or subsequently considered save by direct appeal for reconsideration to the tribunal that gave the first judgment, or by proceedings for reversal in an appellate court. (p. 996.)

JUDGMENTS—Res Judicata—Judgment by Default.—So long as a judgment stands unreversed and unappealed from, it may not be questioned in any other case, and the circumstance that the defendant let the matter go uncontested to judgment does not impair the effect. A judgment by consent or default raises an estoppel. (pp. 996, 997.)

JUDGMENTS—Res Judicata—Matters That Might have been Considered.—A judgment is conclusive not only of the matters that were actually considered, but of those that might have been considered if the defendant had exercised the vigilance that the law requires. (p. 997.)

JUDGMENTS—Res Judicata.—An Action on a Contract, having gone to judgment, affects an action between the same parties subsequently for damages arising from a breach of that contract. The legal theory underlying the two actions may not be the same, but the doctrine of *res adjudicata* applies to the material issuable facts common to both. (p. 999.)

MASTER AND SERVANT—Action for Compensation—Installments.—A Discharged Servant who would recover of his employer upon a contract under which his services were to be paid for in periodical installments must bring his action for all the installments due at the time; otherwise he waives those due and unsued for. (p. 1000.)

Assumpsit to recover monthly installments of salary. There was a judgment for the plaintiff and the defendant appealed. The error assigned was an order making absolute a rule for judgment for want of a sufficient affidavit of defense.

Tustin & Wesley, for the appellant.

Alex. Simpson, Jr., and Bernard J. O'Connell, for the appellee.

110 MOSCHZISKER, J. The court below entered judgment for want of a sufficient affidavit of defense.

The plaintiff first sued the defendant on April 19, 1909. The statement was filed April 28, 1909, and claimed \$416.66, for one month's salary from October 28 to November 28, 1908, averring: "On or about the twenty-eighth day of October, 1907, in pursuance of a verbal agreement with the board of directors of the defendant company, the plaintiff was elected vice-president of the said company at a salary of \$5,000 a year; which said salary was to be paid in monthly installments; and as such officer of said company he was to perform such duties as the said board of directors should assign to him. That in pursuance of the said agreement the plaintiff entered upon the performance of the said duties, which for the year in question were those of general sales agent. That on or about the twenty-eighth day of October, 1908, the plaintiff was re-elected to said office, and the said board of directors assigned to him for the ensuing year, in addition to his regular duties as vice-president, the office of general manager, etc., at Bath, Pa." On April 28, 1909, the defendants entered an appearance, and on May 27, 1909, the plaintiff took judgment for want of an affidavit of defense; which judgment was paid by the defendant on June 9, 1909. After this the plaintiff brought a second **111** suit to recover \$4,583.26, eleven months' salary from November 28, 1908, to October 28, 1909. In this case he filed a statement of claim containing precisely the same averments as those just quoted from the statement in the former action, in addition to which he averred: "That he performed his duties up to the eighth day of February, 1909, when he was wrongfully and maliciously prevented by the defendant company from the further performance of the said duties, and was discharged by the said company from the said employment," and "the said plaintiff has continued from the said time ready and willing at all times to perform said duties or such duties as might be assigned to him." He also averred the facts as to the former action, and that the judgment in that suit "stands to this day unappealed from and unreversed."

The defendant filed an affidavit and a supplemental affidavit of defense, in which it set up as a defense to the whole claim: That there was no contract for the employment of the plaintiff or for his election to office when he was elected second vice-president of the defendant company on October 28, 1907, with an admission that his salary was then fixed by the board of directors at \$5,000 a year; that when the plaintiff was elected vice-president on October 28, 1908, no salary was fixed, and at that meeting he with other members of the board of directors delegated to the executive committee of the board the power and authority to fix the salaries of all

the officers of the company; that on October 29, 1908, the executive committee concluded that no salary was to be paid to the plaintiff as vice-president, and elected him to the office of manager at Bath at a salary of \$250 per month, and so notified him by letter on December 1, 1908; that the plaintiff held his office as vice-president and general manager until February 8, 1909, when he severed his connection with the company; that the board of directors never made any agreement with the plaintiff to pay him \$5,000 a year, and that the plaintiff was never elected to the office of vice-president in pursuance of any ¹¹² contract, but held the office at the pleasure of the board of directors; and finally, a general denial that the plaintiff was wrongfully and without cause prevented by the defendant from the further performance of his duties, or that he was discharged from his employment, "as in said statement of claim averred," and an averment that "the said plaintiff, being unwilling to accept \$250 per month salary as manager of the Bath office, and being unwilling to serve as vice-president without compensation, he withdrew from the service of the defendant company on or about the eighth day of February, 1909, as in the said statement of claim averred, but the defendant denies that on said day, as in said statement of claim averred, the plaintiff was wrongfully and maliciously prevented from a performance of the said duties assigned to him, as second vice-president. The defendant avers that the said plaintiff was discharged from his employment as manager of the Bath office on or about the eighth day of February, 1909." The averments as to the payment of salary are extremely vague, but it is not averred that any part of the salary sued for has been paid, or even that the salary at the rate of \$250 per month was paid up to February 8, 1909.

A second defense was that by bringing suit on April 19, 1909, for only one month's salary ending November 28, 1908, the plaintiff waived all other salary due between the latter and the former dates, and that he is now estopped from claiming the salary so waived.

Both of these defenses were adjudged insufficient, and judgment was entered for \$4,735.80, the full amount of the claim with interest. An appeal has been taken by the defendant.

The court below states: "As to the first defense, it is clear that under ordinary circumstances the denial as made by the affidavit of defense would be sufficient to send the case to a jury. The plaintiff, however, contends that such an effect cannot follow here, because the existence of the contract declared on and its terms are ¹¹³ res adjudicata. The defendant denies this effect to the judgment in the previous case because it was a judgment procured without an issue of fact

or law being taken for want of a sufficient affidavit of defense. There never having been any denial of the plaintiff's averments, it is contended that the binding effect of the judgment is limited only to the matter or thing in controversy in that case, namely, the one month's salary; that while no question could ever be raised again as to that, yet as to any other month's salary, or any other terms of the contract, the question remains open and undecided, because it has never been contested." In disposing of these contentions the learned judge of the common pleas filed an opinion in which he amply sustained his rulings on this branch of the case, and we cannot do better than to quote from and adopt part of that opinion: "The question can no longer be said to be arguable. It is settled public policy that validity must be attributed to judgments of courts, and that when a matter has once properly passed to final judgment, it has become *res judicata*, and the same matter between the same parties cannot be reopened or subsequently considered, save only by a direct appeal for reconsideration to the tribunal that gave the first judgment, or by proceedings for reversal had in an appellate court. So long as a judgment stands unreversed and unappealed from it may not be questioned in any other case. And the circumstance that there was no legal contest in reaching the judgment does not impair its effect. The modern decisions in England and in this country are at one on this point. In *South American and Mexican Co. v. Bank of England* (L. R. 1895, 1 Ch. 37, 44) Sir Roland Vaughn Williams stated the doctrine in these words: 'It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when the parties have once litigated a matter, it is in the interest of the state ¹¹⁴ that litigation should come to an end; and if they agree upon a result or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matter in respect of which an estoppel would have been raised by judgment, if the case had been fought out to the bitter end.' And in the same case the lord chancellor (Herschell) used this language: 'The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is the judgment which results from the decision of the court after the matter has been fought out to the end.' And these views are exactly in line with those of our courts. In *Orr v. Mercer County Mut. Fire Ins. Co.*, 114 Pa. 387, 6 Atl. 696, it was held that 'A confession of judgment in a cause at issue in the court of common pleas, on an appeal from a justice of the peace, is conclusive upon the defendant as to the right of

the plaintiff to recover other payments on the same contract, in subsequent actions, in which the defense is the same as that made before the justice of the peace in the former action.' And in delivering the opinion of the court, Mr. Justice Trunkey said (page 392): 'In legal effect, while it stands, a judgment by default or confession is the same as upon a verdict.' And in support of the doctrine cites the case of *Newton v. Hook*, 48 N. Y. 676, in the following words: 'Suit was brought on two notes against the maker and indorser to recover a payment of interest; the defendant appeared by counsel, but made no answer, and judgment was taken by default. Subsequently, the same plaintiff brought suit against the indorser on three notes, two of them being the two in the former suit, all made in the same transaction, and the defendant set up usury which would have invalidated the notes, and it was ruled that the former judgment was conclusive of the plaintiff's right to recover.' And this doctrine was emphatically reaffirmed by Mr. Justice Fell in *Schwan v. Kelly*, 173 Pa. 65, 33 Atl. 1107, in these words: 'The rule that what has been judicially determined shall not again be made the ¹¹⁵ subject of controversy extends to every question in the proceedings which was legally cognizable, and applied where a party has neglected the opportunity of trial, or has failed to present his cause or defense in whole or in part under the mistaken belief that the matter would remain open and could be made the subject of another proceeding.' In the case before us, no judgment could have been entered for want of an affidavit of defense, unless the statement had presented a valid ground for such judgment, and the ground presented was, that there was a contract for the salary sued for; that it was payable monthly, and that it had not been paid for the first month. The entry of the judgment judicially ascertained these facts, and as that judgment stands unreversed and unappealed from, those facts are in law absolute and cannot be gainsaid in another proceeding. If the defendant felt that in justice he ought to escape their consequences, it was his duty to show to the court that entered the judgment some reason why it should be set aside or modified. He failed to do that, but, on the contrary, paid the amount, which payment was, in law, a declaration that he had no reason to question the facts found by the judgment, and these are now *res judicata*. The defense is therefore ineffectual, and the plaintiff is entitled to recover."

In addition to the cases cited in the opinion of the court below, we have the case of *Allen v. International Text-book Co.*, 201 Pa. 579, 88 Am. St. Rep. 834, 51 Atl. 323, wherein it was ruled: "Where a person is employed for one year at a fixed salary, payable in weekly installments, and is discharged dur-

ing that period, and two weeks afterward sues for two installments of his salary, and recovers a judgment, which is paid, such a judgment conclusively establishes the wrongfulness of the discharge, and in an action brought after the period of employment had expired to recover salary for the balance of the year, the question of the wrongfulness of the plaintiff's discharge cannot again be inquired into"; and *Pennock v. Kennedy*, 153 Pa. 579, 26 Atl. 217, to the effect that a judgment is conclusive not only of the matters that were ¹¹⁶ actually considered, but of those that might have been considered if the defendant had exercised the vigilance that the law requires.

Aside from the general question of the applicability of the principles of *res adjudicata* to a judgment by default, the defendant contends that the declaration in the first case failed to sufficiently aver a contract of employment at a fixed salary or for any definite time, or that the plaintiff's second election was in pursuance of the alleged original contract, and therefore that these matters cannot be said to have been adjudicated in that suit. But the defendant loses sight of the fact that in this other action the plaintiff was suing for the first monthly installment of salary which had accrued after his election for the second year, and that all of the averments as to the origin of the contract were for the purpose of showing a right to recover the amount claimed—\$416.66—on an employment under a yearly contract at a salary of \$5,000. Although the declaration was not stated with technical nicety, no attack having been made on it by demurrer or rule for a more specific statement, and there having been no rule to strike off or open the judgment entered thereon, and that judgment not only remaining unappealed from, unimpeached and unreversed, but having been actually paid by the defendant company, it is now too late to raise these questions. We must assume that the judgment was properly entered, and that all material issuable facts stated or implied in the declaration were well pleaded, and it only remains to see what facts of that nature were involved. They were: 1. That in pursuance of a contract the plaintiff, on October 28, 1907, was elected and employed by the year at a salary of \$5,000 per annum, to be paid monthly; 2. That he was to perform such duties as might be assigned to him; 3. That he entered upon and did perform these duties; 4. That on October 28, 1908, he was re-elected under this contract for the ensuing year, and entered upon the performance of his duties; 5. That there had been a breach ¹¹⁷ of the contract of employment by the defendant and not by the plaintiff. All of these matters were either averred or implied, and on the theory upon which the plaintiff stated his case they were material to a recovery; for that reason we

must take them to have been well pleaded, and the principles of *res adjudicata* apply.

This brings us to the second declaration. All of the issues which we have just enumerated as adjudicated under the first declaration are attempted to be raised by the second, and the only material new ones relate to the nonpayment of the amount sued for and the discharge. There is no sufficient denial of either of these. As to the first, there is practically no denial at all; and in regard to the second, the facts averred by the defendant are not sufficient in law to overcome the allegations of the plaintiff. The plaintiff says the discharge was a wrongful one, and the defendant answers that it was not wrongful, because the plaintiff was not employed at an annual salary for a fixed period, as alleged in his statement of claim, but was employed subject to the right of the executive committee to discharge him at any time; that his salary as second vice-president had been taken away by resolution of that committee, and that he had been properly discharged. This claim of right on the part of the defendant depends upon the ascertainment of a contract materially different from the one relied upon by the plaintiff and adjudicated in the first suit; that is, a contract not for one year's employment at \$5,000, but for an employment subject to discharge or reduction in salary at the will of the defendant. The defendant neither contends nor attempts to show that the plaintiff was properly discharged under the contract declared upon by him in both the first and the present action, but contents itself with a denial of that contract, and justifies the discharge by averring another and essentially different one. The court below very correctly concluded that the judgment in the first suit barred the defendant from setting up this new contract.

¹¹⁸ In addition to this, although the affidavit sets forth a copy of the notice sent to the plaintiff of the resolution cutting off his salary as second vice-president, yet it fails to give a copy of such resolution. For all that can be told from the affidavit as drawn, it may be that the affiant is merely averring his conclusions as to the effect of the resolution passed by the executive committee, and that his conclusion could not be supported in law if the resolution were set forth verbatim et literatim.

The defendant further contends that because the first suit was on the contract for one month's salary, and the second for damages arising from a breach of the contract, the principles of *res adjudicata* do not apply. While the legal theory upon which the two actions are grounded may not be the same, yet this can make no difference in the application of the doctrine of *res adjudicata* to such material issuable facts as are common to both.

We are brought to the conclusion, in view of the matters adjudicated in the first suit, that the averments in the affidavits of defense are not sufficient to justify sending the case to a jury, and the court below was right in so ruling.

In the determination of the second defense, the court below fell into error. When an employee on a contract for a fixed period, at a per annum salary payable monthly, has been wrongfully discharged, he can, if he sees fit, bring a separate action as each installment of salary falls due; yet if no action is brought until more than one is due, all installments that are then due must be included in the one action; and if an action is brought when more than one is due, a recovery in such action will be an effectual bar to a second suit brought to recover installments which were due at the time of the inception of the first action; and this on the theory that a judgment settles everything involved in the right to recover, not only matters that were raised, but those which might have been raised. This rule was recognized and applied in *Jenkins v. Scranton*, 205 Pa. 598, 55 Atl. 788. When the plaintiff ¹¹⁹ brought his action on April 19, 1909, for one month's salary from October 28 to November 28, 1908, he did not include the other four months' salary which were then due. The four months omitted in that action he included in his present suit; and this he had no right to do.

We eliminate the four months' salary, with interest amounting to \$1,751.28, and affirm the judgment in favor of the plaintiff for \$2,984.52.

The Remedies of an Employee Wrongfully Discharged are discussed in the note to *McMullan v. Dickinson Co.*, 51 Am. St. Rep. 515; and in the recent cases of *State v. Police Jury*, 120 La. 163, 124 Am. St. Rep. 430; *Currier v. Ritter Lumber Co.*, 150 N. C. 694, 134 Am. St. Rep. 955; *Seymour v. Oelrichs*, 156 Cal. 782, 134 Am. St. Rep. 154. If a servant employed for a certain period at a fixed salary per week is discharged during the term, and afterward recovers judgment for several installments of salary, such judgment is conclusive of the wrongfulness of his discharge, in an action brought by him after the expiration of the term to recover the balance of salary due, and confines the defense to proof of payment, release, or facts in mitigation of damages: *Allen v. International Text-book Co.*, 201 Pa. 579, 88 Am. St. Rep. 834. According to *Liddell v. Chidester*, 84 Ala. 508, 5 Am. St. Rep. 387, when wages are payable in installments, suits may be brought on the several installments as they mature. According to *Olmstead v. Bach*, 78 Md. 132, 44 Am. St. Rep. 273, a contract of employment is indivisible, if it is to employ a person for one year and to pay him weekly a sum named therein, and but one action can be sustained for its breach.

DAVIES v. PHILADELPHIA RAPID TRANSIT COMPANY.

[228 Pa. 176, 77 Atl. 450.]

EVIDENCE—Preponderance of Witnesses—Inference.—Where the testimony of eight credible witnesses is in direct contradiction of that of a single witness, the probabilities favor the evidence of the larger number. (p. 1002.)

EVIDENCE—Personal Injuries—Plaintiff's Testimony as Against Onlookers.—The weight of the evidence is not to be judged alone by the number of witnesses on either side; yet where it is one witness against many, and that one a plaintiff seeking damages for personal injuries, the court should have the jury consider the probability that the plaintiff, by reason of the fact and character of the accident, was not so favorably placed as onlookers to note and remember just what occurred. (p. 1002.)

EVIDENCE—Personal Injuries—Conflicting Testimony—Instructions.—In an action for damages for personal injuries the court should instruct the jury as to the difference between interested and disinterested testimony and caution them to have regard thereto in weighing conflicting testimony. (pp. 1002, 1003.)

Trespass to recover for personal injuries. The plaintiff obtained a verdict for two thousand five hundred dollars, but remitted five hundred dollars, and judgment was entered for two thousand dollars. The defendant company appealed, the error assigned being that the charge was inadequate.

Thomas Leaming and Wm. M. Stewart, Jr., for the appellant.

Francis M. McAdams, Willard E. Barcus and Joseph P. Rogers, for the appellee.

¹⁷⁷ POTTER, J. Counsel for appellant in this case complain of the inadequacy of the charge of the court. They allege that the case for the plaintiff rested upon her own uncorroborated testimony, and that she was contradicted by her own affidavit made shortly after the occurrence of the accident, and was also contradicted as to the essential facts of the case by the testimony of eight eye-witnesses. Under these circumstances counsel contend that it was the duty of the trial judge to explain clearly to the jury the difference between interested and disinterested testimony, as it was offered in connection with this case, and that the jury should have been cautioned as to their duty in weighing the evidence.

The issue was a very narrow one. It was, whether the car was started as the plaintiff was alighting, or whether she stepped off before the car came to a stop. Only one witness, and that the plaintiff herself, testified that the car was at rest before she attempted to alight. Eight eye-witnesses of the accident testified directly to the contrary,

stating that the plaintiff attempted to get off while the car was yet in motion. The credibility of the witnesses for the defendant was unimpeached, and with eight of them testifying in positive contradiction of the plaintiff's unsupported statement, the evidence gave the defendant a marked advantage to which it was properly entitled under the rules, and which should not have been minimized to its disadvantage in the charge of the court. ¹⁷⁸ Where the testimony of so many credible witnesses is in direct contradiction of that of a single witness, the probabilities are strongly in favor of the evidence of the larger number. Where witnesses are equally intelligent and equally truthful and free from bias, and have equal opportunities for knowledge of the facts to which they testify, the many are less likely to be mistaken than the few. In a conflict of evidence, mere number is not in itself controlling, but it certainly is entitled to great consideration, and should control unless there be special reason to credit the evidence of the smaller number. We think the result of the instructions of the learned trial judge to the jury was to unduly minimize the effect of the marked numerical preponderance of the witnesses who testified for the defendant. He said: "True it is that in this case the defendant called many more witnesses than the plaintiff. The weight of the evidence in a case is not to be determined by the number of witnesses called on either side. The weight of the evidence is to be determined by the character of the evidence." The statement was true, in so far as it went; but, in the same connection, the court should have called the attention of the jury to the probability that the plaintiff, by reason of the fact and character of the accident, was not in so favorable a position to note and remember just what occurred as onlookers would be; and also the fact of plaintiff's pecuniary interest in the result. It is most obvious that the weight of the evidence inclined very strongly against the plaintiff. The knowledge, recollection and veracity of eight credible witnesses, seven of them without the least pecuniary interest in the result of the suit, stood opposed to her. The probabilities were so overwhelmingly in favor of the truth of the statements of the eight witnesses, as to the one simple fact in controversy, that the court should have cautioned the jury strongly against an arbitrary or capricious disregard of the weight of the evidence. It is true that, as a general rule, mere neglect or omission to charge in a particular ¹⁷⁹ way is not error, in the absence of a particular request for such instructions. But an exception to this rule is thus stated in 2 Pepper & Lewis' Digest, 2714: "When a case turns on certain testimony, which is conflicting, it is error for the court not to call the jury's attention to the conflict, and the nature of the testimony, and to explain and set forth the weight to

be given to that kind of testimony, or to fail to explain adequately the relative value of the testimony of the different parties." This statement, as applied to cases where plaintiff's testimony is contradicted by disinterested witnesses, is sustained by our decisions in *Herstine v. Lehigh Valley R. R. Co.*, 151 Pa. 244, 25 Atl. 104, and *Holden v. Pennsylvania R. R. Co.*, 169 Pa. 1, 32 Atl. 103. In this case it was said (page 16): "The testimony of the plaintiff was most profoundly affected by his personal interest in the result. The very fate of his cause depended upon his individual testimony, and as his claim for damages was very large, and the costs and expenses of the trial were necessarily considerable, it is not possible to conceive of a case in which the effect of a heavy pecuniary interest in the result could exercise a more powerful influence upon the mind of the witness than this. As the review of the evidence shows, he stood entirely alone; not a solitary witness corroborated him in the least degree in this vital feature of his case, and of this fact he, being the plaintiff, was necessarily aware. We think the learned court below, in these circumstances, should have carefully explained to the jury the difference between interested and disinterested testimony, and should have specially cautioned them as to their duty in weighing and deciding upon a conflict of testimony in such a case. Nothing of this kind was done, and we think the charge was not adequate in that regard." So in *Fineburg v. Second etc. Ry. Co.*, 182 Pa. 97, 37 Atl. 925, it was held, as set forth in the syllabus, that, "in an accident case, where the testimony of the only witness who testifies to acts of defendant's negligence is contradicted by his own statements, by every other witness in the case, and by ¹⁸⁰ all the circumstances surrounding the accident, it is reversible error for the court to neglect to call the attention of the jury to the pertinent facts affecting the credibility of the witness and the contradictions of his testimony."

In *Hodder v. Philadelphia Rapid Transit Co.*, 217 Pa. 110, 66 Atl. 239, where the facts closely resembled the present case, and where the testimony of the plaintiff was directly contradicted by the conductor, motorman and four passengers, all of whom had equal opportunity with the plaintiff to know the actual facts, it was held that it was reversible error to minimize the effect of the numerical preponderance of the witnesses for the defendant. In the present case, we feel that the instructions of the trial judge tended unduly to minimize the legitimate advantage to which the defendant was entitled by reason of the marked numerical preponderance of credible witnesses in its favor. Because of this, and for the further reason that the charge was inadequate under the circumstances, in failing to instruct the jury as to the difference between interested and disinterested testimony, and

in cautioning them to have regard thereto in weighing the conflicting testimony, the judgment is reversed with a venire facias de novo.

If a Disinterested Witness, Who is in No Way Discredited by Other Evidence, testifies to a fact within his knowledge, which is not in itself improbable, or in conflict with other evidence, the witness must be believed, and the facts so given must be taken as legally established. The testimony of witnesses is not to be disregarded merely because they are interested in the result: *In re Miller's Will*, 49 Or. 452, 124 Am. St. Rep. 1051. It requires an extraordinary case to authorize the court to regard sworn testimony as manifestly impossible and untrue: *Bates v. Chicago etc. Ry. Co.*, 140 Wis. 235, 133 Am. St. Rep. 1069. As to what weight should be given negative testimony, see *Keiser v. Lehigh Valley R. R. Co.*, 212 Pa. 409, 108 Am. St. Rep. 872.

The Term "Preponderance of Evidence" Does not Mean a Mere Numerical Array of Witnesses, but it means the weight, credit and value of the aggregate evidence on either side. If, however, the witnesses are of equal fairness, candor, intelligence and truthfulness, equally well corroborated by the remaining testimony, and are equally free from interest in the suit, then the preponderance is shown by the number of witnesses: *Willcox v. Hines*, 100 Tenn. 524, 66 Am. St. Rep. 761.

An Instruction That the Jury are not to be Controlled by the Mere Numerical preponderance of witnesses on one side or the other, but should consider such preponderance along with other facts and circumstances conducing to credence, or the reverse, is proper: *Alabama etc. R. R. Co. v. Frazier*, 93 Ala. 45, 30 Am. St. Rep. 28.

ALEXANDER v. SHALALA.

[228 Pa. 297, 77 Atl. 554.]

HUSBAND AND WIFE—Deed from One to the Other.—There is no statute in Pennsylvania which authorizes or permits a direct conveyance of the wife's real estate to her husband. (pp. 1005, 1006.)

HUSBAND AND WIFE—Deed from One to the Other.—The fact that the husband joins with the wife in a deed from her to him does not cure the invalidity of the transfer. (p. 1005.)

HUSBAND AND WIFE—Deed from One to the Other.—In an action of ejectment, defendants who rely upon an attempted conveyance from a wife direct to her husband are not entitled to have a conditional verdict rendered to cover the amount of their improvements. (p. 1006.)

Case stated in ejectment. The land in dispute was once owned by Lizzie Alexander, who executed a deed therefor to her husband, who joined in the deed as a grantor. The land was claimed by the defendants under conveyances from the husband, Emory Alexander. There was a judgment for the defendants and the plaintiffs appealed, assigning the entry of such judgment as error.

A. L. Cole and L. E. Boyer, for the appellants.

W. C. Pentz and W. L. Calkins, for the appellees.

²⁹⁸ MOSCHZISKER, J. The controlling question in this case is, Can a married ²⁹⁹ woman, when her husband joins in the deed as a grantor, make a valid conveyance of her real estate directly to such husband as grantee?

While the married women's property acts of the different states are not precisely alike in phraseology, they are all directed to the same end; and when they contain a requirement, such as in the act of June 8, 1893 (Pub. Laws, 344), that the husband shall join in the deed of the wife, the thought seems to be general (where the point has been raised) that a direct conveyance from the wife to the husband is void even though joined in by him: *Johnson v. Jouchert*, 124 Ind. 105, 24 N. E. 580, 8 L. R. A. 795; *Riley v. Wilson*, 86 Tex. 240, 24 S. W. 394; *Trawick v. Davis*, 85 Ala. 342, 5 South. 83; *Rico v. Brandenstein*, 98 Cal. 465, 35 Am. St. Rep. 192, 33 Pac. 480, 20 L. R. A. 702; *Brooks v. Kearns*, 86 Ill. 547; *Kinnaman v. Pyle*, 44 Ind. 275; 21 Cyc. 1292; and it has been so held in New York under a statute which did not contain the requirement: *White v. Wager*, 25 N. Y. 328. It is true that in a number of jurisdictions the opposite rule has been adopted: *Savage v. Savage*, 80 Me. 472, 15 Atl. 43; *Wells v. Caywood*, 3 Colo. 487; *Robertson v. Robertson*, 25 Iowa, 350; *Burdeno v. Amperse*, 14 Mich. 91, 90 Am. Dec. 225; but the statutes in those states do not require the husband to join in the deed.

The common law considered the husband and wife so nearly one that the husband could neither directly convey to his wife nor be a direct grantee from her: 21 Cyc. 1284, 1291. To render such a conveyance from the wife to the husband valid, the statute must confer the power upon her, and thereby remove his common-law disability: 21 Cyc. 1292, sec. 3; 1 Bishop on Married Women, secs. 710, 711; *Rico v. Brandenstein*, 98 Cal. 465, 35 Am. St. Rep. 192, 33 Pac. 480, 20 L. R. A. 702; and the fact that a valid conveyance can be made indirectly through the medium of a third person will not alter the rule: 21 Cyc. 1292, sec. 4; 1 Bishop on Married Women, secs. 712, 713; *White v. Wagner*, 25 N. Y. 328, and *Riley v. Wilson*, 86 Tex. 240, 24 S. W. 394. However interesting, it will serve no useful purpose to theorize upon this subject; the question is one of public policy for the law-making power of the ³⁰⁰ state, and up to this time our legislature has not seen fit to go as far as the appellees contend. In *Wicker v. Durr*, 225 Pa. 305, 74 Atl. 64, a married woman made and delivered a deed to her husband, signed by herself alone, and we held it void, saying: "The acts of 1848 and 1893 materially enlarge a married woman's control of her separate estate, but they leave undisturbed the mode of its exercise in a conveyance of her real estate." We are of opinion that there is no statute in Pennsylvania which

authorizes or permits a direct conveyance of the wife's real estate to her husband, and the deed in question should have been held unauthorized and void.

The question of title is the only one to be decided on this record. The deed being null and the principles of estoppel inapplicable, the defendants are not entitled to have a conditional verdict rendered to cover the amount of their improvements: *McKee v. Lamberton*, 2 Watts & S. 107; *Glidden v. Strupler*, 52 Pa. 400; *Kirk v. Clark*, 59 Pa. 479; *McClure v. Douthitt*, 6 Pa. 414. The present case is distinguishable from *McCoy v. Niblick*, 221 Pa. 123, 70 Atl. 577, 30 L. R. A., N. S., 355, where such a conditional verdict was allowed; there the contract of the wife was valid although nonenforceable. No proper claim for mesne profits was made by the plaintiffs; when one desires to recover mesne profits in an action of ejectment, he should give notice in his declaration or prior to the trial: *Cook v. Nicholas*, 2 Watts & S. 27; *Bayard v. Inglis*, 5 Watts & S. 465; *Carman v. Beam*, 88 Pa. 319; Act of May 2, 1876, Pub. Laws, 95.

The assignments of error are all sustained; the judgment is reversed and is here entered in favor of the appellants.

The Effect of Deeds from Wife to Husband is discussed in *Carpenter v. Booker*, 131 Ga. 546, 127 Am. St. Rep. 241; *Rico v. Brandenstein*, 98 Cal. 465, 35 Am. St. Rep. 192; and in the note to *Turner v. Shaw*, 9 Am. St. Rep. 323. A statute requiring the husband to join in conveyances or encumbrances of the wife's separate estate applies only to conveyances by the wife to a third person other than her husband: *Osborne v. Cooper*, 113 Ala. 405, 59 Am. St. Rep. 117. That a wife may convey directly to her husband without his joining in the conveyance, see *Turner v. Shaw*, 96 Mo. 22, 9 Am. St. Rep. 319.

Conveyances from Husband to Wife are discussed in the note to *Currier v. Teske*, 133 Am. St. Rep. 607.

Compensation for Improvements in Ejectment is discussed in the notes to *Jackson v. Loomis*, 15 Am. Dec. 349; *Cleland v. Clark*, 81 Am. St. Rep. 164.

ROCKWELL v. WARREN COUNTY.

[228 Pa. 430, 77 Atl. 665.]

MINERALS—Effect of Severance from Surface Ownership.—

Where there has been a severance of oil, gas and minerals from the surface, in respect of the ownership, the separate ownership of these minerals constitutes an interest or estate in land. (p. 1008.)

TAXATION—Severance of Estates in Land.—The authority to tax and the manner of its exercise have nothing to do with the right of the owner either to hold his tract of land entire or to sever it by the grant of different estates therein. (p. 1008.)

TAXATION.—When There has been a Severance of the Oil, Gas and minerals from the surface, this constitutes an estate in land subject to taxation, even if this mineral estate underlies unseated lands. (p. 1008.)

D. I. Ball, for the appellants.

John Siggins, Jr., county solicitor, for the appellees.

⁴³⁰ **ELKIN, J.** The question involved here is whether the oil, gas and minerals reserved from the grant of the surface of several tracts of unseated land and now in a separate ownership can be taxed as real estate. If they are real estate, of course they can be taxed as such, and whether they are or not always depends upon the nature of the reservation or ⁴³¹ grant. A mere license to mine coal or to drill for oil and gas, unaccompanied by the right of ownership in the minerals underlying the surface, does not constitute an estate in land. On the other hand, oil, gas and coal are minerals, and when the title to the same is severed from the owner of the surface and is vested in a separate owner, an estate in land is thus created, which, if it be of any value, may be taxed. In the court below it was sought to restrain the collection of certain taxes which had been assessed against the oil, gas and minerals in several tracts of unseated land on the ground that there was no authority of law for the assessment of such minerals in unseated lands. It is contended that an unseated tract of land must be assessed as one entire body, and cannot be divided horizontally into different estates which may be separately owned. It has been held over and over again that there may be different estates and separate ownership of title in the same tract of land. One person may own the surface, another the coal, another the fire-clay and another the granite rock. It is too well settled to admit of argument that there may be such a severance of estates in a tract or tracts of land, and when there is such a severance, each separate owner has an estate therein. It is just as well settled that each separate estate is subject to valuation and assessment as land. As we understand the argument of the learned counsel for appellant, it is conceded that this is true as to seated lands, but it is earnestly contended that the rule should not apply to unseated lands. This distinction is too artificial to be substantial. As to the character of the estate and the right of ownership therein, there is no difference between seated and unseated lands. There is and can be no reason why the coal and other minerals underlying unseated lands may not be severed from the surface in the same manner and subject to the same incidents of ownership as in seated tracts.

It is argued that because seated lands are assessed in the name of the owners while unseated lands are assessed

by survey or warrant numbers regardless of the owners, ⁴³² whose names, if used at all, are only for the purpose of description, there being a personal responsibility for the payment of the taxes on seated tracts and the lands alone being bound if unseated, that the right of severance for the purpose of taxation at least does not exist in the same manner in both instances. This position is unsound, and results from a confusion of the rights of owners in dealing with their own estates and the power of taxing authorities in the levy and assessment of taxes. The authority to tax and the manner of its exercise has nothing to do with the right of the owner either to hold his tract of land entire or to sever it by the grant of different estates therein. The tax is assessed upon the property to be taxed, and that property may consist of the entire tract, or of the surface, or of the minerals, depending upon whether or not there has been a severance. The right to sever being established, the power to tax the severed estate necessarily attaches. For convenience growing out of the difficulties of ascertaining the owners, and other like considerations, the legislature provided a somewhat different method of making assessments of unseated lands and of collecting taxes levied against them, but these tax laws were not intended to and did not interfere with the right of the owner to dispose of his lands by severance or otherwise as to him might seem most advantageous. Most certainly the legislature did not intend by and through tax laws to make a distinction between the owners of seated and unseated lands as to the right of severance. There was a severance of the oil, gas and minerals in the case at bar from the surface, and there can be no doubt, under the authority of many cases, that the separate ownership of these minerals constitute an interest or estate in land: *Logan v. Washington County*, 29 Pa. 373; *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436; *Funk v. Haldeman*, 53 Pa. 229; *Sanderson v. Scranton*, 105 Pa. 469; *Gill v. Weston*, 110 Pa. 312, 1 Atl. 921; *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. 293, 24 Am. St. Rep. 544, 22 Atl. 1035, 13 L. R. A. 627; *Westmoreland etc. Natural Gas Co. v. De Witt*, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731; *Powell v. Lantzy*, 173 Pa. 543, 34 Atl. 450; *Blakley v. ⁴³³ Marshall*, 174 Pa. 425, 34 Atl. 564; *Marshall v. Mellon*, 179 Pa. 371, 57 Am. St. Rep. 601, 36 Atl. 201, 35 L. R. A. 816; *President etc. of D. & H. Canal Co. v. Hughes*, 183 Pa. 66, 63 Am. St. Rep. 743, 38 Atl. 568, 38 L. R. A. 826; *Hutchison v. Kline*, 199 Pa. 564, 49 Atl. 312.

It is clear, therefore, that there was a severance of the oil, gas and minerals from the surface, and we agree with the views expressed in the very excellent opinion of the learned judge of the superior court that this constituted an estate in land subject to taxation, even if this mineral estate did

underlie unseated lands. We also agree with the argument submitted by counsel for appellees that where there is a divided ownership in unseated lands, the surface being owned by one party and the minerals by another party, the surface is subject to assessment for taxes as unseated land, and a tax deed would convey the title to the surface only if the tax was assessed against the surface only, and the minerals, when severed, are subject to separate assessment in the same manner as the surface, and a tax title to the minerals when properly assessed and sold for the payment of taxes would convey a good title to the minerals.

While the question has not been raised here, it is important to keep in mind the fact that the right to tax depends upon the valuation and assessment of a definite estate in land. If there is no land, there is nothing to tax, and this principle applies as well to minerals as to surface. Because there may be a reservation of oil and gas by the grantor of the surface, or there may be an express grant of all the oil and gas underlying one or several tracts of land, it does not follow that in point of fact there is any such estate in existence. When the assessor goes upon the land, it is his duty to make a valuation upon information or knowledge which will furnish some definite fixed basis of valuation. A mere naked reservation of oil and gas in a deed without any other facts to base a valuation upon is not sufficient to warrant the assessment of taxes. Development in the neighborhood, sales of oil or gas lands in close enough proximity to add value, or any other element of value which may form a basis of valuation⁴³⁴ may be taken into consideration by the assessor or other taxing authorities, but it should always be borne in mind that real estate is the thing being dealt with, and that oil and gas are considered real estate, and if there be no oil and gas, then there is no real estate to be taxed.

Decree affirmed at the cost of appellant.

As to Whether There can be Ownership of Gas and Oil in Place, distinct and separate from the surface ownership, see Watford Oil etc. Co. v. Shipman, 233 Ill. 9, 122 Am. St. Rep. 144; Lillibridge v. Lackawanna Coal Co., 143 Pa. 293, 24 Am. St. Rep. 544; Nonamaker v. Amos, 73 Ohio St. 163, 112 Am. St. Rep. 708.

Payment of Taxes on a Tract of Land by the Surface Owner is not payment of taxes on minerals in it owned by another person and separately assessed with taxes in the name of the owner of the minerals: McGraw v. Lakin, 67 W. Va. 385, 68 S. E. 27. The statutes of Kansas providing for the taxation of strata of minerals in land, the title to which has been vested in persons other than the owner of the surface, and imposing penalties for its violation, applies to oil and gas as well as solid minerals. When the different strata are severed by contract or conveyance, each layer or stratum is subject to be taxed separately as real property: Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co., 83 Kan. 136, 109 Pac. 1002.

HOLLIS v. WIDENER.

[228 Pa. 466, 77 Atl. 819.]

FELLOW-SERVANTS—Chief Engineer and Oiler on Yacht.—The higher order of employment of the chief engineer, of a private yacht over that of the oiler does not of itself make the holders of the two positions other than fellow-servants of the owner. (p. 1013.)

MASTER AND SERVANT—Safe Place.—A Promise Made by the chief engineer to the oiler of a private steam yacht to "fix" a dangerous place does not render the owner liable for injuries to the oiler subsequently by reason of the place not being made safe. (pp. 1012, 1013.)

Trespass to recover for personal injuries. The plaintiff obtained a judgment and the defendant appealed. Among the errors assigned was the court's failure to give binding instructions for the defendant.

John F. Lewis and F. C. Adler, for the appellant.

S. Morris Waln and John W. Wescott, for the appellee.

467 **BROWN, J.** On the first trial of this case the plaintiff was the only witness examined, and a nonsuit was entered. In holding that the court below had erred in refusing to take it off, we said, through Mr. Justice Mestrezat: "This is a very close case, and the meager facts disclosed on the trial do not take it out of the realm of doubt. There was but one witness produced and examined at the trial, and his examination on either side was quite unsatisfactory in developing the material facts upon which the case should turn. . . . As we understand the plaintiff's case, he alleges that the place he was assigned to perform the work for which he was employed was unsafe by reason of the failure of the defendant to guard and protect him from the machinery which it was his duty to oil, and the necessity for guarding the machinery was brought to the attention of the employer, or a person representing him, who promised to remove the danger by providing the guards necessary to protect the plaintiff while he was engaged at his work. . . . The plaintiff had been engaged at this work long enough to know the dangers, if any, arising from a defective or negligently constructed platform, and it may be that he assumed the risk of those dangers. But he contends that he rebutted the presumption that he assumed such risk by showing that he notified his employer of the dangerous condition of the platform, and was assured that the danger would be removed, and that he remained at his work solely by reason of this assurance. He claims that the danger to which he was subjected was not so imminent and immediate as to require him to refuse to continue his work, and, therefore, that the promise of his em-

ployer to remove the danger justified him in not at once quitting work": *Hollis v. Widener*, 221 Pa. 72, 70 Atl. 287. On the trial, resulting in the judgment from which we have this appeal, the facts were fully developed, and there is no difficulty in intelligently passing upon the right of the unfortunate appellee to recover.

⁴⁶⁸ The plaintiff was an oiler on a yacht owned by the defendant. He had been employed in that capacity for about fifteen months at the time he was hurt and had served two watches daily of four hours each. His duty required him to oil the engine of the ice machine a least eight times during each watch when the yacht was in commission. In oiling the engine he was compelled to stand on an iron platform, and, on July 23, 1902, while attempting to step on it, his right foot slipped and was caught between the spokes of the driving wheel. His leg was so seriously injured that it was necessary to amputate it about four inches below the knee.

There is much force in the contention of counsel for the appellant that a verdict ought to have been directed in his favor because, from the facts, as fully developed on the second trial, no negligence on his part appeared. The yacht had been built by a most reputable company, under the inspection of the United States government and British Lloyds. When completed it was given the highest class possible for any vessel afloat: "Star 100 A-1," and a license was issued to it in accordance with the laws of the United States. The inspection to which it was subjected was not merely of the plans, but of all the materials before and after they went into its construction. The owner had not interfered either with the plans of the ship or its construction, nor insisted on any special devices in connection with it. Its entire design and construction had been intrusted to a competent ship-builder. In addition to this undisputed state of facts, the testimony of a dozen witnesses, including government inspectors and designing and constructing engineers, concurred that the platform of the ice machine and its approach were constructed in the usual way, of usual and proper material, supplied with a proper and efficient step, with proper rails and guards, and was in all respects safe for the use of the oilers. But, turning to the case of the plaintiff, as made out by himself on the second trial, when all the facts were fully developed, is he entitled to ⁴⁶⁹ recover, and ought the case to have gone to the jury on what we said of it on the first appeal?

About a week before the plaintiff was injured his foot had slipped while he was attempting to step on the platform, and he made complaint of what he regarded as its unsafe condition to the engineer in charge of the engines, who was his brother. He had been oiling the ice machine engine from

it for about fifteen months before this occurred and knew there was no guard in front of the driving wheel, but his contention is that, after his foot slipped the first time, he continued to incur the risk of being hurt, because his employer, after having been notified of the dangerous condition of the platform, had promised him that it would be made safe. His ground of complaint, as set forth in his statement of his cause of action and as testified to by himself on the trial, is the failure of his employer to keep this promise. The averment in the statement is, "The defendant promised and agreed to have the said platform made safe and properly guarded, but neglected to do the same," and the testimony of the plaintiff in support of this averment is as follows: "Q. Bring your mind now to the time when you came near getting caught or hurt—you made some complaint to your brother, you say—what did you say to him? What did you say to your brother? A. I said, 'Mr. Hollis, I slipped in there the other day, yesterday,' I said, 'Can't there be a guard or fender or some precaution put there for us oilers?' Mr. Hollis said, 'Yes,' he said, 'Ed,' or 'Hollis, that's one thing I'm going to do the first chance I have.' He said: 'You go on with your work and be careful with it until I fix that.' Q. Did you go on with your work, relying on this statement? A. I went on with my work, as usual. Q. Why? A. Under the promise of my master that he was going to put guards and a fender there."

The engineer, though the brother of the plaintiff, was not called as a witness, and there was no competent proof submitted by the plaintiff as to just what his authority ⁴⁷⁰ was. The defendant's uncontradicted testimony was that he had no authority to make any structural or other changes in the boat without his consent or that of the master in charge of it, and that no one except the captain had power to do anything or to give any orders.

When we held on the first appeal that this case was for the jury, we were of opinion, formed from "the meager facts" as disclosed by the testimony of the plaintiff alone, that the defendant, or someone acting for and representing him, upon being notified of the dangerous condition of the platform, had promised the plaintiff that it would be guarded, and that, relying upon that promise, he was justified in not at once quitting work; but, under the facts as they now appear, it is clear that the plaintiff never called the attention of his employer to the unguarded condition of the platform, and that no promise by the latter was ever made to have it guarded. What the plaintiff did was to call the attention of the engineer to the condition of the platform, and he promised to have it fixed. But who was the engineer? If he was not authorized to represent and act for the owner of the

boat, no notice to him of the alleged dangerous condition of the platform would be notice to the owner and no promise made by him could bind the owner. The accident occurred on a ship at sea, where, for the safety of all on board, there manifestly must be but one controlling head and but one voice to give orders and issue commands, and the authorities are uniform that all the rest in the service of the owner, except, perhaps, the master, are fellow-servants. In England, even the master is treated as a fellow-servant: *Hedley v. Pinkney & Sons Steamship Co.*, [1894] L. R. App. Cas. 222. In Ireland and Scotland it is held otherwise, and the master is regarded as a vice-principal: *Ramsay v. Quinn*, I. R. 8 C. L. 322; *Leddy v. Gibson*, 11 Ct. Sess. Cas., 3d Ser., 304. In "*The Osceola*," 189 U. S. 158, 23 Sup. Ct. Rep. 483, 47 L. ed. 760, it was held by the supreme court of the United States, upon a full review of the English and American authorities, "that all the members ⁴⁷¹ of the crew, except, perhaps, the master, are, as between themselves, fellow-servants."

The complaint by the plaintiff of the danger of the platform was made to but a fellow-servant, and he continued to discharge his duties as an oiler on what he says was a slippery, dangerous place, on the promise of a fellow-servant to "fix" it. The negligence of which he complains, as he himself puts it, was the failure of his employer to keep a promise to make safe the place where he was working. He admits that he voluntarily continued to work upon it after he knew from experience that it was dangerous, solely because there was a promise to fix it. This promise, however, was not the promise of his employer. It was but the promise of a fellow-servant who had no authority to make it, and, for the failure to keep it, the employer—the owner of the ship—incurred no responsibility.

The seventh assignment of error is sustained and the judgment reversed.

A Master is not Answerable to One Servant for an Injury Caused by the Negligence of Another Servant in the same common employment unless the negligent servant was the vice-principal of the master: *McGregory v. Ultima Thule etc. Ry. Co.*, 90 Ark. 210, 134 Am. St. Rep. 24; *Tennessee etc. R. R. Co. v. Bridges*, 144 Ala. 229, 113 Am. St. Rep. 35; *Indianapolis etc. Transit Co. v. Foreman*, 162 Ind. 85, 102 Am. St. Rep. 185; *Enright v. Oliver*, 69 N. J. L. 357, 101 Am. St. Rep. 710; *Kelly Island Lime etc. Co. v. Pachuta*, 69 Ohio St. 462, 100 Am. St. Rep. 706. Tests for determining the question as to who are fellow-servants are given in *Enright v. Oliver*, 69 N. J. L. 357, 101 Am. St. Rep. 710, and cases cited in the cross-reference note thereto.

The Right of Recovery by Employees, injured while performing hazardous duties, is considered in the notes to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884; *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289. If a man continues in dangerous employment, with knowledge of the danger, he must abide the consequences, so far as any claim against the employer is concerned: Note to *Houston etc.*

Ry. Co. v. De Walt, 97 Am. St. Rep. 890; Miller v. Moran Bros. Co., 39 Wash. 631, 109 Wash. 917; Knox v. American Rolling Mill Corp., 236 Ill. 437, 127 Am. St. Rep. 291.

As to Fellow-servants on a Boat it has been held that the master of a lighter and the crew, and the master and mate of a vessel, are fellow-servants. But that a deck-hand on steamboat A and the crew of steamboat B, the owners being partners, and a stevedore's foreman and his laborers, are not fellow-servants: Note to Fisk v. Central Pac. B. R. Co., 1 Am. St. Rep. 32, 33.

STINSON'S ESTATE.

[228 Pa. 475, 77 Atl. 807.]

A WILL IS THE LEGAL DECLARATION of a Man's Intention which he wills to be performed after his death, and, under the Pennsylvania wills act, this declaration must be in writing and signed at the end by the testator. (p. 1015.)

WILL—What is Signing at the End of a Will.—A testator's written declaration is his *animus testandi*, and when this is fully expressed, his will is finished and the end of it reached. It is there that his signature must appear as evidence that it is his will. (p. 1015.)

WILL—Irregular Paging—Signature in Middle.—A written instrument occupying three pages of a sheet of paper in the irregular order, 1, 3, 2, and signed in the middle of the second page, is valid as a will, provided that throughout this order there is a connected internal sense containing a clear expression of testamentary intention and excluding, from an inspection of it, any conclusion but that the testatrix signed her name at the place she regarded as the end of her will. (p. 1016.)

James Gay Gordon and J. Morris Yeakle, for the appellants.

Montgomery Evans, Nicholas H. Larzelere and Irvin P. Knipe, for the appellees.

476 BROWN, J. The requirement of the act of April 8, 1833 (Pub. Laws, 249), is, that "every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof." The question raised on this appeal is whether the paper which was admitted to probate by the register of wills of Montgomery county as the last will and testament of Agnes J. Stinson had been signed by her at the end thereof. On appeal to the orphans' court of the county from the action of the register, the president judge of the orphans' court of Berks county, specially presiding, held, in a well-considered opinion, that the will had been so signed. The document admitted to probate consists of a single sheet of legal cap paper, folded in the middle

in the usual way along the short dimension, making four pages of equal size. There is no writing on the fourth page. The writing in issue appears upon the first, second and third pages of the paper. The document is holographic, and the signature of Agnes J. Stinson appears about the middle of the second page, following the usual ⁴⁷⁷ in testimonium clause, and to the left of her signature are those of two subscribing witnesses. The learned counsel who, in the court below, represented the appellant from the decree of the register admitted, with characteristic candor, that the testatrix, after writing the first page, proceeded to the third, then wrote last what appears on the top of the second page, and, after the completed expression of her testamentary intention, signed her name. Application was made to the court below for a rehearing, on the ground that counsel had no authority, either from the appellant from the decree of the register or from any other contestant of the will, to make such admission, and on this appeal it is one of the grounds of complaint. No testimony of any kind was offered as to the order in which the pages of the will were written at the time the testatrix signed it. Both the attesting witnesses were dead, and counsel for the present appellants admit that the issue which they raise "must be determined wholly by an inspection of the alleged will itself." Our inspection of the document has satisfied us that the testatrix, after having written the first page, skipped the second, proceeded to the third, and, having reached the bottom of it, returned to the second, and, when she had completed the disposition of her estate at about the middle of that page, signed her name there in the presence of two witnesses. The admission of counsel, complained of by the appellants, is, therefore, wholly eliminated from the case. The question before us, reduced to one of great simplicity, is whether the end of a will is, as counsel for appellants contend, "the physical end of the writing, the point which is spatially farthest removed from the beginning," or is the logical end of the testator's disposition of his property, wherever that end manifestly appears on the paper.

A will is the legal declaration of a man's intention which he wills to be performed after his death. Such declaration must, under our wills act, be in writing and signed at the end thereof by the testator, unless prevented by an absolute inability. His written declaration ⁴⁷⁸ is his *animus testandi*; when it is fully expressed, his will is finished and the end of it reached. It is there that his signature must appear as evidence that it is his will. What he regards as the end of his will and what must manifestly be regarded as the end of it, from an inspection and reading of the writing, is the end of it under the statute, which contains nothing about the spatial

or physical end of it. The will before us, admittedly written by the testatrix herself, bears upon its face the unmistakable sequence which she intended to give to her writing. She started on the first page, and when she reached the bottom of it, turning the paper over, skipped to the third and there continued her writing, at the top of which, on the first line, the unbroken disposition of her property is continued. When the bottom of that page was reached she turned to the second, and, on the first line of it, continued in clear words the clause relating to the provisions on the third page for the Women's Christian Association of Norristown. She then proceeded to appoint her executors, and having done so, reached the end of her will and there signed her name. From the beginning of the first page, continuing on the third and ending on the second, there is connected internal sense, containing a clear expression of testamentary intention, and the only conclusion to be reached from an inspection of the writing is that the testatrix signed her name at the place which she regarded as the end of her will. She signed her name at the end of her written act which she intended to be her will, and, as it clearly so appears from the paper itself, her execution of it is not to be declared invalid because she failed to follow the sequence of the pages. The sequence of her will is unbroken from the first line on the first page to the place where she signed her name on the second, which was the end.

While no one of our cases where the question in which the sixth section of the act of 1833 was passed upon is precisely like the one now before us, *Baker's Appeal*, 107 Pa. 381, 52 Am. Rep. 478, is similar to it, and what was there said is here ⁴⁷⁹ controlling. In that case a will was written on the first and third pages of a sheet of paper and signed at the end of the third page. In a devise to A, written on the third page, numbered "4th," certain words describing the property devised were erased and the words "See next page" were there interlined. On the fourth page of the same sheet of paper was written an unsigned clause, numbered "4th," making a bequest to A, and also additional bequests to other beneficiaries. The scrivener who drew the will testified that the erasure and interlineation were made by him by testator's direction, and he identified the writing on the fourth page as the subject of the said reference in the will, and as having been written by him at the testator's direction prior to the signing by the latter. In holding that the writing on the fourth page was to be read into the will as constituting the fourth clause thereof, and that the entire instrument, with said clause incorporated therein, should be admitted to probate as the testator's will, we said: "Thus the general principle has been clearly established that a will is to be read in such order of pages or paragraphs as the testator manifestly

intended, and the coherence and adaptation of the parts clearly require. In writing a will upon the pages of foolscap paper, a testator may or may not conform to the order of the consecutive pages of the folio; there is no law which binds him in this respect; he may begin upon the fourth page of the folio and conclude upon the first, or he may commence upon the first, continue upon the third, and conclude upon the second; in whatever order of pages it may be written, however, it is to be read, as in *Wikoff's Appeal*, according to their internal sense, their coherence or adaptation of parts. The order of connection, however, must manifestly appear upon the face of the will; it cannot be established by extrinsic proof. Whilst, therefore, the end of the writing in point of space may in most cases be taken as the end of the disposition, it does not follow that in all cases the signature must, of necessity, be there written, ⁴⁸⁰ if it be written at the end of the will, according to such connection and arrangement of the pages or sheets as the obviously inherent sense of the instrument requires." To the same effect is the following from what was said by Mitchell, C. J., in *Swire's Estate*, 225 Pa. 188, 73 Atl. 1110: "The statute requires that a will shall be in writing, and signed by the testator 'at the end thereof.' The end meant by this provision is the logical end of the language used, which shows that the testamentary purpose has been fully expressed. The position of the signature with regard to the bottom or end of the page is only evidence on the question whether the testator has completed the expression of his intention. Prima facie that is the natural place for the signature to be placed to show the full expression of the testator's wishes, and therefore is presumptively the right place for it, but it is only evidence and must give way to evidence of a different intent. . . . In the present case, the connected sense of the text is entirely clear, though it does not follow the usual order of arrangement. But it does not deviate from it more than many letters written in the style of the present day where the writing jumps from the first to the third page and then back to the second. The full substance of the testatrix's intent and its expression are there, and the signature is at what she intended and regarded as the end of her will. Where that is manifest, the continuity of sense, and not the mere position on the page, must determine the statutory 'end thereof' as the place for the signature."

The requirement of the English acts is similar to that of our act of 1833 as to where a will is to be signed. In *Goods of Coombs*, L. R. 1 Prob. & Div. 302, a will filled the first and third pages of a sheet of foolscap paper, leaving no room at the bottom of the third page for the signatures of the testator and the attesting witnesses. These were writ-

ten on the second page, and it was held that the will was duly executed under 1 & 15 Vict., which require wills to be signed "at the foot or end" thereof. In the Goods of Wotton, L. R. 3 Prob. ⁴⁸¹ & Div. 159, a testatrix procured the form of a will lithographed on the first side of a sheet of foolscap paper and wrote her will on the second and third pages of it, ending near the bottom of the third. The fourth was blank. She signed her name in the presence of witnesses at the foot of the lithographed form, on the first page, and it was held that the will was signed at the foot or end thereof, as required by the acts, Sir J. Hannen saying: "The true way to look at the transaction seems to be that, as the will was begun on the second and continued on the third side of the paper, these must be taken to be the first and third pages of the will, and so we are brought round to what, under ordinary circumstances, would be called the first page, but which, upon these facts, must be treated as the last page of the will, as I hold it was when executed."

It is urged by the learned counsel for appellants that their contention that the end of a will is the physical end of the writing—the point spatially farthest removed from the beginning—has been sustained by the New York court of appeals in *Will of Andrews*, 162 N. Y. 1, 76 Am. St. Rep. 294, 56 N. E. 529, 48 L. R. A. 662. But that case differed in very important particulars from this. There the will was written upon a printed blank, folded in the middle so as to make four consecutive pages, with the attestation clause at the top of the second page. At that point it was signed by the testator and the subscribing witnesses, and the first two pages made a complete will. The third page contained other and complete dispositions of property, in no manner connected with what appeared on the first and second pages, except that the third page was numbered "2nd page" and the second page "3rd page." In addition, the will was not in the handwriting of the testatrix, but in that of a person to whom the bulk of the estate was given as the residuary beneficiary. The case cannot be regarded as authority at all for the question now before us, which was properly disposed of by the court below, and its decree is affirmed at appellants' costs.

As to When a Will is Signed at the End, see *Mader v. Apple*, 80 Ohio St. 691, 131 Am. St. Rep. 719; *Baker's Appeal*, 107 Pa. 381, 52 Am. Rep. 478; and when not, see *Matter of Andrews*, 162 N. Y. 1, 76 Am. St. Rep. 294.

SLOAN v. BROWN.

[228 Pa. 495, 77 Atl. 821.]

CORPORATE STOCK—Purchase from Agent.—Where a pledgee or a purchaser takes stock with notice that the capacity of the party he deals with is that only of an agent, he cannot deny the rights therein of the principal. (p. 1022.)

CORPORATE STOCK—Purchase from Agent.—A Broker Buying Stock not of its owner but of his agent is bound to inquire into that agent's authority. (pp. 1022, 1023.)

CORPORATE STOCK—Purchase from Agent.—A Broker, After Buying Stock of an agent at a price under that fixed by the agent's authority, must, on tender of that price back with interest, restore the stock of the principal. (p. 1023.)

CORPORATE STOCK—Leaving With Agent to Sell.—Laches cannot be Imputed to an owner of stock who leaves it in his agent's hands, with a power of attorney, for the purpose of selling or pledging it, provided he instructs the agent as to the figure at which he is to part with it. (p. 1023.)

Appeal from a decree dismissing a bill in equity to compel the return of certain shares of stock.

John M. Freeman and Robert Woods Sutton, for the appellant.

Thomas Patterson, J. H. Painter and J. C. Slack, for the appellees.

497 POTTER, J. In the bill of complaint filed in this case the plaintiff alleged that the defendants had purchased from one Frederick W. Ward, at much less than the real value thereof, 261,112 shares of stock of the San Toy Mining Company, which they knew belonged to plaintiff; that said Frederick W. Ward had no authority to make such sale, and defendants knew that he had not; that plaintiff had demanded the return of the stock, having tendered to the defendants the amount which they paid for it, together with interest thereon. Plaintiff therefore prayed for an injunction to restrain the transfer of the stock on the books of the corporation; for a decree finding that the defendants held the said shares of stock as trustee for the plaintiff, and directing them to return and transfer to the plaintiff the said stock on payment to them of the amount paid by them therefor, with interest.

The court below was of the opinion that the fact that the plaintiff left the certificate of stock in the possession of Ward, together with the stock power signed in blank, protected the defendants in purchasing the stock from Ward, and relieved them from the burden, ordinarily placed upon those dealing with a special agent, of inquiring into the nature and extent of his authority. The bill was therefore dismissed. The

facts of the transaction are not in dispute. Sloan and Ward became interested ⁴⁹⁸ in the purchase of shares in a lumber company, and Ward was to advance the money for certain payments. Sloan went to British Columbia to examine timber tracts. Before leaving, in order to secure Ward for the advances he was to make for Sloan's share in the deal, Sloan left with Ward a certificate for 261,112 shares of San Toy Mining Company, with a power of attorney to transfer the stock, signed in blank. Ward was unable to make the payments, as he had agreed to do, and he used the certificate of stock as collateral security for the sum of \$9,000, borrowed from the firm of A. E. Masten & Company. The latter used the power of attorney, and had the stock transferred to themselves and a new certificate issued in their own name; so that Sloan's stock in the San Toy Company then stood in the name of A. E. Masten & Company, and was pledged to them for the payment of the sum of \$9,000, borrowed by Ward. In order to complete the timber deal, the payment of considerable more money was required. Ward being unable to keep his agreement to provide the money, telegraphed to Sloan for advice. Sloan replied by wire, "If necessary sell Schwab hundred thousand San Toy or more fifty or better." At the same time he telegraphed R. R. Brown, one of the defendants, "Will you lend me \$25,000 on 261,112 shares San Toy stock see Frederick Ward." The next day he wired Ward to see Dick Brown about loans. On July 21, 1908, Ward telegraphed Sloan that he was unable to sell to Schwab, and asked further advice. On July 27th, Sloan wired from British Columbia, "Just returned Graham Island wonderful property if can't sell borrow all you can on stock Dick Brown see William Shannon Wednesday try extend part." Ward then went to defendants. He first saw R. R. Brown, who referred him to James E. Brown. These gentlemen were at the time respectively treasurer and vice-president of the San Toy Mining Company. They knew the stock in question belonged to Sloan, and inquiry was made of Ward by James E. Brown as to his authority to sell. ⁴⁹⁹ Ward replied that he had authority to sell the stock; that he had the certificate with power of attorney to transfer, and showed the telegram last above quoted. Defendants did not pursue the inquiry as to Ward's authority any further, but apparently relied upon Ward's possession of a certificate, with an assignment and power of attorney to transfer. As a matter of fact, as above noted, at that time the certificates had been assigned to A. E. Masten & Company and surrendered, and a new certificate made out in the name of Masten & Company. James E. Brown then made an offer of ten cents per share for the stock. Ward took a little time to consider, consulted with his attorneys, and showed them the two telegrams; one

authorizing him to sell to Schwab at fifty cents per share or better, and the other saying, "If can't sell borrow all you can on stock Dick Brown"; and was advised by his attorneys that these telegrams did not authorize him to sell the stock to Brown at ten cents per share. Disregarding this advice, however, Ward accepted the bid of James E. Brown for the stock; had Masten & Company surrender the certificate, and used the proceeds to make a payment upon the lumber deal in which he was interested with Sloan. The trial judge held that the delivery of the certificate by plaintiff to Ward, with power of attorney to transfer, authorized Ward to sell the stock as though it were his own, at any price he deemed fit. He relied upon Woods' Appeal, 92 Pa. 79, 37 Am. Rep. 694, as authority for this ruling. We think he misapprehended the ground upon which that case was decided. In Woods' Appeal the pledgees of the stock did not know that the brokers who pledged it were not the owners, and the decision was put squarely upon that ground, Mr. Justice Trunkley saying (page 393): "The defendants had no knowledge of the collusive transaction between the executor and McDowell & Wilkins (the brokers and pledgors), nor reason to believe that they, the pledgors, were not the real owners, as they appeared." From the master's report in that case (page 382) it seems ⁵⁰⁰ that the defendant testified that he dealt with them (the pledgors) as principals, not as agents, and that he had no doubt, or reason to doubt, that the certificates were their property when he received them. In the present case, the facts are quite to the contrary; the Browns dealt with Ward as an agent, not as a principal, and knew that the stock belonged to Sloan.

The proper distinction to be made in such cases is pointed out in the opinion by Mr. Justice Dean in Ryman v. Gerlach, 153 Pa. 197, 25 Atl. 1031, 26 Atl. 302, where, referring to Woods' Appeal, he shows that the purchasers of the stock in that case were protected as "innocent strangers." And he points out that if they were not such, and "if they knew the securities credited to Bodmer were in fact Ryman's, then the sale of them without authority from either Bodmer or Ryman was a wrongful conversion for which they are answerable." And he went on to say: "Nor is there any reason, founded on the peculiar necessities of stock dealing, why brokers should not be held to the observance of the same rule of morals and law as men engaged in other avocations." This distinction was accurately preserved and followed in Westinghouse v. German Nat. Bank, 188 Pa. 630, 41 Atl. 734. There the plaintiff deposited stock with a broker as security for certain stock operations he was carrying on. He gave the broker three certificates with a power of attorney on the back of each duly executed by him. The broker, with-

out knowledge or consent of his customer, pledged the certificate with a bank as collateral security for his own indebtedness to the bank. The bank knew, when the stock was pledged, that it belonged to the plaintiff and not to the broker. The plaintiff filed a bill in equity against the bank to compel the surrender of the certificates to him. The court below entered a decree in his favor, which was affirmed by this court, in an opinion by Mr. Justice Dean, in which he said (page 633): "The German National Bank, when it accepted the stock as collateral security on Lawrence's general credit account, ⁵⁰¹ had full knowledge that they belonged to Westinghouse, and so far as the record shows, it also knew Lawrence had not the consent of Westinghouse to repledge them. This knowledge on the part of the bank is affirmatively proved. It would not have been implied had nothing more appeared than the fact that Lawrence, the apparent owner, had pledged them for his own account. Westinghouse had put it in the power of his broker to do this, and would not have been heard to complain. But when the bank actually knew, notwithstanding what appeared on the certificates, that the ownership was still in Westinghouse, it was bound to inquire of the owner, whether there was authority in the broker to repledge. Not having done so, it cannot now claim that the owner's right is barred. It is so held by all our cases." And in strict consistency with the principle thus declared, in the subsequent case of *Westinghouse v. German Nat. Bank*, 196 Pa. 249, 46 Atl. 380, where it was not shown that the bank had knowledge that the stock pledged was not owned by the broker, it was held that the owner was not entitled to recover it from the bank.

We think the principle is sound and well established that where a pledgee or a purchaser takes stock with notice of the capacity in which the agent holds, he cannot deny the rights of the principal therein. "A person buying stock from an agent, with knowledge that the latter is acting as agent, is bound to inquire into the scope of his authority": 1 *Cook on Corporations*, 6th ed., sec. 351. "Every person dealing with an agent is bound to ascertain the nature and extent of his authority. He must not trust to the mere presumption of authority, nor to any mere assumption of authority by the agent. He must at all times be able to trace the authority home to its source. Keeping within the scope of that authority, he is safe, and cannot be affected by secret instructions of which he was ignorant. But if he had knowledge of the instructions, or notice sufficient to put him upon an inquiry by which they might have been discovered, ⁵⁰² he will be held bound by them": *Mechem on Agency*, 289.

The defendants here, having dealt with Ward as an agent and not as a principal, were bound to inquire into the nature

and extent of his authority. They did so to a limited extent, and what they admittedly learned was quite sufficient to put them upon notice of the limitations upon that authority. The telegram shown by Ward indicated upon its face some prior instruction to him. The expression, "If can't sell, borrow," implied that some price at which to sell had been fixed. Inquiry would have disclosed at once the fact that this limitation was fifty cents per share, to Schwab. No other authority to sell had apparently been given to Ward. We agree with the court below that under the facts found, there is nothing to justify a conclusion that the plaintiff was guilty of laches. It appears that defendants admitted the jurisdiction of the court, and made no denial of their ability to return the stock. The evidence and findings of fact show that the sale was made to James E. Brown individually, rather than to the firm of Morris Brown & Company. No suggestion is made by counsel for appellee that a decree against James E. Brown for the return of the stock cannot be enforced. We are of opinion that under the established rule of law, as applied to the facts of this case, the plaintiff is entitled to the relief for which he prays, and that he should have a decree for the restoration of the 261,112 shares of stock, upon the repayment of the amount paid to Ward therefor, with interest.

The decree of the court below is reversed, and the bill of complaint is reinstated, and it is ordered that the record be remitted to the court below, for the entry of a decree in favor of the plaintiff, as herein indicated.

One Dealing With a Supposed Agent is Bound to ascertain the scope of his authority. Otherwise he assumes the risk and must suffer the consequences: *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598. See, also, *Swindell v. Latham*, 145 N. C. 144, 122 Am. St. Rep. 430.

If a Principal Repudiates the Unauthorized Contract of His Agent within a reasonable time after being informed thereof, and restores to the owner all fruits which have come into his hands as the result of such unauthorized contract, he cannot be held liable: *Cram v. Sickel*, 51 Neb. 828, 66 Am. St. Rep. 478. The liability of a principal for the unauthorized acts of his agent is the subject of a note to *Franklin Fire Ins. Co. v. Bradford*, 88 Am. St. Rep. 779.

KOEHLER v. ST. MARY'S BREWING COMPANY.

[228 Pa. 648, 77 Atl. 1016.]

CORPORATION—Sale of Corporate Property by Directors.—It is statutory in Pennsylvania that in the absence of fraud or collusion a sale of corporate property by the board of directors, a majority of the stockholders consenting, cannot be assailed by the minority, since in becoming a stockholder one has notice of the power of the board so to sell. (p. 1025.)

CORPORATION—Sale of Corporate Property by Directors.—Although a minority stockholder may not protest a sale of corporate property by the directors on the sole ground of inadequacy of price, he may on the ground of the nature of what represents the price, if it is other than money. A sale contemplates a money return for the thing transferred. (pp. 1026, 1027.)

SALE—Necessity of Money Consideration.—A sale is a contract for a money consideration only, and a consideration in the shape of a mortgage bond, which is a promise to pay money, does not satisfy the requirement. (p. 1027.)

CORPORATION—Sale of Property.—Where the Consideration for a conveyance of corporate property consists of mortgage bonds of another corporation, instead of money, a dissatisfied stockholder must be paid off in cash according to the ratio his stock bears in value to what would be his proportion of the bonds. (p. 1028.)

Bill to enjoin the sale of corporate property. The bill was dismissed and the complainants appealed, assigning as error a refusal to admit testimony and the decree dismissing the bill.

Alex. Simpson, Jr., Paul Benson, J. A. Gleason, Louis Rosenzweig, Gunnison, Rilling & Fish and Fred H. Ely, for the appellants.

John G. Johnson, William A. Stone, E. H. Baird and Scandrett & Barnett, for the appellees.

650 **BROWN, J.** On December 22, 1908, the Elk County Brewing Company, a Pennsylvania corporation, proposed to the St. Mary's Brewing Company, a like corporation, to purchase from it all of its franchises and property, real, personal and mixed, for the sum of \$250,000. This was not to be paid in money, but in bonds of the purchasing company, running for thirty years and secured by a first mortgage on all of its property, rights and franchises. It further agreed to assume all the liabilities of the St. Mary's Brewing Company, and that said company should retain from its cash assets \$35,000 for the payment of dividends to its stockholders. On or about the date that the proposition was made the board of directors of the St. Mary's Brewing Company accepted it, subject to the approval of the stockholders, who were duly notified to meet on February 27, 1909, for the purpose of taking action upon the proposed sale. On Febru-

ary 26th—the ⁶⁵¹ day before the meeting—this bill was filed by the appellants, minority stockholders, for the purpose of enjoining the sale. No preliminary injunction was issued, and the meeting was held, at which 2,365 votes were cast, resulting in a majority of 535 in favor of the sale. The bill avers fraud on the part of the majority stockholders and board of directors of the St. Mary's Brewing Company, and collusion between them and the Elk County Brewing Company to deprive the complainants and other minority stockholders of the St. Mary's Brewing Company of their holdings in that company and to defraud them of their interest in the property and assets thereof. These allegations are denied in the answer, and the finding of the court is that the proposed sale is for a sufficient consideration and that there was no fraud or collusion between the defendants themselves, or any of them, or between the defendants, or any of them, and the incorporators, officers and directors of the Elk County Brewing Company. As this finding was warranted by the evidence, it is not to be disturbed.

Complaint is made of the court's refusal to allow the appellants to show, in support of their allegation of fraud, that the price offered was inadequate. Gross inadequacy of price is at times a badge of fraud in connection with a sale, but in a sale like this, made by one corporation to another, in accordance with the provisions of the act of April 17, 1876 (Pub. Laws, 30), inadequacy of price, standing alone, with nothing else to support the charge of fraud and collusion, is not in itself any evidence of fraud, and is not sufficient to enjoin or set aside the sale. In the absence of fraud or collusion on the part of the majority stockholders, the minority stockholders of the St. Mary's Brewing Company are not to be heard to complain of inadequacy of price, for they knew when they became stockholders that the board of directors of the company could, with the consent of a majority of the stockholders, sell for such price as they might in good faith agree to take for the corporate property. They knew that, as to ⁶⁵² this, they would at all times be compelled to bend to the will of the majority. There is no complaint that the election of the stockholders was irregularly held or that any statutory requirement in connection with the action of the board of directors or stockholders in agreeing to sell was disregarded; and, therefore, upon a mere naked allegation of inadequacy of price, the court below could not have entertained the appellants' bill. The disallowance of the offer to show inadequacy of price was for the following correct reason given by the court at the time of its exclusion: "As we conceive the law to be, the legislature by the act of 1876 has vested absolutely in the corporation itself the power

to sell and convey its franchises and assets for a price or consideration fixable by the corporation as exercised through the votes of the majority of its stockholders. The power of reviewing such corporate action has not been given by the legislature to the courts, and they will not set aside such sale for mere inadequacy of price or enjoin the same unless it be shown affirmatively that the majority of the stockholders acted fraudulently or collusively to deprive the minority stockholders of a fair distributive share of the proceeds of the sale. As we now view the testimony so far produced by the plaintiffs, they have failed to show facts or to produce testimony from which we could infer fraud or collusion; on the other hand, by the witnesses whom they have called upon the stand they have produced considerable affirmative evidence that the sale was for the general and equal benefit of the stockholders, and that none of the majority stockholders are participating, or will in the future participate, in the sale or be benefited by the results thereof in any way different from that of the minority stockholders. We could not, from the testimony as we now recall it, draw inferences to the contrary."

But the complaint of the appellants is not confined to fraud and collusion. It extends to that condition of the sale which requires them to take for their holdings bonds ⁶⁵³ of the purchasing company running for thirty years. As to this they manifestly ought to have been heard, and proper relief should have been granted. Their stock in the St. Mary's Brewing Company is concededly valuable, and because they are compelled to submit to a sale of the corporate property and franchises authorized and directed by the majority, are they to be compelled to take in exchange for it anything but money, or what, under the circumstances, a chancellor to whom they apply for relief ought to regard as its equivalent? Are they to be compelled to take bonds of a brewing company running for thirty years and secured only by a mortgage on the brewery plant, the value of which, long before the maturity of the bonds, may be practically swept away by a wave of prohibition or wiped out by the refusal of the court of quarter sessions to longer license it? There can be but one answer to this, and authorities, numerous as they are, are hardly needed to support it.

A sale is "an agreement by which one of two contracting parties, called the seller, gives a thing and passes the title to it, in exchange for a certain price in current money, to the other party, who is called the buyer or purchaser, who, on his part, agrees to pay such price": 2 Bouvier's Law Dictionary, Rawle's Rev., p. 943. "A sale may be defined as a contract, founded on a money consideration, by which the absolute or general property in the subject of the sale is transferred

from the seller to the buyer": 24 Am. & Eng. Ency. of Law, 3d ed., p. 1022. A sale is a transfer of the absolute or general property in a thing for a price in money: Benjamin on Sales, 6th ed., sec. 1. "A sale is a word of precise legal import, both at law and in equity. It means at all times a contract between parties, to give and to pass rights of property for money, which the buyer pays, or promises to pay, to the seller for the thing bought and sold": Williamson v. Berry, 8 How. 495, 12 L. ed. 1170; Huthmacher v. Harris' Admrs., 38 Pa. 491, 80 Am. Dec. 502; Bigley v. Risher, 63 Pa. 152. It is not to be pretended that these definitions ⁶⁵⁴ are not applicable to a sale by one corporation to another of its franchises and property as authorized by the act of 1876, and, being so, clearly a minority stockholder objecting to the sale cannot be compelled to take anything but cash for his interest in the purchase price: Cook on Corporations, 6th ed., sec. 671; 2 Savidge on Corporations in Pennsylvania, sec. 1090. In the comparatively recent case of Carr v. Rochester Tumbler Co., 207 Pa. 392, 56 Atl. 945, a stockholder was held to the terms of the sale of the corporate property which gave him stock in payment of his interest because he had attended the meeting of the stockholders called to pass upon the proposed sale and had assented to the action of the majority in authorizing and directing it upon the terms stated; but we at the same time said: "It is true, and we do not know that the appellant disputes it, that a dissenting stockholder cannot be compelled to take anything but cash for his interest on the sale of the corporate property. If, however, he is one of the stockholders present and participating in, and assenting to, the action of the majority in authorizing a sale and transfer of the property, he cannot thereafter repudiate the terms on which the sale was authorized and made, and decline to accept payment for his stock in accordance with the conditions of sale." This was not mere obiter dictum, but was intended to be an announcement that if the stockholder had not waived his right to receive cash for his stock, he could not have been compelled to accept anything else for it.

But it is contended that because in Williamson v. Berry, 8 How. 495, 12 L. ed. 1170, and other cases cited by counsel for the appellees, a sale is said to be "for money which the buyer pays or promises to pay," this sale ought not to be interfered with, as the bonds of the Elk County Brewing Company are promises to pay. This in effect means, and counsel for appellees so contend, as we understand them, that, as the act of 1876 confers upon majority stockholders unrestricted and unlimited power to sell, they may sell not only for money. but for a promise to pay ⁶⁵⁵ running for a long period of time, and with or without proper security for fulfillment. In other words, not only the sale, but the condi-

tions of it as to the payment of the purchase money, are for the majority alone, to which the minority must yield in the absence of fraud or collusion to cheat them. If, under this theory of the appellees, the appellants can be compelled to take bonds running for thirty years, they could be compelled to take them running for a hundred. This never was and could not have been the intention of the legislature. To give judicial sanction to the contention of the appellees would be to place minority stockholders all over the commonwealth at the mercy of the majority, who, whenever so inclined, could most seriously impair, if not entirely wipe out, the holdings of the minority by compelling them to accept in exchange therefor promises to pay which no prudent business man would accept for his property if voluntarily selling it. Fraud and collusion, when practiced, are always hard to prove, for the perpetrators generally cover their tracks, and it is cold comfort to a minority stockholder to tell him that he will not be compelled to accept anything but cash or its equivalent for his stock, if he can show fraud or collusion on the part of the majority in a sale of the corporate property.

It is to be remembered that, as to these appellants, the sale to the Elk County Brewing Company was an involuntary one. This seems to be entirely overlooked by the appellees. A promise to pay is, of course, the same as money when a seller voluntarily takes it. By his acceptance of it, or his agreement to accept it, in a contract of sale, he is estopped to say that it is not money for the purpose of sustaining or enforcing the sale; but not so when one sells involuntarily, being compelled to do so by the law, as in the present case. The right then is to get money for that which the owner is compelled to part with, or what, under the circumstances, a chancellor ought to regard as the equivalent of money. If the equivalent is a promise to pay, it must be a promise to pay ^{cash} within a reasonable time, properly secured. All this is for a chancellor when he is asked to protect the legal rights of a stockholder, and from his decree an appeal will always lie for abuse of discretion.

On the reargument of this appeal counsel for appellees stated that, while they still insisted that the appellants should be compelled to take the bonds of the Elk County Brewing Company, they were willing to have the decree dismissing the bill affirmed upon condition that the appellants be paid cash for their proportionate shares of the purchase price. This was very prudent, and the decree is affirmed, upon condition that the appellees pay, or cause to be paid, to the appellants within sixty days, cash for their respective interests in the purchase price of \$250,000, for the sale and transfer to the Elk County Brewing Company of the franchises and corpo-

rate property of the St. Mary's Brewing Company, the costs below and on this appeal to be paid by the appellees.

The Right to Sell the Property and Franchise of a Corporation is discussed in the recent case of *Cooper v. Utah etc. Ry. Co.*, 35 Utah, 570, 136 Am. St. Rep. 1075, and in the cases cited in the cross-reference note thereto.

The Sale by a Corporation of All Its Assets, and the effect thereof, are considered in the notes to *Tanner v. Lindell Ry. Co.*, 103 Am. St. Rep. 548; *Morrison v. American Snuff Co.*, 89 Am. St. Rep. 604.

CASES

IN THE

SUPREME COURT

OF

SOUTH DAKOTA.

DANFORTH v. EGAN.

[23 S. D. 43, 119 N. W. 1021.]

ATTORNEYS—Admission and Disbarment—Power of Courts.—The right to say who shall, as attorneys, be recognized as officers of the courts, together with the right to expel such persons whenever they have been adjudged unworthy or unfit for that trust, vested in the courts, is as much the law of the land, and of as much dignity as such, as any law found in the constitution or statutes. It does not depend upon either the constitution or statutes for its existence, but exists in all courts of record unless expressly restricted or taken away by express legislation. (p. 1033.)

ATTORNEYS—Disbarment.—The Effect of the Disbarment of an attorney is to deprive him of every privilege to which his license had entitled him, not only in the court making the order of disbarment, but also his privileges in all other courts. After disbarment he can appear in court only under circumstances authorizing any layman to appear. (p. 1033.)

OFFICERS.—One Who cannot Perform the Duties of an office cannot qualify therefor. (p. 1034.)

OFFICERS—Qualifications—Disbarred Attorney.—An attorney who has been disbarred and who cannot by reason thereof practice in any of the courts of the state is not eligible to the office of "state's attorney," being unable to perform a great part of the duties thereof. (p. 1034.)

OFFICERS—Knowledge of Disqualification—Fraud on Public.—One who allows his name to be voted for for public office, knowing or believing that if elected he will be unable to perform the most important duties of the office, is guilty of a fraud upon the people in allowing his name to go and remain upon the ballot. (pp. 1034, 1035.)

OFFICERS—Qualifications—How Far may Act by Deputy.—One must be qualified to discharge all of the duties of the office to which he is elected or aspires, and the fact that he may appoint a deputy to discharge certain duties which he is not qualified to perform will not render him eligible or qualify him for the office. (p. 1035.)

OFFICERS.—The Use of the Word "Attorney" in the Title of an officer means one holding a license from the courts to practice law. (p. 1035.)

STATE'S ATTORNEY.—A Disbarred Attorney is not Eligible to the office of state's attorney, he being unable to fulfill the duties thereof. (p. 1036.)

ATTORNEYS.—The Right to Practice Law, to be an "officer of the court," is not an absolute right, but is a privilege or license. Without any statutes upon the subject of admission to practice, a person cannot practice as an attorney without a license from the court. (pp. 1036, 1037.)

OFFICERS—Qualifications.—"Learned in the Law," when used in connection with the word "attorney" in prescribing the qualifications of an officer, is surplusage, and is controlled by the more limited term "attorney." (p. 1037.)

OFFICERS—Qualifications.—"Learned in the Law."—A Disbarred Attorney who has been found by the judgment of disbarment to have violated many of the ethical laws which should control the conduct of an attorney cannot be held to be "learned in the law" within the meaning of that term as used in prescribing the qualifications of an officer. (pp. 1037, 1038.)

OFFICERS—Qualifications.—"Learned in the Law."—Admitted to Practice, or entitled to be admitted to practice, in the courts is contemplated by the use of the phrase "learned in the law" in prescribing the qualifications of an officer. (p. 1039.)

Muller & Conway, for the appellant.

George J. Danforth, Park Davis and Alpha A. Orr, for the respondent.

⁴⁵ **WHITING, J.** This is an election contest case, wherein the plaintiff and respondent contests the right of defendant and appellant to qualify for, and hold the office of, state's attorney in and for Minnehaha county. The decision of the lower court was against the defendant, and he appeals from the judgment of said court and the order of said court denying a new trial.

No questions were raised upon the pleadings, and the cause was submitted to the trial court upon the facts as they appeared in the pleadings, and by a stipulation made in open court. The facts are, in brief, as follows: The defendant, George W. Egan, a person over twenty-five years of age, and a resident of Minnehaha county for more than a year prior to November, 1908, did at the general election on November 3, 1908, receive a majority of the votes cast for the office of state's attorney, and received the certificate of election for said office. Said Egan had held a license to practice as an attorney in the courts of record of this state, but on October 10, 1908, by a judgment in disbarment rendered by the supreme court on that day, his license to practice had been revoked, and such judgment in disbarment has, since October 10, 1908, remained in full force and effect.

It is conceded that the only question in this case is as to the effect of this judgment of disbarment. Did it disqualify him from holding the said office of state's attorney? It is a mat-

ter of common knowledge that questions of this kind, relating to the exercise ⁴⁶ of the right of the public to choose those who shall serve it as public officers, naturally tend to create strong feeling among the people generally, and more especially among those residing within the territory to be affected by the outcome, and we are fully aware that this case is no exception to that rule. Taking this situation into consideration, and the further fact that this case has to do with questions peculiarly important and essential to the well-being of the great profession to which we as lawyers belong, certainly from choice we would refrain from entertaining this cause and determining the question raised. This is especially true when the determination thereof depends upon the legal effect of the previous judgment of this court. The writer of this opinion, however, is happily free from any feeling of embarrassment on this ground, inasmuch as he was not a member of this court when the judgment of the court was rendered in the disbarment case. It is strongly urged in this case that the electors of Minnehaha county should not be denied their free choice to select whom they wish to serve them, and they should not, and cannot, be denied this right of choice, unless they, together with the other people of this state, have limited such right of choice by the laws they have enacted. The people have enacted laws declaring that in order for people to hold certain offices they must be possessed of certain qualifications or belong, in the case of certain offices, to certain classes, and the people have thus limited their own rights. The people have also delegated to the courts of our state the duty to administer the laws of the state, including the restrictions upon the elective franchise, and it becomes the duty of the courts to fearlessly perform this work be it ever so unpleasant. We may well repeat the words of the supreme court of Colorado, in a case very similar to this, and involving many of the same questions raised herein, the case being that of *People v. Hallet*, found in 1 Colo. 352. The court said: "While the will of the people is sovereign, still it must be expressed in accordance with recognized public law, and when it exceeds the limit of this, it is the duty of the court to interfere, and by judicial checks afford the people time for reason and reflection."

1. Can the appellant appear in a court of record?

⁴⁷ As we read the brief of appellant, he virtually concedes that his election to the office of state's attorney does not entitle him to appear in the courts of record of this state as such state's attorney, when he could not appear in matters not pertaining to such office; but inasmuch as we consider this admission, if well founded, to be fatal to the claims of appellant, we will not pass it without full consideration.

Did the framers of the constitution intend to indirectly take from the courts, in favor of a certain excepted class of persons, a right which the statutes of the territory had recognized as resting in the courts—a right recognized for centuries, by all countries and states having laws based on the English common law, as the inherent right of the court, a right necessary in the very nature of courts and the duties devolving upon them, a right which, if lost, would soon bring the courts of our land into contempt—the right to say who shall, as attorneys, be recognized as officers of the courts, together with the right to expel such persons whenever they have been adjudged unworthy or unfit for this important trust? This right of the courts is as much the law of our land, and of as much dignity as such, as any law found in the constitution or statutes. It is not dependent upon either the constitution or statutes for its existence, but exists fully in all courts of record unless expressly restricted or taken away by express legislation, and it is a serious question whether it lies within the power of the legislature to more than regulate this right of the court, whether the legislature can more than prescribe certain qualifications for admission, leaving to the proper court to fix others if it sees fit, and whether the legislature can more than fix certain grounds for disbarment, leaving to the court the right to disbar for other reasons within sound judicial discretion: 3 Am. & Eng. Ency. of Law, pp. 287, 300, 301; 4 Cyc. 900. No one has ever contended that our supreme court, in which our statutes have left this right of admission and disbarment, had not full power to exercise such right the same as to reach any other judicial determination, or that the effect of its decision or judgment had in any manner been restricted. As regards the effect of disbarment, the authorities are uniform that it deprives the party disbarred of ⁴⁸ every privilege to which his license had entitled him, not only his privileges in the court making the order of disbarment, but also his privileges in all courts. He cannot be recognized as an attorney in any courts of his own state, and the courts of other states, if aware of his disbarment, will refuse him permission to appear before them: 3 Am. & Eng. Ency. of Law, 314, and cases cited. Certainly it cannot be contended, and the appellant has not in this action contended, that such judgment of disbarment was of less effect against him than as if he had not been chosen state's attorney, and it is certainly true that no court in Minnehaha county, or in any other county in this state, can recognize him as an attorney. He could only appear in a court under circumstances authorizing any layman to appear.

2. Not being able to appear in court as an attorney, can the appellant qualify for and hold the office of state's attorney?

It would seem axiomatic, too plain for argument and serious contention, that one who cannot perform the duties of an office cannot qualify therefor. Our constitution was adopted at a time when we had a complete code of laws, providing, among other things, as to what were the duties of the person holding the office, which was then termed that of "district attorney," and during statehood has been known as that of "state's attorney." The laws prescribing these duties had been in force since the very earliest days of our territory. They were in effect and in contemplation of the framers of the constitution at the time such constitution was drafted, it being well known that the territorial statutes would remain in full effect, as regards this matter, until such time as future legislatures should change same. Very slight changes have been made regarding the duties of this office, the main duties of which have at all times been that of appearing for the county and state, in all civil and criminal matters, in the courts of the county. The other duties of this office are trivial as compared with this one, including, as it does in the word "appearing," the signing of every paper to be used in any manner in a case or proceeding in court. It must be conceded, therefore, that if appellant should be admitted into this office, he could perform but a small part of the duties thereof.

⁴⁰ It was held under the old common law in England that gross or palpable unfitness for an office disqualified one to hold such office, for the reason, as it was held, "for only men of skill, knowledge, and ability to exercise the same, are capable to serve the king and his people": Throop on Public Officers, sec. 71. In an early New York case (*Conroy v. Mayor etc.*, 6 Daly, 490) it was held that one appointed court interpreter, who was totally ignorant of all foreign languages, could not draw pay for the time he was in said office. The court, in deciding this case, used these words: "There is no attempt to show the plaintiff is unsuited or unfit for the position he held, except in the sense of being at all times unable to perform its duties. By accepting the position of interpreter, when, if he understood no foreign language, he could not interpret at all, he stands convicted of a fraud, either upon the officer who appointed him, and the public from whom he was to receive compensation, or upon the latter alone." So in the case at bar, leaving out of consideration any question of unfitness for the position sought, if this appellant, at the time he allowed his name to be voted on for this office, believed that if elected he would be unable to perform the most important duties of said office (and he now concedes that he cannot perform such duties), we have no hesitancy in saying that his action in allowing his name to go upon and remain on the ballot was a fraud upon the people of Minnehaha county, who had a right to exercise their

choice between two or more persons, either of whom was fully authorized and qualified to perform all the duties of the office if elected. We hold this to be true no matter how unjust the appellant thought the judgment in disbarment to be, and no matter if it was in fact unjust.

It might be claimed, however, that inasmuch as the statute allows him a deputy, he could perform part of the duties himself, and the deputy could appear in court. Leaving out of consideration the question whether a principal officer can hold office in any case where he has not the qualifications required of a deputy (and the laws of this state specifically require the deputy state's attorney to be an attorney of record [Pol. Code, sec. 935]), let us ⁵⁰ consider this matter of performing official duties through another. In the case of *State v. Allen*, 21 Ind. 516, 83 Am. Dec. 367, the facts were that Allen, a county auditor, during his term of office, enlisted in the United States army during the Rebellion, leaving his office in charge of a deputy. The office was treated as abandoned, and another person elected thereto, and action was brought to secure possession thereof. The court held that Allen had forfeited the office by his enlistment and leaving the office in charge of a deputy. The court said: "He certainly must discharge the duties of the office, for he takes an oath and gives a bond to do that. He may have a deputy to assist him, but the duties of the office must be discharged under his supervision. It is a familiar principle of law that the acceptance of every office is upon an implied contract that the acceptor will perform its duties with integrity, diligence and skill: 2 Blackstone's Commentaries, 164." To be state's attorney in this state one must take an oath "faithfully to discharge the duties of his office" (Const., art. 21, sec. 3), and must give a bond conditioned to that effect. This term "faithfully to discharge the duties" refers not to part but all the duties. Such an oath could not honestly be taken by one who knew, at the time of taking it, that if allowed to enter upon the office, he could discharge but a minor part of the duties thereof, and it would be ridiculous to claim that one will be permitted to even oversee and dictate the work in a court of record who is forbidden to appear therein. We, therefore, have no hesitancy in holding that under the laws of this state appellant cannot appear as an attorney in the courts of this state, even though chosen as state's attorney of a county; that therefore he could not rightfully qualify as such state's attorney and hold such office.

3. Use of the word "attorney" in name of officer. Let us, however, look further, and consider whether the appellant can rightfully claim that he comes under the requirements of the constitution regarding qualifications for this office. The constitution provides that the state's attorney shall be

learned in the law, and says nothing regarding admission to practice. During the history of the territory of Dakota, and down to this time, as we have before stated, we have had, first, an officer known as ⁵¹ "district attorney"; then one known as "state's attorney." Some of the time there had been no attempt to define qualifications of such officer, but we venture that it has never before occurred to anyone that this office could be filled by one not an "attorney," as the word "attorney" is understood when applied to a prosecuting officer, to wit, a person holding a license from some court of record. The legislature in framing our present statute recognized this fact, and provided specifically that the state's attorney be a person duly admitted to practice as an attorney in some court of record in this state: Pol. Code, sec. 927½. This provision was in the statute at the time our constitution was framed, and had been there since the year 1883. Therefore, it will be presumed that the framers of the constitution had in mind a person possessed of this qualification when they framed the constitution, and nothing but the very clearest reasons should compel such an interpretation of the words used in the constitution as to nullify this plain mandate of a provision of statute that had been in force for years prior to the constitution.

We think the word "attorney" in the name of the officer holding this office, whether he be termed "state's attorney," "district attorney," or "county attorney," forecloses all question as to intent of the framers of the constitution. There is certainly nothing in the use of the word "attorney" when connected with the word "state's" to give to it a meaning different from that ordinarily given to it by statutes or law-writers. The statutes of the territory and of the state never recognized, as entitled to the designation "attorney," anyone but a person holding a license to practice law. Section 685, Political Code, speaking of the license to be granted, says, "which license shall constitute the person receiving the same an attorney and counselor at law," etc. Without this license, no matter how learned he may be in the law, he is not an attorney. The law student fresh from his school may well be termed a lawyer, but not an attorney. Bouvier defines a lawyer as "one skilled in the law," but an attorney as "an officer in a court of justice, who is employed by a party in a cause to manage it for him," and says further: "As a general rule, the eligibility of persons to hold the position of attorney at law is settled by local legislation ⁵² or by rule of court." To be an "officer" one must be chosen or appointed, or otherwise invested with the position. It is not a thing that a person gets merely by fitting himself therefor. It takes the act of some other person, or body of persons. This right to practice law, to be an "officer of the court," is

not an absolute right, but is a privilege or license. Without any statutes on the subject of admission to practice a person could not practice as an attorney without license from the court: 4 Cyc. 898-900. Blackstone, in speaking of the courts of Westminster Hall and practitioners therein, says: "No man can practice as an attorney in any of those courts but such as have been admitted and sworn an attorney." Notice the peculiar wording, "admitted and sworn an attorney." From the very early days of English history we find the statutes providing that before a man could practice as an attorney he must be examined and licensed. We thus find that the word "attorney," when applied to the law, has long since had an established meaning, and refers only to parties licensed to practice. We cite with approval the following words of Martin, J., in a case similar to this (that of *People v. May*, 3 Mich. 598): "Now the word 'attorney,' when used in connection with the proceedings of courts and the authority to conduct business in them, as well as when employed in a general sense with reference to the transaction of business usually, and almost necessarily, confided to members of the legal profession, has a fixed and universal signification on which the technical and proper sense unite. The legislator and the judge, the lawyer and the layman, understand it alike as having reference to a class of persons who are by license constituted officers of courts of justice, and who are empowered to appear and prosecute and defend, and upon whom peculiar duties, responsibilities, and liabilities are devolved by law in consequence." And the judge further says: "Have the people by the new constitution attached any different signification to these words [prosecuting attorney], or taken this officer out from under the operation of chapter 95, section 26, of the Revised Statutes of 1846? We think not." The statute referred to was one similar to our section 685, Political Code, requiring an attorney to be licensed in order that he may practice. We, therefore, conclude that by use ⁵³ of the word "attorney" in naming this officer state's attorney, the framers precluded any contention that the office could be held by any person, no matter how "learned in the law," if he had not been admitted to practice as an "attorney," and was licensed as such when he sought to qualify.

4. Is appellant "learned in the law"? It is the contention of appellant that, being "learned in the law," he meets the requirement of the constitution, and is entitled to hold the office in question. We have already shown that this phrase "learned in the law" is really mere surplusage, as it is controlled by the more limited term "attorney," yet we will consider briefly this phrase, and see whether the appellant could bring himself thereunder in view of the judgment of this court in the disbarment proceedings. To be learned in

the law one certainly must be learned in all those branches of the law which have at all times been recognized as essential in order to qualify one to practice as an attorney, and to be admitted as such. He must not only be versed in the books of law, such as those on contracts, torts, evidence, domestic relation, etc., but it is even more important that he be well based upon those rules of conduct which as a lawyer and practitioner should control his relations with his fellow lawyers, his clients, witnesses, and jurors in court, and the public in general. Knowledge of this branch of the law, commonly known as "legal ethics," has long been recognized as the most important qualification for one who is to be intrusted with the sacred duties of an attorney at law, and our present statute recognizes this fact, and makes legal ethics one of the branches to be considered in passing upon the qualification of one seeking admission to practice: Pol. Code, sec. 686. This court has by its judgment held that the appellant has violated many of the ethical laws which should control the conduct of an attorney. We took no part in said judgment, but we are bound to take judicial notice of it, especially as it is referred to in the record in this case. We must as a matter of law, and we do, presume that the decision of the court in the disbarment proceedings was just, and that everything stated therein was justified by the evidence. It appears, therefore, that prior to such decision this appellant had done many ⁵⁴ things which showed either gross ignorance of, or willful disregard of, the laws of legal ethics. When this fact has been judicially determined, as in this case, against this appellant, he will not be heard to claim that he knew his duties and the ethical rules which should have controlled his actions, and intentionally disregarded the same, but the law in its kindness will conclusively presume that he performed those acts which caused his disbarment in ignorance of his duties and of the rules of ethics, and will therefore say that no matter how well versed he may be in many branches of the law, yet being ignorant in its most important branch, he is not "learned in the law."

In the decision of the cause we have not, so far, in any way considered the decisions of this court in either the case of *Jamieson v. Wiggin*, 12 S. D. 16, 76 Am. St. Rep. 585, 80 N. W. 137, 46 L. R. A. 317, or the case of *Howard v. Burns*, 14 S. D. 383, 85 N. W. 920, though both sides have referred to them. The first involved the office of county judge, and required a determination of what the framers of the constitution meant in using the term "learned in the law," when designating one of the qualifications for the said office of county judge. In this case this court, through Haney, J., say that by the use of this term the framers of the constitution held that the class who could hold the office of county judge

was confined to persons who, when elected, were either admitted, or entitled to admission, without examination to practice as an attorney at law in this state. This interpretation of these words would exclude appellant from the list of those "learned in the law" in this state, as he is neither admitted, nor entitled to admission to practice law; in fact, he is expressly forbidden to practice. The defendant strenuously contends that the decision in the case of Howard v. Burns, 14 S. D. 383, 85 N. W. 920, is controlling in his favor upon the issue in the case at bar. But giving the decision of Howard v. Burns full effect, it can avail appellant nothing. This court held that Howard could hold the office of state's attorney because he held a certificate to admission from the supreme court of Illinois, which certificate was held competent evidence that he was "learned in the law." It can readily be seen that the appellant here is in a far different situation than was Howard in the case above. Howard held his certificate ⁵⁵ from another state, unimpeached in any manner, and under the ruling of the court that was proof that he was "learned in the law." Appellant holds the certificate of the court of another state admitting him to practice in that state, and under the ruling in Howard v. Burns it would be evidence that he was "learned in the law." Against that would stand the judgment of the supreme court of this state saying he was "not learned in the law," a judgment which, under the law of comity between states, would undoubtedly be recognized by the courts of the state granting appellant his license, and cause such courts to refuse to recognize him as an attorney so long as the judgment of this court stands. If, as held in Howard v. Burns, the certificate from Illinois was admissible, certainly a judgment of the supreme court of Illinois revoking such certificate would have been admissible, and much more a judgment, as in this case, of our own supreme court would be admissible to overcome the prima facie case raised by the admission of such certificate.

For the reasons hereinbefore stated the judgment of the circuit court and order denying a new trial are affirmed.

Attorneys—Admission to Practice—Power of Courts and Legislatures.

In discussing the power of the legislature to prescribe qualifications and regulations for obtaining license and admission to practice law, the court in the recent case of *In re Application for License to Practice Law*, 67 W. Va. 213, 67 S. E. 597, says: "The authority of the legislature is denied by some courts, on the ground that courts have the sole right to prescribe for themselves the qualifications of their ministers of justice, and rules and regulations for their admission, without interference by a co-ordinate branch of the government: *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519; *In re Mosness*, 39 Wis. 509, 20 Am. Rep. 55; *In re Splane*, 123 Pa. 527, 16 Atl. 481; *In re Branch*, 70 N. J. L. 537, 57 Atl. 431. The Illinois court in *Re Day* denied the authority of the legislature to require that possession of a

certificate of graduation from a law school of a certain specified standard should entitle the holder to be admitted to practice law. Such right, on the other hand, seems to have been upheld in New York: *In re Cooper*, 22 N. Y. 67. See, also, *In re Applicants for License to Practice Law*, 143 N. C. 1, 55 S. E. 635, 10 L. R. A., N. S., 288.

"The North Carolina case just cited is much relied on by counsel for the applicant. The court in this case was divided three to two, the two judges dissenting having filed vigorous dissenting opinions. And the editor of the note to this case just referred to says: 'Aside from the above case, no case can be found wherein the court holds or recognizes the right of the legislature to encroach upon the right of the court to require that the attorneys practicing before it shall be of good moral character.' The decision of the majority in this case put the right to a license and to practice law in the courts upon the same plane with the right to pursue any other avocation in life, and concedes the right to the legislature to prescribe rules and regulations therefor.

"With scarcely an exception it has been held that both in the admission to and suspension from practice of the law, courts act judicially in the exercise of an inherent power, and not in a mere administrative or ministerial capacity, and in the execution of the will of some other branch of the government: *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519; *Ex parte Secombe*, 19 How. 9, 15 L. ed. 565; *Garrigus v. State*, 93 Ind. 239; *In re Splane*, 123 Pa. 527, 16 Atl. 481; *In re Garland*, 4 Wall. 333, 18 L. ed. 366; *Walker v. State*, 4 W. Va. 749; *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407; *State v. Stiles*, 48 W. Va. 425, 37 S. E. 620; *State v. Shumate*, 48 W. Va. 359, 37 S. E. 618, and *State v. Hays*, 64 W. Va. 45, 61 S. E. 355.

"But notwithstanding the jurisdiction of the courts over the subject, it has been generally conceded that the legislature may, in the exercise of its police power, prescribe reasonable rules and regulations for admissions to the bar, which will be followed by the courts. But the legislature may not impose unreasonable rules or deprive the courts of their inherent power to prescribe other rules and conditions of admission to practice: *In re Day*, 181 Ill. 735, 54 N. E. 646, 50 L. R. A. 519; *In re Leach*, 134 Ind. 665, 34 N. E. 641, 21 L. R. A. 701; 3 Am. & Eng. Ency. of Law, 287; 4 Cyc. 900; *Ex parte Secombe*, 19 How. 9, 15 L. ed. 565; *In re Goodell*, 39 Wis. 232, 20 Am. Rep. 42."

The Power of Courts to Disbar Attorneys and Proceedings Therefor are discussed in *People v. Amos*, 246 Ill. 299, 138 Am. St. Rep. 239; *Beckner v. Commonwealth*, 126 Ky. 318, 128 Am. St. Rep. 287; and in the notes to *In re Philbrook*, 45 Am. St. Rep. 71; *State v. Kirke*, 95 Am. Dec. 333. As to the meaning of "learned in the law," see *Jamieson v. Wiggin*, 12 S. D. 16, 76 Am. St. Rep. 585.

STATE v. VIERCK.

[23 S. D. 166, 120 N. W. 1098.]

BURGLARY.—Recent Possession of the Stolen Property, either in larceny or in burglary, is a circumstance which should be left to the jury, with instructions to give it such weight as they think it entitled to, when considered in connection with all the other evidence, in determining the guilt or innocence of the accused. (pp. 1043, 1044.)

BURGLARY.—Recent Possession of Property.—Instruction.—It is proper to refuse an instruction requested by the defendant in burglary that "you are further instructed that even if you should find from the evidence that the defendant had in his possession property

that had been taken from the building, as was described in the information, a short time after it was taken, that fact does not raise a presumption of law that the defendant is guilty of the crime of breaking as charged in the information, nor does it shift the burden of proof upon the defendant to satisfactorily explain his possession of the property." (p. 1044.)

BURGLARY.—"Breaking," in the Law of Burglary, may consist in unlatching a door and opening it, or unlocking a door and opening it, or in opening a door which is shut but is neither locked nor latched. In fact, anything by which any obstruction to entering the building by the body is removed is a "breaking" within the meaning of the law. (p. 1045.)

BURGLARY—What Constitutes—Breaking and Entering.—Under the provisions of Revised Penal Code of South Dakota, section 566, subdivision 2, which provides that "every person who breaks or enters, in the day or in the night time . . . any building, etc., with intent to steal therein or to commit any felony, is guilty of burglary in the third degree," "entering" alone is sufficient to constitute the crime, and, though the information charges both breaking and entering, the crime would be complete whether the entry was accomplished by means of force or without it. (p. 1045.)

BURGLARY—Degrees—Lesser and Distinct Offense.—Revised Penal Code of South Dakota, section 571, providing that "every person who, under circumstances not amounting to burglary, enters any building, etc., with intent to commit any felony, etc., is guilty of a misdemeanor," describes an offense which is not one of the degrees of the crime of burglary, but an entirely independent crime, and for that reason Revised Code of Criminal Procedure of South Dakota, section 357, providing that "when it appears that a defendant has committed a public offense, and there is a reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only," has no application to such distinct offense, though it may be included in a greater offense charged. (pp. 1045, 1046.)

CRIMINAL LAW—Instructions—Included Offense.—The trial court is not required, in the absence of a request, to instruct the jury that under Revised Code of Criminal Procedure of South Dakota, section 409, "the jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment or information, or of an attempt to commit the offense." (p. 1046.)

George G. Yeaman, for the appellant.

S. W. Clark, attorney general, Cloyd D. Sterling, assistant attorney general, and J. E. House, state's attorney, for the state.

168 SMITH, J. The defendant was convicted of the crime of burglary in the third degree, in breaking and entering in the night-time a certain saloon building occupied by one Frank Simons, with intent to steal the goods, chattels and property of the said Frank Simons then and there being. Defendant brings the case to this court for review upon alleged errors occurring at the trial. There are twenty-eight assignments of error, but these are grouped and discussed by de-

fendant's counsel under four heads, and may be considered by the court in the same order.

It is contended, first, that the court erred in overruling a motion to direct a verdict for defendant at the close of the state's evidence. The specific assignment is that "there is an entire lack of evidence showing any breaking or entering, which is the gist of the action." Briefly stated, the evidence at the trial disclosed: That the building was used as a saloon, of which one Frank Simons was the proprietor. That a short time before the alleged burglary the owner of the adjoining premises, in making repairs, had removed a portion of his building, leaving exposed part of the basement of the saloon building. Through this basement an opening had been made large enough for a man to pass through into ¹⁶⁹ the cellar under the saloon. The accused assisted in doing the repair work, was familiar with the premises, had sometimes tended bar in the saloon, and was seen in the saloon as late as 11 o'clock the night the burglary was committed. About two weeks previously a considerable portion of the floor of the cellar under the saloon had been spread with air-slacked lime, covering the space between the hole in the basement and the stairway leading up into the saloon. The door at the head of this stairway was always kept closed, and, some of the witnesses say, was always locked and was not used for any purpose. At the close of business the evening of November 22d, the night of the burglary, the saloon was locked up as usual. Simons, the proprietor, opened up the saloon about 5 o'clock the next morning, and on going to the cash drawer discovered that a money sack left in the drawer the night before was gone. On the trial he testified that as near as he could remember this sack contained about forty dollars and seventy-five cents, consisting of two five dollar gold pieces, one ten dollar gold piece, a ten dollar bill, and some silver. On discovering the loss of this money, Simons immediately notified Mr. Healy, the sheriff, informing him that he suspected the accused. The sheriff got the defendant and brought him down to the saloon about 7 o'clock that morning, and there searched him in the presence of Simons and others. Bills and silver were found on his person to the amount of thirty-nine dollars and seventy-five cents, and also a gold watch concealed in one of his socks. About an hour later he was again searched by the sheriff at the jail and two five dollar and one ten dollar gold piece was found concealed inside the lining of his vest. About 9 o'clock the same morning the sheriff examined the saloon premises and noticed what appeared to be some tracks going in and coming out of the hole in the basement. Lime was found on the cellar stairs and on the floor behind the bar. The door at the head of the cellar stairs had been disturbed and was unlocked when

first discovered in the morning. On the trial the gold watch found in defendant's possession was fully identified as one which had been kept in one of the drawers behind the bar in the saloon. Several witnesses testified to having noticed lime on defendant's shoes at the time he was searched in the morning.

The evidence as to the breaking and entering was therefore ¹⁷⁰ wholly circumstantial. That a crime may be proved by circumstantial evidence is too well settled to require a citation of authority. The circumstances proved in this case point very strongly to the guilt of the accused, and, if such evidence has been submitted to the jury under proper instructions, this court would not be justified in disturbing the verdict of guilty. The court instructed the jury fully and correctly as to the law of circumstantial evidence, but one part of the charge, relating to the recent possession by accused of property alleged to have been taken from the building at the time of the burglary, was excepted to, and is assigned as error. This part of the instruction is as follows: "Upon the question of whether or not the defendant was the person who broke and entered the building, that is a question which the jury will have to determine for themselves from all the evidence upon the trial. However, I might say to you regarding the possession of the property which is alleged to have been stolen at the time of the burglary, that when the fact that a burglary has been committed has been shown, and that property has been stolen, and the question is whether or not the defendant committed, or aided, or abetted in committing the burglary, his possession of the stolen goods at a time recently after the burglary is a circumstance for you to consider and weigh in connection with all of the other evidence in determining the guilt or innocence of the defendant. It is a circumstance tending to show the guilt of the defendant, unless the facts and circumstances proven upon the trial show that he may have come into possession of it honestly. The possession of the property, if any, and all of the other facts and circumstances as shown by the evidence, may be taken into consideration by you in determining the one fact whether or not, if you find that the building was broken and entered into, it was the defendant who did it."

We are inclined to the view that the recent possession of stolen property whether in larceny or in burglary, and whether such possession be "explained" or "unexplained," is a circumstance—an evidentiary fact—which may have a greater or lesser weight as proof of guilt, when considered with, and strengthened or weakened by, all the other evidence in the case. If the evidence tends ¹⁷¹ to show the possession to be an honest one, the probative force of the fact of recent possession may be greatly modified or entirely destroyed. If

wholly unexplained, it may carry a conviction of guilt to the minds of the jury; but, whether explained or unexplained, it is competent and relevant evidence upon the issue of guilt or innocence. The courts in many states, as in Iowa, have undertaken by instructions to tell the jury what effect such evidence should have upon their minds. These courts have held that an instruction is not reversible error which tells the jury, in effect, that possession unexplained creates a presumption of guilt which will warrant a conviction. The propriety of such an instruction may well be doubted. In the case of *State v. Brady*, 121 Iowa, 561, 97 N. W. 62, 12 L. R. A., N. S., 199, such an instruction was held not error, but the court says: "We think the language unhappily chosen. The law does not attach 'a presumption of guilt' to any given circumstance, nor does it require the accused to overcome the presumption thereby raised." We think the true rule is that recent possession of the stolen property, either in larceny or in burglary, is a circumstance which should be left to the jury, with instructions to give it such weight as they think it entitled to, when considered in connection with all the other evidence, in determining the guilt or innocence of the accused. We think the instruction by the trial court is in accordance with the view here expressed and states the law correctly.

In this connection the following instruction was asked by defendant's counsel and refused and an exception taken. This ruling is assigned as error: "You are further instructed that even if you should find from the evidence that the defendant had in his possession property that had been taken from the building, as was described in the information, a short time after it was taken, that fact does not raise a presumption of law that the defendant is guilty of the crime of breaking as charged in the information, nor does it shift the burden of proof upon the defendant to satisfactorily explain his possession of the property." In support of his contention that the refusal of this request was error, counsel cites *State v. Brady*, 121 Iowa, 561, 97 N. E. 62, 12 L. R. A., N. S., 199, the same case hereinbefore referred to. An examination of ¹⁷² that case will show it to be an authority directly opposed to the instruction requested. The trial court in this case did not instruct the jury that the recent unexplained possession of the property stolen in a burglary raised a presumption of guilt, nor that such evidence would shift the burden of proof upon the defendant to satisfactorily explain his possession of the property. The case cited seems to hold, however, that such instruction would not constitute reversible error. The refusal of this request was not error.

As to what would constitute a "breaking," under the law defining burglary, the court instructed the jury as follows:

"While in law there must be a breaking and an entry with intent to steal, yet the breaking may consist in unlatching a door and opening it, or unlocking a door and opening it, or in opening a door which is shut but is neither locked nor latched. In fact, anything by which any obstruction to entering the building by the body is removed is a 'breaking' within the meaning of the law. So if a person unlocks or unlatches a door and walks in, or if a door has no latch or lock on it, and the door is pushed open and a person goes in, that is a sufficient breaking in the law." The giving of this instruction is assigned as error. The information in this case is drawn under the provisions of subdivision 2 of section 566 of the Revised Penal Code, which reads as follows: "Every person who breaks or enters, in the day or in the nighttime, either: . . . (2) Any building, or any part of any building, booth, tent, railroad car, vessel, or other structure or erection in which any property is kept, with intent to steal therein or to commit any felony, is guilty of burglary in the third degree." It will be observed that this section does not require a "breaking," but "entering" alone is sufficient to constitute the crime, and, though the information charges both breaking and entering, the crime would be complete whether the entry was accomplished by means of force or without it. The contention is that an actual forcible breaking and entering must be read into this section. The statute seems to us too plain to require a discussion of this proposition, and, even if an actual breaking were necessary to constitute the crime charged, the instruction of the court as to what constitutes a breaking states the ¹⁷³ law correctly, and the giving of it to the jury was quite favorable to the defendant.

The next assignment of error is "that the court erred in its failure to instruct the jury as to included offenses." Section 409 of the Revised Code of Criminal Procedure reads as follows: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment or information, or of an attempt to commit the offense." It is claimed that the crime defined by section 571 of the Revised Penal Code, contained in the same chapter which defines burglary, is necessarily included in the information in this case. That section reads: "Every person who, under circumstances not amounting to burglary, enters any building or part of any building, booth, tent, warehouse, railroad car, vessel, or other structure or erection, with intent to commit any felony, larceny or malicious mischief is guilty of a misdemeanor." It may be conceded that the offense defined by this section is necessarily included in that which is charged in the information. No request for an instruction to the jury that the ac-

cused might be convicted of this lesser offense was presented to the trial court, nor was any such instruction given in the general charge of the court. The included offense defined by section 571 is not one of the degrees of the crime of burglary, but is an entirely independent crime, and for that reason section 357 of the Revised Code of Criminal Procedure has no application.

The court was not required to instruct the jury that they might convict the accused of this lesser offense. This is expressly decided by this court in *State v. Kapelino*, 20 S. D. 591, 107 N. W. 335. In that case the court goes further, and holds that the trial court is not required to charge the jury, even upon request, as to an offense which might be included, but which the evidence would not warrant. In the case of *State v. Horn*, 21 S. D. 237, 111 N. W. 552, decided by this court, the accused was charged with the crime of shooting at another with intent to kill. No request was made for an instruction, but error was assigned because the trial court did not charge as to the lesser offense of assault. The court says: "While in this case a simple assault is necessarily included in the offense ¹⁷⁴ with which the accused was charged, and the jury might have returned a verdict therefor, no instruction with reference thereto was requested, and so the error complained of was not available." This rule requiring a request by the accused for an instruction submitting to the jury the question of guilt or innocence of an included offense gives the accused the option to take his chance of a clear acquittal of the higher offense, rather than a possible conviction of the lesser included offense through a compromise verdict. This rule cannot prejudice the accused, because it gives him the right, by a proper request, to have the lesser offense considered by the jury if he thinks it may reduce his chance of a conviction of the higher offense. It is therefore quite favorable to the accused.

We find no error in the record of the trial court.

The judgment is therefore affirmed.

BREAKING AND ENTRY IN BURGLARY.

I. Breaking.

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I. Breaking.

a. Definition.—“Breaking,” as an element in the crime of burglary, is defined by Blackstone as “an actual breaking,” not a mere legal *clausum fregit* (breaking the close) (by leaping over invisible ideal boundaries, which may constitute a civil trespass), but a substantial and forcible irruption. As at least by breaking, or taking out the glass of, or otherwise opening, a window; picking a lock, or opening it with a key; nay, by lifting up the latch of a door, or unloosing any other fastening which the owner has provided”: 4 Blackstone's Commentaries, 226. Bishop defines breaking to be “any disrupting or separating of material substances in any inclosing part of a dwelling-house, whereby the entry of a person, arm, or any physical thing capable of working a felony therein may be accomplished. While the substance thus operated upon must be such as the law deems of the realty, the breaking does not necessarily imply an injury thereto”: 2 Bishop's New Criminal Law, sec. 91.

Turning to a few cases for a definition, we find in *Fisher v. State*, 43 Ala. 17, that a sufficient “breaking” in burglary is any breaking that enables the prisoner to take the property out through the breach with his hands. “A breaking, essential to constitute the crime of burglary, may be by any act of physical force, however slight, whereby any obstruction to entering is forcibly removed”: *Metz v. State*, 46 Neb. 547, 65 N. W. 190. “Passing an imaginary line is a ‘breaking of the close,’ and will sustain an action of trespass *quare clausum fregit*. In burglary, more is required—there must be a breaking, removing, or putting aside of something material which constitutes a part of the dwelling-house and is relied on as a security against intrusion”: *State v. Boon*, 13 Ired. (N. C.) 244, 57 Am. Dec. 555. In *Carter v. State*, 68 Ala. 96, Stone, J., after quoting from a number of authorities, says: “The sum of these authorities, we think, is, that if the entrance be effected through an opening previously there, without forcible enlargement of it, this cannot be a burglarious entrance, unless it is effected through an open chimney. This rule applies to a door or window left open, or any other opening in the house, through which the ingress is effected. It has even been held that if a window sash be left partly raised—not enough to allow entrance—it is not burglarious to raise it higher, and thus enter the premises. On the other hand, it does not require violent or mechanical force to constitute a burglarious breaking. On the contrary, if any force be required and employed to remove or displace that which has been placed there to close the opening, or to protect the contents within, this is enough. The law does not and cannot institute an inquiry into the sufficiency of the

various fastenings, that may be employed for the preservation of chattels in store."

The word "breaking" implies the use of force: *Mathews v. State*, 36 Tex. 675; but not such force as would be denominated violence; only such force as is sufficient to effect a clandestine entry: *State v. Robertson*, 32 Tex. 159. In *People v. White*, 153 Mich. 617, 117 N. W. 161, 15 Ann. Cas. 927, the rule is stated as follows: "If any force at all is necessary to effect an entrance into a building, through any place of ingress, usual or unusual, whether open, partly open, or closed, such entrance is a breaking sufficient in law to constitute burglary, if the other elements of the offense are present." "The word 'break,' used in the statute (Code Va., c. 162, sec. 12), is borrowed from the law in regard to burglary, and is therefore to be understood as it would be when used in a charge of burglary. If, then, in any case, a party shall by even slight force remove or displace anything attached to the house as part thereof, and relied upon by the occupant for safety of the house, it is housebreaking within the meaning of the statute, if the other constituent parts of the offense exist": *Finch v. Commonwealth*, 14 Gratt. (Va.) 643. The word "forcibly," which qualifies the words "break and enter" in many of the state codes, would seem to express but the degree of force that was implied at common law from the word "break": *Timmons v. State*, 34 Ohio St. 426, 32 Am. Rep. 376.

Under the Texas Penal Code a burglarious entry may be made in the daytime as well as at night; and in *Ross v. State*, 16 Tex. App. 554, the court in an obiter dictum differentiates a night entry from a daytime entry in the character of the force requisite to make the entry burglarious. "If the entry is at night," says the court, "the slightest force to effect it will suffice"; impliedly saying that a greater degree of force would be requisite to make an entry burglarious in the daytime. This view, however, is not supported in *Daggett v. State*, 39 Tex. Cr. 5, 44 S. W. 148, 842, nor, seemingly, in *Hamilton v. State*, 11 Tex. Cr. App. 116.

b. Illustrations of "Breaking" and of "No Breaking."—Turning, now, from abstract definitions to concrete illustrations, we will consider various and particular acts that have been adjudged to be burglarious breaking, and also other particular acts that have been held not to fall within that category. Opening closed doors or windows with burglarious intent, no matter how such opening may be effected, is a breaking, in the law of burglary: *State v. Carpenter*, 1 Houst. C. C. 367; *State v. Snow*, 3 Penne. 259, 51 Atl. 607; *May v. State*, 40 Fla. 426, 24 South. 498; *Kent v. State*, 84 Ga. 438, 20 Am. St. Rep. 376, 11 S. E. 355; *Scott v. State*, 122 Ga. 138, 50 S. E. 49; *State v. Reid*, 20 Iowa, 413; *State v. O'Brien*, 81 Iowa, 93, 46 N. W. 861; *State v. Connors*, 95 Iowa, 485, 64 N. W. 295; *State v. Brower*, 127 Iowa, 687, 104 N. W. 284; *State v. Groning*, 33 Kan. 18, 5 Pac. 446; *State v. Powell*, 61 Kan. 81, 58 Pac. 968; *State v. Herbert*, 63 Kan. 516, 66 Pac. 235; *Frank v. State*, 39 Miss. 705; *State v. Hecox*, 83 Mo. 531; *State v. Moore*, 117 Mo. 395, 22 S. W. 1086; *State v. Woods*, 137 Mo. 6, 38 S. W. 722; *State v. Peebles*, 178 Mo. 475, 77 S. W. 518; *State v. Helms*, 179 Mo. 280, 78 S. W. 592; *State v. Henderson*, 212 Mo. 208, 110 S. W. 1078, 17 L. R. A., N. S., 1100, 15 Ann. Cas. 930; *State v. Wilson*, 225 Mo. 503, 125 S. W. 479; *Ferguson v. State*, 52 Neb. 432, 66 Am. St. Rep. 512, 72 N. W. 590; *People v. Bush*, 3 Park. C. R. 552; *Tickner*

v. People, 6 Hun, 657; *McCourt v. People*, 64 N. Y. 583; *State v. Boon*, 35 N. C. (13 Ired.) 244; *State v. Fleming*, 107 N. C. 905, 12 S. E. 131; *State v. Vierck*, 23 S. D. 166, 120 N. W. 1098; *Bass v. State*, 69 Tenn. (1 Lea) 444; *Sparks v. State*, 34 Tex. Cr. 86, 29 S. W. 264; *Matthews v. State* (Tex. Cr. App.), 38 S. W. 172; *Parker v. State* (Tex. Cr. App.), 38 S. W. 790; *Hedrick v. State*, 40 Tex. Cr. 532, 51 S. W. 252; *Barber v. State* (Tex. Cr. App.), 69 S. W. 515; *Jones v. State* (Tex. Cr. App.), 132 S. W. 476; *Finch v. Commonwealth*, 14 Gratt. (Va.) 643.

On the other hand, entering a house through an open door or window, even with felonious intent, is no breaking into the house in the sense in which the word "breaking" is used in the law of burglary: *Pines v. State*, 50 Ala. 153; *Green v. State*, 68 Ala. 539; *Lockhart v. State*, 3 Ga. App. 480, 60 S. E. 215; *Smith v. Commonwealth* (Ky.), 128 S. W. 68; *Commonwealth v. Steward*, 7 Dane Abr. (Mass.) 136; *State v. Kennedy*, 16 Mo. App. 287; *People v. Arnold*, 6 Park. C. R. (N. Y.) 638; *State v. Rivers*, 2 Ohio Dec. 102; *Melton v. State*, 24 Tex. App. 287, 6 S. W. 303; *Williams v. State* (Tex. App.), 13 S. W. 609; *Costello v. State* (Tex. Cr. App.), 21 S. W. 360; *Jones v. State*, 48 Tex. Cr. App. 336, 87 S. W. 1157; *Winkler v. State* (Tex. Cr. App.), 126 S. W. 1134.

The cases are not in harmony on the question as to whether the raising higher a window partly open, or the pushing a door already partly open, so as to effect an entrance, is a "breaking" such as to make the entry a burglarious one. The English authorities take the negative view on this issue. Thus in *Rex v. Hyams*, 7 Car. & P. 441, it was held not to be a breaking, where the prisoner threw up a sash which had been raised a couple of inches and so effected an entrance. And in *Rex v. Smith*, 1 Moody, 178, it was said that there was no decision under which, in case of a sash partly open but not sufficiently open to admit a person, the raising of it so as to admit a person could be considered a breaking; and that in this respect the court ought not go beyond decided cases. The following Massachusetts cases follow the English rule on this point: *Commonwealth v. Steward*, 7 Dane Abr. 136; *Commonwealth v. Strupney*, 105 Mass. 588, 7 Am. Rep. 556; as does also the case of *Rose v. Commonwealth*, 19 Ky. Law Rep. 272, 40 S. W. 245.

The cases of *People v. White*, 153 Mich. 617, 117 N. W. 161, 17 L. R. A., N. S., 1102, 15 Ann. Cas. 927, and *Claiborne v. State*, 113 Tenn. 261, 106 Am. St. Rep. 833, 83 S. W. 352, 68 L. R. A. 859, take the opposite view, and, as it seems to us, the logical one, in view of related acts that have been held to be burglarious breaking. Where, for example, pushing open a closed door, opening an unfastened screen door, the house door being open, removing a screen, entering through an unfastened transom, lifting a cellar door, raising or pulling down an unfastened window-sash, where all these have been held to be a sufficient burglarious breaking, it seems, as said by the court in the case last cited, a useless refinement to hold that the further raising of a window partly open is not sufficient evidence of breaking, when the opening in the window is enlarged by the person entering so as to make the aperture sufficient to admit his body. "Here," said the court, "is a material change of the status, and the change is accomplished by the application of force." It should be borne in mind, also, as was pointed out by the attorney general in *Commonwealth v. Strupney*, 105 Mass. 588, 7 Am. Rep. 556, that when the case of *Rex v.*

Smith, 1 Moody, 178, was decided, housebreaking was a capital felony, and the distinction then made in *favorum vitae* need not now be maintained. To the fact that the barbarity of the hangman's noose is no longer associated with this crime may be due the tendency of the courts, in their interpretation of the law of breaking, to depart from the strict construction of the common law, which required an actual breaking, and to hold that but the slightest force is necessary to constitute a breaking. In the codes of some of the states, indeed, the element of breaking has been entirely eliminated from the definition of burglary, entry alone being sufficient to constitute the crime. In such states, of course, the act of breaking is important only on the question of intent.

The law of burglarious breaking can doubtless be best ascertained from a study of the decided cases in which it is announced in connection with a given state of facts. We shall therefore select and pass in review a number of representative English and American cases where the law has been applied to varying states of fact. In *Rex v. Brown*, 2 East P. C. 487, there was an aperture communicating with an upper floor, which was closed by folding doors with hinges that fell over it and remained closed by their own weight, but without any interior fastening, so that those beneath could push them open at their pleasure by a moderate exertion of strength. It was held that the pushing open of these folding doors was sufficient to constitute a breaking. So the lifting of the flap of a cellar, usually kept down by its own weight, is a sufficient breaking for the purpose of burglary: *Rex v. Russell*, 1 Moody C. C. 377. These two cases, however, seem to be opposed by the case of *Rex v. Lawrence*, 4 Car. & P. 231, where it was held that the lifting of a trap-door covering a cellar, which was merely kept in its place by its own weight, and which had no fastenings, because, it being a new trap-door, they had not been put on, is not a sufficient breaking to constitute a burglary. It would seem, however, that this ruling was somewhat obiter, for it appears that the defendant, after entering the house in the manner above stated, unlocked and opened a hall door and thus made his escape, which was held to be a sufficient breaking out of the house.

In *Rex v. Hall*, R. & R. 355, it is held that where a window opens upon hinges, and is fastened by a wedge, so that pushing against it will open it, forcing it open by pushing against it is sufficient to constitute a breaking. And in *Rex v. Haines*, R. & R. 451, it is decided that the pulling down of the sash of a window is a breaking, though it has no fastening and is only kept in its place by the pulley-weight; and it is equally a breaking although there is an outer shutter which is not put to. Removing the fastening of a window by the hand introduced through a partly broken pane of the window, and thereby opening the window and entering is a breaking, not by breaking the residue of the pane, but by unfastening and opening the window: *Rex v. Robinson*, 1 Moody C. C. 327. And it is a sufficient breaking if a party breaks a pane of glass of a window and puts his hand in for the purpose of opening the shutter, although he does not succeed in doing so: *Rex v. Perkes*, 1 Car. & P. 300. In *Regina v. Bird*, 9 Car. & P. 44, it appeared that the glass of the window had been cut some time previously, but that every portion of the glass remained in its place until the defendant pushed it in. This was decided to be a sufficient breaking.

The American cases are in substantial harmony with the English cases on the subject of breaking. In *People v. Nolan*, 22 Mich. 229, it was held that the removal of an iron cellar window grating, covering an area opposite a cellar window, was as clearly a breaking as the opening of the window would have been, or any outer door. In *Sims v. State*, 136 Ind. 358, 36 N. E. 278, it was held to be a breaking where the defendant entered the house through a window by removing the wire screen, which was fastened into the window with nails, which he took out. In *Commonwealth v. Stephenson*, 25 Mass. (8 Pick.) 354, where the window of a house was covered with a netting of double twine nailed to the sides, top and bottom, it was held that cutting and tearing down the netting and entering the house through the window was a burglarious breaking and entry. Said the court in this case: "The offense consists in violating the common security of a dwelling-house, in the night-time, for the purpose of committing a felony. It makes no difference whether the door is barred and bolted or the window secured or not; it is enough that the house is secured in the ordinary way; so that by the carelessness of the owner in leaving the door or window open, the party accused of burglary be not tempted to enter. Shutting the window-blinds and leaving the windows open for air is a common mode of closing a house in the warm season; if the blinds are forced it is a breaking."

In *Dennis v. People*, 27 Mich. 151, it was held that an entry into a building by raising a transom window attached by hinges above, and arranged to fall into the frame by its own weight, when the window was shut into the frame, so as to require some force to open it, was a sufficient breaking. In *People v. Dupree*, 98 Mich. 26, 56 N. W. 1046, it was held that the fact that a respondent slightly raised a window in the daytime, so that the bolts which fastened it down would not be effectual, would not devalue his subsequent breaking and entering through the window in the night-time of the character of burglary.

In *State v. Conners*, 95 Iowa, 485, 64 N. W. 295, it appeared that the keeper of a store was sitting outside in front of the store, the front door being open; that the permanent door at the rear of the room was also open, but there was a wire screen door, which was closed. This door was not fastened with a latch, but was hung on spring hinges, which served to keep it closed. The accused opened this door and entered the store. It was held that this was a breaking.

In *Webb v. Commonwealth*, 18 Ky. Law Rep. 220, 35 S. W. 1038, a door of the building which was burglarized (a livery-stable) consisted of a latticed and of a solid part. The latticed part was the upper part, and was about seven feet high and nine feet wide, below which the solid part of the door hung, and filled a space of about three and a half feet by nine feet. The latticed part was standing open. The other part was fastened by a hasp and pin. The defendant unfastened it by removing the pin and shoving the door open. This was held to constitute a breaking. In *State v. Powell*, 61 Kan. 81, 58 Pac. 968, it was held that the removal of a post leaning against a door to keep it closed was a sufficient breaking.

In *Miller v. State*, 77 Ala. 41, where it appeared that the defendant had abstracted corn from a crib by thrusting his arm through the chinks in the crib, it was held that if, according to the testimony of the prosecution in the case, the defendant had removed the filling or

obstruction which had been placed in the chinks of the crib, and thereby effected an opening, through which he thrust his arm, and by that means abstracted the corn, this would be a sufficient breaking to constitute that element in the crime of burglary. If, on the other hand, the defendant, as he testified, did not remove the obstruction, and neither effected nor enlarged the opening through which he thrust his arm and abstracted the corn, then there was no breaking, and hence no burglary. In the somewhat similar case of *Metz v. State*, 46 Neb. 547, 65 N. W. 190, it was held that the removal of a board from the bottom of a corn-crib, so that a considerable quantity of the corn fell out, was a breaking.

In *Hunter v. Commonwealth*, 7 Gratt. 641, 56 Am. Dec. 121, it appeared that the entry into the house was effected through an opening intended for a window, but to which there was neither sash nor shutter; and that the covering over this opening was an old cloak hung at the top on two nails, one on either side of the opening and loose at the bottom. This cloak was removed from one of the nails, and the end of the cloak was drawn through the opening. The general court, placing its reasons for the reversal of the case upon other grounds, declined to express any opinion as to whether the removal of the cloak in the manner stated amounted to a burglarious breaking; although one of the judges in a supplementary opinion contended that it did not, citing *Rex v. Lawrence*, 4 Car. & P. 231, in support of his view.

In *Commonwealth v. Trimmer*, 1 Mass. 476, the court adhered to the strict construction of the common law, deciding that the removal of a loose plank in a partition wall of a building was not a "breaking," although the removal of the plank afforded the defendant ingress to the room where the theft was committed.

c. **Breaking Without Entry.**—In the penal codes of some of the states either breaking or entry into the house of another with felonious intent constitutes burglary. But it has been held that this alternative provision has not changed the common-law rule as to the character of the breaking necessary to the committing of the crime. It is not enough that there be a breaking or breakage in the sense in which these words are commonly used. There must be an opening or mode of entrance effected by which a felony may be committed. Thus in *Anderson v. State*, 84 Ark. 54, 104 S. W. 1096, it was held that the prying off of a wooden window shutter without opening or breaking the window, and the further act of cutting a hole in the door of a building too small to admit the hand, and too far from the fastening to permit the use of an instrument to unfasten the door, did not constitute a breaking sufficient to sustain a charge of burglary.

In *Minter v. State*, 71 Ark. 178, 71 S. W. 944, it was held not to be a burglarious breaking where the defendant simply removed some slats on the outside of a window and some tacks and putty from the window sash, leaving the glass of the window sash still in place. And in *Gaddie v. Commonwealth*, 117 Ky. 468, 111 Am. St. Rep. 259, 78 S. W. 162, it was held that to remove an outside window strip, thus leaving the window unprotected so that it may be easily lifted out, does not constitute a breaking of the building, if additional force is necessary to remove the window and make entry possible.

A statute making it a felony to forcibly break and enter a railroad car with the intent to steal therefrom does not authorize a convic-

tion for the breaking of the car with intent to steal therefrom; there must also be an entering of the car for that purpose. Evidence, therefore, that the defendants broke the seal on the car door, slid it open a little, and then pushed it back in place, and walked away, was insufficient to warrant a conviction under the statute: *Price v. Commonwealth*, 129 Ky. 716, 112 S. W. 855. Under a statute, however, providing that if any person shall feloniously break a warehouse, etc., with intent to steal, etc., he shall be punished by confinement in the penitentiary, etc., one may be properly convicted upon evidence showing that he broke open a smoke-house with intent to steal meat therefrom, though there was no actual entry into the smoke-house, or any theft of the meat: *Mullins v. Commonwealth*, 14 Ky. Law Rep. 569, 20 S. W. 1035.

The codes of some of the states provide a penalty for mere attempts to commit burglary. Such attempt, as defined in *Fonville v. State* (Tex. Cr. App.), 62 S. W. 573, is an endeavor to accomplish the crime carried beyond mere preparation, but falling short of the ultimate design in any particular of it. In prosecutions under such statutes, "breaking," in its legal, common-law sense, need not be shown. For example, in *Harris v. People*, 44 Mich. 305, 6 N. W. 677, an allegation in an information that the defendants "feloniously, and with intent feloniously and burglariously to break and enter the said dwelling-house, did insert between the upper and under sash of an outside window of said dwelling-house a certain instrument, to wit, a knife," was decided to be a sufficient allegation of an attempt at burglary. So, in *Commonwealth v. Flaherty*, 25 Pa. Super. Ct. 490, a conviction of breaking with attempt to commit larceny was upheld, where it appeared that the defendant broke a transom window of a store, but before he succeeded in making an entry was discovered and fled. In *Mason v. State* (Tex. Cr. App.), 100 S. W. 383, the defendant was held guilty of an attempt to commit burglary where he broke a hole about eight inches square in the front window of a shoe store, but was apprehended before he had abstracted any of the shoes.

d. Breaking, After Entry Without Breaking.

1. **Inner Doors and Windows.**—The breaking requisite to constitute burglary is not confined to the external parts of the house, but may be of an inner door, after the offender has entered through a part of the house which he has found open: 2 *Russell on Law of Crimes*, p. 1069; 2 *Bishop's New Criminal Law*, sec. 97. Thus, if one enters the house through an open outer door, or an open window, and, when within the house, turns the key of a chamber door, or unlatches it, with intent to steal, this will be burglary: 1 *Hale*, 553; *Rex v. Johnson*, 2 *East P. C.* 488. And it is none the less a burglarious breaking where a person is in the house lawfully in the first instance, and then breaks into a room in the house for the purpose of theft; as where the prisoners went into a house to eat, and, seizing their opportunity, slipped upstairs, picked open the lock of a chamber door, broke open a chest, and stole plate. The "breaking" here was the picking open the lock of the chamber door, not the breaking open the chest: *Anonymous*, 1 *Hale*, 524.

Compressing the law on this point into a maxim, the court, in *People v. Young*, 65 Cal. 225, 3 *Pac.* 813, says: "One who enters with burglarious intent a room of a house enters the house with such intent."

The inside room in this case was the "ticket office," partitioned off from the waiting-room in a railway station. A similar case was that of *State v. Ferguson* (Iowa), 128 N. W. 840, where the testimony showed that the defendant entered the waiting-room of a railway station through an open door, and pried open the window of the ticket office, which occupied the center of the depot building; and the case of *State v. Scripture*, 42 N. H. 485, where the defendant entered the building through the outer door of the gentlemen's waiting-room, which was then standing open, passed from that room into the ticket office by opening the door of communication between those rooms with a key, it then being locked, and then unlocked and took money from the money drawer in the ticket office. Still another railway station case, illustrative of burglarious breaking, is that of *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238, where the proof showed that the outer door of the station was left open, but that after getting into the building, the doors of a number of inner apartments were broken open by the defendant, and a quantity of postage stamps belonging to the railroad company stolen and carried away.

In *Carter v. State*, 68 Ala. 96, the facts in the case showed that the building broken into was used as a gin-house and rice-mill; that in the floor of the upper room there was a hole a foot wide and four feet long, through which a portion of the rice-mill machinery worked when the mill was in operation; this hole was covered by a loose plank. The defendant entered the room through this hole by removing the plank, having previously entered the lower room through an open window. These facts, the court decided, made out a case of burglarious breaking.

"We will not strain the law to meet a particular case, nor will we refine it away in the interest of burglars," said the court, in *Rolland v. Commonwealth*, 85 Pa. 66, 27 Am. Rep. 626, and therefore ruled that it made no difference that the felony was to be committed in a room adjoining the one that was broken into. In *Martin v. State*, 1 Tex. App. 525, the proof showed that the burglarized store consisted of a main room and a shed-room, in the latter of which were two windows. The door leading from the shed-room into the main room was latched. It was decided that defendant's entry into the store, accomplished by entering the shed-room through one of the windows that was open, and then lifting the latch to the door of the main room, was a burglarious breaking and entry.

The breaking open of a chest or cupboard by one who has entered the house by means of an open door or window is not a burglarious breaking, because such articles are no part of the house: 1 Hale, 523; 1 East P. C. 488; *State v. Wilson*, 1 N. J. L. 439, 1 Am. Dec. 216. When, however, cupboards, presses, lockers, and the like are so affixed to the house as to have the status of fixtures, some doubt has been created as to whether or not their felonious breaking should be considered burglarious: *Fost.* 108. The better rule, doubtless, is that expressed by Judge Foster, viz., to regard them as personalty in the law of burglary, "though in questions between the heir or devisee and the executor, these fixtures may with propriety enough be considered as annexed to and parts of the freehold": *Fost.* 109.

2. Breaking Out.—Before the enactment of the statute of 12 Anne, there was some doubt whether under the common law one could be convicted of burglary for breaking out of a house, where he had

entered the house without breaking. The better opinion seemed to be that the breaking, to be burglarious, must be for the purpose of effecting an entrance, and not for the purpose of effecting an escape. Sir Matthew Hale says in his *Pleas of the Crown*, page 554: "If a man enters, in the night-time, by the doors open, with the intent to steal, and is pursued, whereby he opens another door to make his escape, this I think is not burglary, for *fregit et exivit, non fregit et intravit*." And Coke says a burglar is "he that by night breaketh and entereth into a mansion house with intent to commit a felony."

To remove the doubt on the subject the statute of 12 Anne (Stat. 1, c. 7) was passed, which made it burglary to break out of a house, the same as to break into it. This statute has been repealed, but subsequent legislation in England has embodied substantially the same provisions. The preamble to the act of 12 Anne is as follows: "Whereas there has been some doubt whether the entering into the mansion house of another, without breaking the same, with an intent to commit some felony, and breaking the said house in the night-time to get out, be burglary, be it declared and enacted," etc. In view of this preamble, the act was regarded, in *State v. Ward*, 43 Conn. 489, 21 Am. Rep. 665, not as an original enactment setting aside the common law, but as declaratory of it. And it was there decided that one who in the night-time entered a dwelling-house, without breaking, for the purpose of committing a felony, but broke out in making his escape, was guilty of burglary at common law. "If each and every of the acts constituting a crime are committed," said the court, "and all the evils consequent on the crime are produced, the precise order in which the acts are done cannot be material. Now, burglary is the breaking and entering the house of another in the night season with an intent to commit a felony. The jury have found that, coupled with the guilty intent, the accused committed every act going to make up this crime. The accused stood not on the doing of these acts, nor on the order of doing them, except so far forth as was convenient and necessary to accomplish his guilty purpose. That this offense is burglary we can have no doubt. It is true that doubts have been expressed whether a breaking, for the purpose of escape, constituted burglary. Lord Hale and Chief Justice Trevor expressed such doubts on the trial of Elizabeth Clark at the Old Bailey in 1707. The offense was punishable with death, and it was creditable to the hearts of the judges to make fine distinctions and insist on technicalities in favor of human life, especially when the offender was a woman. The law, however, was then generally considered well settled, and so the statute of 12 Anne was soon after passed as a declaratory act." After quoting from the act the court proceeded: "We incline to the opinion that the facts found to have been committed by the accused constituted the crime of burglary at common law, and that the statute of Anne, above quoted, should be regarded simply as declaratory of that law. If the statute be viewed in another aspect, as in alteration and amendment of the common law, it may still perhaps be considered a part of our law by adoption, though not of binding force as a statute. Statutes of this character, passed by parliament before our Declaration of Independence, have been adopted by our sister states as part of their common law: *Commonwealth v. Leach*, 1 Mass. 59; *Commonwealth v. Knowlton*, 2 Mass. 534; *Pemble v. Clifford*, 2 McCord (S. C.), 31; *Sackett v. Sackett*,

8 Pick. (Mass.) 309; *Boynnton v. Rees*, 9 Pick. (Mass.) 528; *Commonwealth v. Chapman*, 13 Met. (Mass.) 68. In this state, in 1787, our superior court recognized and adopted the statute of 9 Anne, altering and amending the common law relating to writs of mandamus: *Strong's Case*, Kirby (Conn.) 345."

Notwithstanding the well-reasoned opinion in the case we have just been considering, the case has not been generally followed in this country. It has been quite generally held that in the absence of statutory enactment making it burglary, breaking out of a house cannot be considered a burglarious breaking: *Brown v. State*, 55 Ala. 123, 28 Am. Rep. 693; *White v. State*, 51 Ga. 285; *Wine v. State*, 25 Ohio St. 69; *Rolland v. Commonwealth*, 82 Pa. 306, 22 Am. Rep. 758; *Adkinson v. State*, 64 Tenn. (5 Baxt.) 569, 30 Am. Rep. 69; *Edwards v. State*, 36 Tex. Cr. 387, 37 S. W. 438. The two early cases of *In re Guche*, 6 City Hall Rec. 2 (N. Y. 1821), and *State v. Manluff*, 1 Houst. C. C. 208 (Del. 1866), follow the case of *State v. Ward*, 43 Conn. 489, 21 Am. Rep. 665, on this question. North Carolina has a statute similar to the English statute, making the breaking out of a house burglarious. But here, in order to convict, the charge of "breaking out" must be distinctly laid in the indictment; a conviction cannot be had for this offense under an indictment charging simply "breaking and entering," even though the proof shows that there was a "breaking out": *State v. McPherson*, 70 N. C. 239, 16 Am. Rep. 769.

The doctrine adverse to the holding that a "breaking out" is burglarious is very succinctly stated in the fifth report of the English commissioners on criminal law, which is quoted with approval in *Rolland v. Commonwealth*, 82 Pa. 306, 22 Am. Rep. 758. The portion of the report bearing directly upon this point states: "By the statute of 12 Anne, chapter 1, section 7 (subsequently repealed and reenacted), the crime of burglary was extended to the case of an offender who, having committed a felony in a dwelling-house, or having entered therein with intent to commit a felony, afterward broke out of such dwelling-house in the night-time. This extension does not, we think, rest upon just principles. After a felony has been committed within the dwelling-house, the offense is not in reality aggravated by lifting the latch of a door, or the sash of a window, in the night-time, in order to enable the offender to escape. A breaking out, indeed, may be an innocent act, as it may be committed by one desirous of retiring from the further prosecution of a crime, and the extension of the law of burglary to such a case is not warranted by the principles upon which the law is founded, inasmuch as a circumstance not essential to the guilt of the offender or the mischief of the act is made deeply essential to the crime. It is ineffectual, even with a view to the object proposed; the pretext for the conviction fails in the absence of a breaking out, which is a casual and uncertain circumstance."

To the same effect is the language of the court in *Adkinson v. State*, 64 Tenn. (5 Baxt.) 569, 30 Am. Rep. 69: "It is insisted, however, by the attorney general that unlocking the door for flight makes the breaking required in this offense, under section 4674 of the code, which is: 'Any person who, after having entered any of the premises mentioned in the first section of this article with intent to commit a felony, break such premises, he shall be punished in the same way as if he had broken into the premises in the first instance.' This,

however, is nothing more than the principle of the common law, that breaking in furtherance of the design, that is, felonious purpose, after entry, makes out the offense. It cannot mean that breaking after abandonment of the purpose and for a different purpose than the commission of a felony shall be referred arbitrarily to the felonious design. If this should be held, a party who, by trespass, enters a house with design to steal, who changes his mind and abandons that purpose, but in going out of the house unlocks a door for egress, would be guilty of burglary. We cannot assent to this view of the question. The door, in this case, was unlocked for escape from the house, not for entrance or in forwarding a felonious design. There was no felonious breaking in this view."

e. **Breaking by Unusual Places of Entry.**—By unusual places of entry, we mean unusual from a burglary standpoint. Getting into a house through a window is an unusual entrance for an honest man; but not for a burglar, as the numerous cases we have cited show. The unusual entrances to which we have reference are those that display some originality on the part of the burglar—some departure from the beaten paths of burglardom; as, for example, where he emulates the good St. Nicholas by going down the chimney, not, it is needless to say, with the benevolent purpose of that frosty but kindly individual. Such a mode of entrance was at an early date declared to be burglarious breaking, on the ground that the chimney is as much closed as the nature of the thing will permit: 1 Hawk., c. 38, sec. 4; 2 East P. C. 485; 4 Blackstone's Commentaries, 226; Rex v. Brice, R. & R. C. C. 450. And such seems now to be the settled law: Donohoo v. State, 36 Ala. 281; Walker v. State, 52 Ala. 376; Olds v. State, 97 Ala. 81, 12 South. 409; State v. Willis, 52 N. C. 190. In the last-cited case such an entrance was decided to be a burglarious breaking, although the chimney was made of logs and sticks, was in a state of decay, and not more than five and a half feet high. After citing a number of authorities the court said: "In all this long and strong array of great authorities, not a word is said about the height, size or quality of the chimney; and it seems to a majority of the court that any attempt to make a distinction between the different kinds of chimneys will be attended with great difficulty, and lead to much uncertainty and confusion. Where will the dividing line be drawn? If the entry through a chimney in a certain state of decay, and only five feet and a half high, is not a burglarious one, in how much better condition and how much higher must it be, before the law will recognize it as a protection against nocturnal invaders? This is a question more easily to be asked than to be successfully answered. We are unwilling to undertake the task of answering it, and are content to hold that the chimney, as described in the bill of exceptions, was such a one as could not be entered by a thief in the night-time without committing the crime of burglary." The chief justice, however, dissented from the majority of the court. "It is settled," he said, "that to enter a dwelling-house by coming down the chimney is a burglarious breaking. But I cannot concur in the conclusion that the opening used in this instance for the passage of smoke, comes within the application of the principle. It is true, the structure is called a chimney in the statement of the case, but a description is given of it, so as to present the question, Is it a chimney within the meaning of the law in reference to burglary? It is also

true that this, like many other questions of law, is attended with difficulty; but it seems to me that the mode resorted to for its solution is not the true one. If to enter a chimney five feet and a half high be not burglary, how much higher must it be—ten, fifteen or twenty feet? A good rule works both ways. If to enter a chimney five and a half feet high be burglary, how much lower may it be—four, three or two feet? Upon a consideration of the reason of the law in respect to chimneys, and calling in aid the analogies furnished by the cases on other points, although no case is found on the point now before us, my conclusion is, that the opening or structure, or chimney, call it what you please, must be such a one as may reasonably be relied on for protection against felonies; which is a question to be decided by the court upon the facts of each case, like ordinary diligence, probable cause, reasonable time, etc. The law making it burglary to enter by a chimney is founded on this reason: The purpose of a chimney requires that it should be left open, and its construction is usually such that more effort and daring is necessary to enter in that way than to force a door or hoist a window. . . . In order to bring it within the principle, the structure must be such a one as may reasonably be relied on for protection; for, if it be partly rotted down, so as to be no higher than a man's head, and as easy to enter as a window with the sash out, it must stand on the same footing. The old cases which established the doctrine that an entry by coming down the chimney is a burglarious breaking, were decided with much hesitation, because the hole was open, and although a description of the chimney is not given in any of them, still it is clearly to be inferred the entrance in that mode was difficult, and that circumstance was taken to counterbalance the fact of its being open. . . . In the case now before us the top part of the chimney, a funnel, had rotted off, and but for the few loose boards that were laid over it to keep out the rain (upon which no stress is laid), a smart dog could easily have jumped in and stolen the lady's meat, and if one or two more rounds had been off, an enterprising old sow could have performed the same feat! I cannot bring my mind to the conviction that to enter through such a hole constitutes the crime of burglary, nor am I satisfied by calling this structure a chimney, and relieving myself from the difficulty of distinguishing between the different kinds of chimneys by saying that 'a chimney is a chimney'; for that seems to me to be sticking in the letter, which we are admonished not to do, even in the construction of statutes, by the maxim, 'Que haeret in litera haeret in cortice,' and of course it should not be done in making the application of a principle of the common law, which rests on 'the reason of the thing.'"

Passing, now, to other unusual modes of entering in burglary, we find it decided that entering a building by crawling through a small hole under the door-sill is a breaking: *Knotts v. State* (Tex. Cr. App.), 32 S. W. 532. As is the entering of a barn by pulling away rails driven into hay in such a manner that the ends of the rails covered the opening: *State v. Rivers*, 2 Ohio Dec. 102. And where the evidence showed the building was made of logs, and rested upon the ground, and was without a floor other than the ground itself, the entry being effected by digging a hole under the lower log, and going through this hole under the log into the house, this was de-

cided to be a "breaking": *Pressley v. State*, 111 Ala. 34, 20 South. 647.

In *Marshall v. State*, 94 Ga. 589, 20 S. E. 432, it was decided to be a burglarious breaking where the defendant, for the purpose of making room for his body, pushed aside the band used in operating machinery, which ran through an open hole. Getting into a room through an open transom over a door, while a somewhat unusual method of entry, is not a burglarious one: *McGrath v. State*, 25 Neb. 780, 41 N. W. 780. But effecting such entrance by tearing away a curtain that was stretched over the transom was decided to be a burglarious breaking: *Holland v. State*, 47 Tex. Cr. App. 623, 85 S. W. 798.

II. Entry.

a. **In General.**—Breaking and entry are so closely connected in the law of burglary that many of the cases heretofore cited on the subject of breaking bear more or less directly upon the subject of entry as well, although we have endeavored to confine the discussion to the subject of breaking alone. We shall in like manner, in the present subdivision, consider the subject of entry apart from that of breaking, although the discussion will necessarily be confined within much narrower limits.

Entry is an indispensable element in the crime of burglary: 4 Blackstone's Commentaries, 227; *State v. Fisher*, 1 Penne. 303, 41 Atl. 208. Except, of course, where, as in the principal case (*State v. Vierck*, 23 S. D. 166, ante, p. 1040, 120 N. W. 1098), the statute makes one guilty of the offense who breaks or enters." And the offense is complete after the breaking and entry are complete, notwithstanding the abandonment of the felonious undertaking after the entry: *Schwartz v. State*, 55 Tex. Cr. App. 36, 114 S. W. 809.

b. **What Constitutes an Entry.**—A burglarious entry, as defined by Bishop, "consists of putting, through the place broken, into any space of whatever dimensions pertaining to the dwelling-house, the body, the hand, or any inanimate substance capable of accomplishing the felony meant, whether in fact it does accomplish it or not": 2 Bishop's New Criminal Law, sec. 92. It has also been broadly defined to mean every kind of entry other than one made by the free consent of the occupant of the house: *Martin v. State*, 1 Tex. Cr. App. 525; *Jones v. State* (Tex. Cr. App.), 132 S. W. 476. An entry is not confined to the entrance of the whole body; it may consist of the entry of any part, for the purpose of committing a felony. For example, in *Franco v. State*, 42 Tex. 276, it was decided that the defendant had "entered," where the testimony showed that he had raised the window and was holding it up with his hand in such a way that his fingers were within the house, his elbows resting on the sill of the window, his body outside of the house.

In *Nash v. State*, 20 Tex. App. 384, it appeared from the evidence that there was a trap-door in the floor, which opened upward on hinges. The proprietor of the mill, because of prior depredations of like character, suspected other burglarious attempts, and, to prevent their success, placed over the trap-door a "spring-gun." In order to fire this gun the door would have to be raised about twelve inches. On the night of the attempted burglary and theft one of the party of would-be burglars placed his hand under the door and raised it, and, while pushing the door upward, the gun fired, frightening the

burglars away. It was decided that when the door was raised, the hand that raised it was in the house, making the entry complete.

In *White v. State*, 7 Ga. App. 596, 67 S. E. 705, the defendant was adjudged to have made a burglarious entry where all but his lower limbs had been drawn through the window that he had opened. In *State v. Boysen*, 30 Wash. 338, 70 Pac. 740, a sufficient entry was shown where the defendants broke a window, and one of them reached in and removed the stores and handed them to the other. Where, however, there is nothing but a breach of the window shutter, and no entry beyond the sash window, there is no sufficient entry to constitute burglary: *State v. McCall*, 4 Ala. 643, 39 Am. Dec. 314.

In *Rex v. Bailey, R. & R.* 341, it appeared from the evidence that a sash-window was fastened in the usual way, by a latch, from the bottom of the upper sash to the top of the lower one; and that there were inside shutters that were fastened. One of the prisoners broke a pane of glass in the upper sash of the window, and introduced his hand within, with the intention to undo the latch by which the window was fastened. While he was cutting a hole in the shutter with a center-bit, and before he had undone the latch of the window, he was seized. All the judges were of opinion that the introduction of the hand between the window and the shutter to undo the window latch was a sufficient entry to constitute burglary.

In *Rex v. Rust*, 1 Moody, 183, the facts were these: The glass sash-window was left closed down, but was thrown up by the prisoners; the inside shutters were fastened, and there was a space of about three inches between the sash and the shutters, and the shutters themselves were about an inch thick. It appeared that after the sash was thrown up, a crow-bar had been introduced to force the shutters, and had been not only within the sash, but had reached to the inside of the shutters, as the mark of it was found on the inside of the shutters. The judges were of the opinion that this was not a case of burglary, as it did not appear that any part of the hand was within the window, although the aperture was large enough to admit it.

c. Entry by Instruments.—While the authorities hold it sufficient to constitute a burglarious entry if the hand, or any part of the person, is within the house for any purpose, the law appears to be different where an instrument is used. The instrument must be within the premises, not only for the purpose of making an entry, but also for the purpose of effecting the contemplated felony; as where a hook is introduced for the purpose of taking away goods, or a pistol put in for the purpose of killing the inmates of the house, there the entry is sufficient; but if the instrument is merely used for the purpose of making an entry, then the proof of the entry fails: *Rex v. O'Brien*, 4 Cox, 398.

The rule is illustrated in *Rex v. Steel*, 2 East P. C. 491, where it appeared that a center-bit had penetrated through the door, from chips found in the inside of the house, yet as the instrument had been introduced for the purpose of breaking, and not for the purpose of taking the property or committing any other felony, it was decided that the entry was incomplete.

In *Walker v. State*, 63 Ala. 49, 35 Am. Rep. 1, the defendant, intending to steal shelled corn, bored a hole through the floor of a corn-crib from the outside, and thus drew the corn into a sack

below. In the course of an opinion declaring this to be an entry, the court says: "When one instrument is employed to break, and is without capacity to aid otherwise than by opening a way of entry, and another instrument must be used, or the instrument used in the breaking must be used in some other way or manner to consummate the criminal intent, the intrusion of the instrument is not, of itself, an entry. But when, as in this case, the instrument is employed, not only to break, but to effect the only entry contemplated, and necessary to the consummation of the criminal intent; when it is intruded within the house, breaking it, effecting an entry, enabling the person introducing it to consummate his intent, the offense is complete." This case was cited with approval, and followed, in the very similar case of *State v. Crawford*, 8 N. D. 539, 73 Am. St. Rep. 772, 80 N. W. 193, 46 L. R. A. 312, where the defendant stole wheat from a granary by boring three holes with a two-inch auger through the walls of the granary and into one of the wheat bins, the weight of the grain forcing several bushels of the wheat to pass out of the aperture.

d. Entry of Store Open for Business.—Entering a store that is open for business, in the same manner and by the usual way that customers enter, is a burglarious entry where the intention to commit a felony is formed before or at the time of entering: *Pinson v. State*, 91 Ark. 434, 121 S. W. 751; *People v. Barry*, 94 Cal. 481, 29 Pac. 1026; *People v. Brittain*, 142 Cal. 8, 160 Am. St. Rep. 95, 75 Pac. 314; *Gonzales v. State* (Tex. Cr. App.), 50 S. W. 1018. The case of *State v. Newbegin*, 25 Me. 502, supports the contrary view. It should be noted, however, that the Maine statute requires both a breaking and entry to constitute burglary, while the element of breaking is not necessary to the offense under the Arkansas and California codes. Under the Texas code the entry must be by breaking. The case of *Gonzales v. State* (Tex. Cr. App.), 50 S. W. 1018, seems, therefore, to conflict with that of *State v. Newbegin*, 25 Me. 502.

III. Breaking and Entry With Consent of Owner.

a. Knowledge of Intended Burglary.—The fact that the owner of a burglarized building has previous notice that the crime is to be committed, and makes no effort to prevent it, but adopts means to secure the arrest of the burglar, does not relieve the latter from responsibility, where he personally performs every act which is essential to the crime: *Thompson v. State*, 18 Ind. 386, 81 Am. Dec. 364; *State v. Abley*, 109 Iowa, 61, 77 Am. St. Rep. 520, 80 N. W. 225, 46 L. R. A. 862; *State v. Jansen*, 22 Kan. 498; *State v. Stickney*, 53 Kan. 308, 42 Am. St. Rep. 284, 36 Pac. 714; *Duncan v. Commonwealth*, 85 Ky. 614, 4 S. W. 321; *State v. Sneff*, 22 Neb. 481, 35 N. W. 219; *Robinson v. State*, 34 Tex. Cr. 71, 53 Am. St. Rep. 701, 29 S. W. 40; *Bird v. State*, 49 Tex. Cr. App. 96, 122 Am. St. Rep. 503, 90 S. W. 651. Where, however, the owner is connected with the original design to break the house, and aids and abets the burglar for the purpose of entrapping him, the latter will be absolved: *Allen v. State*, 40 Ala. 334, 91 Am. Dec. 477; *Bird v. State*, 49 Tex. Cr. App. 96, 122 Am. St. Rep. 803, 90 S. W. 651; *Egginton's Case*, 2 East Crim. Law, 666; *Regina v. Johnson*, 1 Car. & M. 218, 41 Eng. Com. L. 123.

In the case first cited—*Allen v. State*, 40 Ala. 334, 91 Am. Dec. 477—the proof showed that the defendant proposed to a servant that they rob

the office of the latter's employer, and the servant communicated this fact to his employer, who informed the police, and, acting on their advice, furnished his servant with the key to his office, by means of which, at an appointed night, the servant unlocked the office door, and together with the defendant entered the room, where they were arrested. "We are satisfied the prisoner is not guilty of the offense charged in the indictment upon the evidence set out in the bill of exceptions," said the court. "It is difficult to conceive how a person can be guilty of burglary who enters a house with a key voluntarily furnished him by the owner to enter, knowing at the time that the person wishes to enter to steal. It is, in effect, a consent to the entry by such person, and is not even a trespass."

In such a case, however, the servant must act under instructions of his master. If he acts upon his own initiative in the steps he takes in the pretended collusion with the burglar, the latter will not be excused. Thus, where a clerk in a store, having neither the custody nor the right to admit anyone thereto, at the time a burglary is committed therein, and for the purpose of apprehending the accused, knowing that the crime is to be committed, but without the knowledge or consent of the owner of the store, loans a detective a key thereto in order to allow a duplicate to be made for the use of the accused, the acts of the clerk are no defense to the crime. His assent to the criminal entry of the store by the accused by means of such key cannot be imputed to the owner of the store: *State v. Ahley*, 109 Iowa, 61, 77 Am. St. Rep. 520, 80 N. W. 225, 46 L. R. A. 862.

In the somewhat unusual case of *Forsythe v. State*, 6 Ohio (6 Ham.), 20, the defendant sought to excuse a breaking and entering a dwelling-house at night by showing the permission of the wife of the owner of the house that he might enter it for an unlawful purpose. The defense, it is hardly necessary to say, did not avail him.

b. Entrapment by Detectives.—The assistance of a detective in a burglary, acting for detective purposes, is no defense to a person who himself does every act essential to constitute the burglary: *State v. Stickney*, 53 Kan. 308, 42 Am. St. Rep. 284, 36 Pac. 714; *State v. Currie*, 13 N. D. 655, 112 Am. St. Rep. 687, 102 N. W. 875, 69 L. R. A. 405; *People v. Morton*, 4 Utah, 407, 11 Pac. 512. As was said by the court in *State v. Jansen*, 22 Kan. 498: "The act of a detective may, perhaps, not be imputable to the defendant, as there is a want of a community of motive. . . . But where each of the overt acts going to make up the crime charged is personally done by the defendant, and with criminal intent, his guilt is complete, no matter what motives may prompt or what acts be done by the party who is with and apparently assisting him."

Where the detectives or police officers, acting as decoys, or otherwise, induce the defendant to commit the crime of burglary, or aid and abet him in the perpetration of the essential parts of it, the defendant will not be considered guilty of the offense: *People v. Collins*, 53 Cal. 185; *Love v. People*, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139; *People v. McCord*, 76 Mich. 200, 42 N. W. 1106; *State v. Hayes*, 105 Mo. 76, 24 Am. St. Rep. 360, 16 S. W. 514; *Roberts v. Territory*, 8 Okl. 326, 57 Pac. 840; *Speiden v. State*, 3 Tex. App. 156, 30 Am. Rep. 126.

The last-cited case is a very instructive one. A firm of bankers, suspecting defendant of an intention to rob the bank, employed de-

tectives to act as decoys and induce him to enter the bank. Pursuant to a plan agreed upon the sheriff of the county, with a number of assistants, entered and took possession of the bank during the daytime, to remain therein until the burglary was effected and the defendant was arrested. In the night the back door of the bank was forced open by the detectives, who came in, spoke to the concealed parties, and went into the vault; when, after remaining about an hour, one of them went out, told the defendant they wanted more help, and returned in a short time, and, coming in, closed the door after him. In a minute or two the defendant came in and closed the door, when the officers arrested him. It was decided that the detectives and the other officers were the servants and agents of the bankers, and had full authority to consent to defendant's entry into the bank, and that his entry was not only with their consent, but at their solicitation. In contemplation of law there was no burglary, however much the defendant was guilty in purpose and intent.

IV. Breaking and Entry by Servants and by Other Occupants of Premises.

a. **By Servants.**—At common law no difference was made between the act of a servant or domestic in opening and entering a room in his master's house with felonious design, and that of a stranger breaking and entering from the outside. Indeed, the opportunity afforded the servant to commit the crime with greater ease was considered to aggravate rather than extenuate the guilt: 4 Blackstone's Commentaries, 227. This seems now to be the law, in the absence of any statutory enactment to the contrary: *Hild v. State*, 67 Ala. 39; *Pointer v. State*, 148 Ala. 676, 41 South. 929; *Young v. Commonwealth*, 31 Ky. Law Rep. 842, 104 S. W. 266; *United States v. Bowen*, Fed. Cas. No. 14,629 (4 Cranch C. C. 604). The Texas code, however, makes a distinction between an unlawful entry into a house (or room in a house), made by a domestic servant or inhabitant thereof, and that made by a stranger. To constitute burglary on the part of a domestic servant or inhabitant of the house, under this code, there must be an actual, and not a constructive, breaking (Penal Code, art. 714), while on the part of a stranger, a constructive breaking is sufficient, as by lifting a latch or raising a window or opening an unlocked door (Penal Code, art. 708). The words "constructive breaking" are here used in their ordinary sense, and not in their legal sense; constructive breaking in the legal sense implying an entry by deceit, threats or conspiracy with house servants.

In *Peters v. State*, 33 Tex. Cr. 170, 26 S. W. 61, the facts were these: The defendant resided in a livery-stable. Adjoining his room, and in the same building, was an oat bin, the entrance to which was by a small door, which was raised by any person getting oats. It was unlocked. The bin contained oats belonging to other parties, who rented other portions of the livery-stable. During the night the defendant raised the door and took out some oats and fed to his horses. It was decided that this did not constitute the actual breaking required by the Texas code to constitute burglary. In *Love v. State*, 52 Tex. Cr. App. 84, 105 S. W. 791, it was decided that a railway porter, whose duties required him to be in and around a passenger station, was not guilty of burglary in breaking open a drawer in a public telephone booth located in a corner of the waiting-room and

stealing money therefrom. But in *Jackson v. State*, 43 Tex. Cr. App. 260, 64 S. W. 864, it was decided that the mere fact that a saloon in the basement of a hotel was controlled by the management of the hotel, and that the defendant was a servant in and about the hotel business, did not constitute him a domestic servant in relation to the saloon. Where, therefore, he entered the saloon with intent to steal, he was held guilty of burglary, although he effected an entry without the actual statutory breaking.

It was decided in *Neiderluck v. State*, 23 Tex. App. 38, 3 S. W. 573, that a domestic servant, conspiring with those who are not servants, may be guilty of burglary, though the breaking is not actual, and such as, if committed by the servant acting alone, would not be burglarious. In *Morrow v. State* (Tex. Cr. App.), 25 S. W. 284, the evidence showed that the defendant had been placed on the outside of a house for the purpose of protecting it from fire. This, it was decided, did not authorize him to enter the house; and when he did enter the house through an upper window with intent to steal, he committed burglary.

b. Tenants of Premises.—If a person, being a guest in a hotel, breaks into other parts of the house where he has no right to enter, for the purpose of committing a felony, it is burglary, the same as if he had broken in from the outside: *State v. Clark*, 42 Vt. 629; *Ullman v. State*, 1 Tex. App. 220, 28 Am. Rep. 405; *Holland v. State*, 45 Tex. Cr. 172, 74 S. W. 763; *Hofland v. State*, 47 Tex. Cr. App. 623, 85 S. W. 798. And a tenant of an apartment in a warehouse is guilty of burglary if he breaks into and steals from another apartment in the warehouse occupied by other tenants: *Commonwealth v. Ballard*, 18 Ky. Law Rep. 782, 38 S. W. 678.

In *Stone v. State*, 63 Ala. 115, the evidence disclosed that the two rooms of a gin-house, which was no longer used for the ginning of cotton, were externally accessible through separate doors; and in the partition between them there was a hole through which the lint-cotton as expelled from the gin, when that should be in operation, was intended to pass. The defendant, who occupied one of these rooms, crawled through the hole in the partition into the other room occupied by another person and stole a quantity of cotton belonging to the latter. It was decided that this was no such breaking as is requisite to constitute burglary. Nor was the defendant guilty of that offense by opening the door of the room of which he had the key and lawful use, and entering therein, though he did so with the intent to pass through the hole mentioned and steal the cotton.

Clarke v. Commonwealth, 25 Gratt. (Va.) 908, is an instructive case on the point we are now considering. The facts were these: D. and H. rented a room jointly, both having a key to it. The defendant had an adjoining room, the doors of the two rooms entering upon the same porch near each other. H. and the defendant conspired to steal D.'s goods in his absence, and H. opened the door with his key, and they entered the room and took and carried away D.'s trunk with its contents. It was decided that this was not a burglarious breaking and entry on the part of the defendant.

V. Constructive Breaking and Entry.

a. In General.—The term "constructive breaking" is sometimes inaccurately used in the cases to distinguish the breaking that is un-

accompanied by any actual violence, such as the lifting the latch of a door or opening an unfastened window. This, of course, is not the strict, legal connotation of the term. Constructive breaking in the law of burglary, as has already been stated, is effected where the entry is accomplished by means of fraud, threats, or by confederacy with servants residing in the house. It has also been considered to be constructive breaking and entry where firearms are discharged into the house: 1 Hawk., c. 38, sec. 11; and again, where a man sends into the dwelling a child of tender years and innocent of any crime, but does not personally enter: 1 Hale P. C. 555. The modes in which constructive breaking may be accomplished, however, have quite generally been held to be the three first mentioned; and these will now be briefly considered.

b. Fraud.—A frequently used method of effecting an entry by fraud is where the thief knocks at the door or rings the door bell, pretending to have business with the owner, and, being by such means let in, robs him. This is held to constitute burglary: *State v. Carter*, 1 Houst. C. C. (Del.) 402; *State v. Johnson*, 61 N. C. 186, 93 Am. Dec. 587; *State v. Mordecai*, 68 N. C. 207; *Ducher v. State*, 18 Ohio, 308; *Johnston v. Commonwealth*, 85 Pa. 54, 27 Am. Rep. 622.

It was held in *Nicholls v. State*, 68 Wis. 416, 60 Am. Rep. 870, 32 N. W. 543, that there was a constructive breaking where the defendant had secreted himself in a box, and thereby obtained an entry into an express-car, with intent there to commit a felony. It was held, however, not to be a burglarious entry where the defendant entered a store through an open door, concealed himself until the store was closed, and then took goods, and went out by opening one of the doors: *Smith v. State* (Tex. Cr. App.), 60 S. W. 668. Nor was it considered a fraudulent entry where the accused took off his shoes and entered through an open door: *Hamilton v. State*, 11 Tex. App. 116. In *State v. Henry*, 31 N. C. (9 Ired.) 463, it was decided that there cannot be a constructive breaking, so as to constitute burglary, by enticing the owner out of his house by fraud and circumvention, and thus inducing him to open his door, unless the entry of the trespasser be immediate or in so short a time that the owner or his family has not the opportunity of refastening the door. In this case the owner, by the stratagem of the trespasser, was decoyed to a distance from his house, leaving his door unfastened, and his family neglected to fasten it after his departure, and the trespasser, after the expiration of about fifteen minutes, entered the house through the unfastened door, with intent to commit a felony. This, according to the majority of the court, did not constitute burglary, Chief Justice Ruffin dissenting.

c. Threats and Intimidation.—"Where in consequence of violence commenced or threatened in order to obtain entrance to a house, the owner, either from apprehension of the violence or in order to repel it, opens the door, and the thief enters, such entry will amount to a breaking in law": Russell on the Law of Crimes, p. 1070. This point will be sufficiently illustrated by the citation of the case of *State v. Foster*, 129 N. C. 704, 40 S. E. 209. In this case the evidence was that the prisoners by trick and fraud procured the clerk of a store to unfasten the door, when they forced their way into the store. Upon their gaining an entrance in this way, they covered him with pistols and marched him into his sleeping apartment, opening off

the store—the door between being open—and there taking his pistol, purse, and other property. The guilt of the defendants, under an indictment for burglary in the first degree, depending upon the question as to whether they had broken into the sleeping apartment, it was held that the clerk being carried into his sleeping apartment under the influence of a loaded pistol bearing upon him, was a breaking—a constructive breaking into the apartment.

d. **Confederacy With House Servants.**—Where a servant conspires with a thief to let him into his master's house to commit a felony, and in consequence of such agreement opens the door or window to let him in, this is considered to be burglary in both the thief and the servant: *State v. Rowe*, 98 N. C. 629, 4 S. E. 506; *Neiderluck v. State*, 23 Tex. App. 38, 3 S. W. 573; *Rex v. Cornwall*, 2 Strange, 881. And this is so notwithstanding a statute requiring an actual breaking to constitute burglary in a servant, and where, therefore, there would have been no burglary on the part of the servant had he acted alone: *Neiderluck v. State*, 23 Tex. App. 38, 3 S. W. 573.

STATE v. EGLAND.

[23 S. D. 323, 121 N. W. 798.]

CRIMINAL TRIAL—Prima Facie Case—Direction of Verdict. When the state has introduced evidence upon which, if believed by the jury, they may reasonably find the defendant guilty of the crime charged, the state has made out a prima facie case, and the court is not justified in directing a verdict in favor of the defendant. (p. 1067.)

CRIMINAL TRIAL—Instructing Jury as to Manner of Deliberation.—An instruction that the jury should examine the questions submitted to them with candor, and with a proper regard and deference to the opinions of each other; that it is their duty to decide the case if they can conscientiously do so; that in conferring together they ought to pay a proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments; that a juror, dissenting from the majority, should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath; that a minority should seriously ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows, is not erroneous as invading the province of the jury, or attempting to dictate to them the manner in which they should conduct their deliberations. (pp. 1068, 1069.)

NEW TRIAL—Appeal from Order Granting or Refusing.—The granting or denying of a new trial is largely in the sound, judicial discretion of the trial court; and unless there is a manifest abuse of

such discretion, the ruling upon such a motion will not be reversed by the supreme court. (p. 1070.)

CRIMINAL TRIAL.—While an Instruction Relating to the Penalty for the crime charged, where the jury have nothing to do with imposing the penalty, may be technically erroneous, it is error without prejudice, and consequently no ground for reversing a judgment. (p. 1068.)

Anderson & Waddel, for the appellant.

S. W. Clark, attorney general, Cloyd Sterling, assistant attorney general, and Frank Sears, state's attorney, for the state.

³²⁴ **CORSON, J.** Upon an information duly filed by the state's attorney of Day county the defendant was tried and convicted of the crime of an assault with intent to commit rape, and from a judgment and order of the circuit court denying a new trial, the defendant has appealed.

The appellant seeks a reversal of the judgment upon four grounds, viz.: (1) Error of the court in denying appellant's motion, made at the close of the evidence on the part of the state, to advise the jury to return a verdict in favor of the appellant; (2) error of the court in denying appellant's motion, made at the close of all the evidence, to advise the jury to return a verdict in his favor; (3) errors of the court in its charge to the jury; (4) error of the court in denying appellant's motion for a new trial.

After a careful review of the evidence on the part of the state, we are clearly of the opinion that, if the jury believed the same, it was amply sufficient to justify the jury in finding the defendant guilty of the crime charged. That the jury did believe it clearly appears by their verdict. When the state has introduced evidence upon which, if believed by the jury, they may reasonably find the ³²⁵ defendant guilty of the crime charged, the state has made out a prima facie case, and the court would not be justified in taking the case from the jury, and advising a verdict in favor of the defendant, or, as stated by Mr. Thompson in his work on Trials (section 2246): "In other words, where the facts offered in evidence by the plaintiff, if true, make out a prima facie case, the jury, and not the judge, ought to pass upon them." As there was a conflict in the evidence, the court very properly denied the appellant's motion for a direction of a verdict in his favor at the close of all the evidence, as the weight of the evidence, and the credibility of the witnesses, was a matter for the determination of the jury, and the court would not be justified in such a case in advising the jury to acquit the defendant. There being, therefore, evidence to warrant the jury in finding a verdict of guilty, it was the duty of the court to submit the case to them, leaving to them the duty of determining

the weight of the evidence and credibility of the witnesses. It is only when there is not sufficient evidence to justify the verdict, or a fatal variance between the evidence and the charge as made in the information or indictment, that the trial court is authorized to advise the jury to return a verdict in favor of the defendant: See Thompson on Trials, sec. 2246, and following sections. The court was clearly right, therefore, in denying appellant's motion.

It is contended by the appellant that the court erred in charging the jury, "as matter of law, that every person who is guilty of an assault with intent to commit any felony is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or of a fine not exceeding five hundred dollars, or of both such fine or imprisonment," on the ground that, as the jury in the case before them had nothing to do with imposing the penalty for the crime alleged to have been committed, it was error for the court to thus instruct them. Possibly, in view of the fact in this case that the jury was not authorized to determine the penalty to be imposed in case of a verdict of guilty, the court may have committed a technical error in thus charging them, but if it was error, it was error without prejudice, and consequently is not ground for reversing the judgment.

³²⁶ It is also contended by the appellant that the court erred in its instructions to the jury as follows: "And it is also proper for the court to remind you that you should try to come to an agreement in this case. The only mode provided by our laws for deciding questions of fact in criminal cases is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided; that you are selected in the same manner, and from the same source, from which any future jury must be, and there is no reason to suppose that this case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And with this view it is your duty to decide the case, if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other in all cases. In the present case the burden of proof is upon

the state to establish every part of it, beyond a reasonable doubt; and if, in any part of it, you are left in doubt, the defendant is entitled to the benefit of the doubt, and must be acquitted. But, in conferring together, you ought to pay a proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. And, on the one hand, if much the larger number of your panel are for conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves, whether they may not reasonably, and ought not to, doubt the correctness ³²⁷ of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows." It is argued by the appellant that this instruction was an invasion of the rights of the jury, and an attempt to dictate to them the manner in which they should conduct their deliberations in the jury-room; that the only province of the court is to state the issues, and then give the jury the usual and general rules for determining the weight and sufficiency of evidence. But in our opinion the court in this instruction in no manner invaded the province of the jury, and that the instruction is fully sustained by authority.

The learned supreme court of Massachusetts sustained a similar charge to the jury, and in the course of its opinion that court says: "Upon a careful consideration of these instructions we are clearly of opinion that so far from being improper, or of a nature to mislead, they were entirely sound, and well adapted to bring to the attention of the jury one of the means by which they might be safely guided in the performance of their duty. A proper regard for the judgment of other men will often greatly aid us in forming our own. In many of the relations of life it becomes a duty to yield and conform to the opinion of others, when it can be done without a sacrifice of conscientious convictions. More especially is this a duty, when we are called on to act with others, and when dissent on our part may defeat all action, and materially affect the rights and interests of third parties. Such is the rule of duty constantly recognized and acted on by courts of justice. They not only form their opinions, but reconsider, revise and modify their own declared judgments by the aid and in the light of the decisions of other tribunals. But this could not be done, if it were not permitted to them

to doubt and correct their opinions, when they were found to differ from those of other men, who have had equal opportunities of arriving at sound conclusions with themselves." And the view expressed by that court seems to meet with the approval of Mr. Thompson in his work on Trials, as he quotes the charge of the trial court, and also the decision of the supreme court above referred to, as a part of this text (section ³²⁸ 2303, Thompson on Trials). And the supreme court of Indiana, in *Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369. in discussing a similar question, says: "It is the duty of jurors to consider carefully every part of the evidence, and, if necessary, reconsider it, and to hear and consider the views and arguments of their fellow-jurors; but at last each one of them must act upon his own judgment, and not upon that of another." And the supreme court of Connecticut, in *State v. Smith*, 49 Conn. 376, says: "Although the verdict to which each juror agrees must, of course, be his own conclusion, and not a mere acquiescence in the conclusions of his fellows, yet, in order to bring twelve minds to a unanimous result, the jurors should examine with candor the questions submitted to them, and with due regard and deference to the opinions of each other. In conferring together the jury ought to pay proper respect to each other's opinions, and listen with candor to each other's arguments. If much the larger number of the panel are for a conviction, a dissenting juror should consider whether the doubt in his own mind is a reasonable one which makes no impression on the minds of so many men equally honest, equally intelligent with himself, who have heard the same evidence, with the same attention, and with equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to, doubt the conclusions of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows." The views expressed by the courts above quoted meet with our approval: and we are of the opinion that the circuit court committed no error, therefore, in that part of his charge to the jury above quoted.

The last contention of the appellant that the court erred in denying his motion for a new trial is untenable. The granting or denying of a new trial is largely in the sound, judicial discretion of the trial court; and, unless there is a manifest abuse of such discretion, its ruling upon such a motion will not be reversed by this court. It is true, in the case at bar, there was a sharp conflict ³²⁹ in the evidence; but as the jury, upon a full consideration of the case, and after listen-

ing to a very full and clear statement of the law applicable to the case by the court, found a verdict of guilty, we cannot say that there was any abuse of the court's discretion in denying the motion. The law applicable to such motions is too well settled in this court to require the citation of authorities.

Finding no error in the record, the judgment of the circuit court and order denying a new trial are affirmed.

McCoy, J., taking no part in the decision.

The Court has a Right to Urge the Jury to Agree upon a Verdict. Hence, after the jury has been out over twenty hours, it is not error for the court, upon the jury's coming in a second time, to instruct that, if one or two of them differ in their views of the evidence from the others, they should thereby be induced, although not required, to surrender conscientious convictions, and to doubt the correctness of their judgments, and that this disparity of opinion should lead them to inquire whether they are not mistaken: *Gibson v. Minneapolis etc. Ry. Co.*, 55 Minn. 177, 43 Am. St. Rep. 482. The coercion of jurors until they agreed upon a verdict seems to have been warranted by the common law, but this common-law rule has been swept away, and any attempt on the part of the court to drive the jurors into an agreement demands a new trial: *People v. Sheldon*, 156 N. Y. 268, 66 Am. St. Rep. 564.

WATTERS v. DANCEY.

[23 S. D. 481, 122 N. W. 430.]

BROKER—When has Earned Commissions.—Before a real estate broker will be entitled to recover commissions, he must show that he has found and brought to the owner of the land a purchaser ready, willing, and able to enter into a contract of purchase on the prescribed terms; or in lieu of producing and presenting such a purchaser, he must show that he has obtained from him a valid and binding contract in favor of the land owner, and one that can be enforced by the land owner himself in case of a breach or default in the terms thereof. (pp. 1073, 1074.)

BROKER—Authority to Sell—Commissions.—Where land is simply listed for sale with a real estate agent, the only person who can sell the land is the owner; the agent himself has no authority to sell unless duly authorized in writing. A contract, therefore, made by the agent with a prospective purchaser to purchase the land from the agent does not bind the owner or entitle the agent to his commissions unless the owner approves and ratifies the contract. (p. 1073.)

TRIAL.—A Verdict is Properly Directed for the defendant where the evidence, with all inferences which can justifiably be drawn therefrom, is insufficient to support a verdict for the plaintiff. (p. 1075.)

BROKER—Cash Purchaser, What is not.—Where a real estate listing contract provides for "all cash over the encumbrance," evidence that the proposed purchaser, procured by the agent, has an abundance of property out of which the required payment might be made is not sufficient evidence that he is ready and willing to purchase. He must have the cash in hand. (p. 1075.)

William Issenhuth, for the appellant.

Bruell & Morris, for the respondent.

⁴⁸² **McCOY, J.** In this case plaintiff, who is also the appellant, brings this suit against the defendant to recover \$960 commissions for having found a purchaser for defendant's land, who, as plaintiff alleges in his complaint, was ready, willing and able to purchase on the terms prescribed by defendant. Defendant answered, denying generally all plaintiff's allegations, and thus putting plaintiff upon proof as to all the allegations of his complaint. At the close of the plaintiff's testimony on the trial the defendant moved the court to direct a verdict in favor of the defendant, on the grounds that the plaintiff had wholly failed to prove a cause of action against the defendant, and for the reason that the undisputed evidence showed that, if said land was so listed, the same had been withdrawn from sale prior to the time plaintiff had received any notice that plaintiff claimed to have sold the same. The court granted the motion, and a verdict was accordingly directed in favor of the defendant. To which ruling of the court the plaintiff duly excepted. It is now contended by the plaintiff that the trial court erred in directing ⁴⁸³ a verdict, but we are of the opinion that there exist several plain and clear reasons why this position of the appellant is not tenable.

From plaintiff's testimony it appears that, on about July 28, 1906, the plaintiff and defendant had a conversation in the office of plaintiff, whereby the defendant told plaintiff that he might list for sale his land, consisting of one one-quarter section, for \$34 per acre, net to defendant, payable all cash, over and above an encumbrance of \$2,100 thereon; that thereafter, on the first day of August following, the plaintiff procured a purchaser, H. T. Bell, for said land, at \$40 per acre cash over the \$2,100 encumbrance, and that on that date plaintiff and said Bell entered into a written contract, whereby Bell agreed to purchase the said land on the said terms, not from the defendant, but from the plaintiff, and by the terms of which contract the said Bell also agreed to forfeit to the plaintiff, G. M. Watters, the \$500 cash paid in case Bell defaulted in the terms of said contract. After procuring this contract from Bell, plaintiff, on August 2d, wrote to the defendant, inclosing a draft for \$50 as earnest-money, and notifying defendant that he had sold the land

on his terms, and again, on August 6th, the plaintiff wrote defendant: "We have sold your land \$34 net to you." "This was the price and terms you listed it to us. H. T. Bell has purchased this land from us at \$40 per acre, which leaves us a profit of \$960 in the land." These letters and the draft were returned to plaintiff, the defendant having refused to receive or accept the same. On August 3d the defendant wired plaintiff: "Concluded not to sell." In every case of this character, the plaintiff must prove, before he can recover, that he has found and produced and brought to the land owner a purchaser who is ready, willing and able to enter into a contract to purchase with the land owner on the prescribed terms; or, in lieu of producing and presenting such a purchaser, he must show that he has obtained from such purchaser a valid and binding contract in favor of the land owner, and being a contract that might be enforced by the land owner himself in case of a breach or default in the terms thereof: *McLaughlin v. Wheeler*, 1 S. D. 497, 47 N. W. 816; *Huntemer v. Arent*, 16 S. D. 465, 93 N. W. 653; *Mattes v. Engle*, 15 S. D. 330, 89 N. W. 651; ⁴⁸⁴ *Howie v. Bratrud*, 14 S. D. 648, 86 N. W. 747; 19 Cyc. 255; *Flynn v. Jordal*, 124 Iowa, 457, 100 N. W. 326; *Johnson Bros. v. Wright*, 124 Iowa, 61, 99 N. W. 103; *Ormsby v. Graham*, 123 Iowa, 202, 98 N. W. 724; *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 162, 42 N. E. 134; *Mattingly v. Pennie*, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200; *Gunn v. Bank of California*, 99 Cal. 349, 33 Pac. 1105; *Hayden v. Grillo*, 35 Mo. App. 647.

In *Johnson Bros. v. Wright*, 124 Iowa, 61, 99 N. W. 103, the court says: "The agency was to find a purchaser on certain terms, and, in order to earn the commission, it was incumbent upon plaintiff to furnish a person, ready, able and willing to buy on the terms fixed. To accomplish this, where no sale is actually made, either a valid obligation to buy must be procured and tendered to the principal, or the vendor and the proposed purchaser must be brought together, so that the vendor may secure such a contract, if he wished to do so." It is not sufficient that a contract be made to purchase the land from the agent. Where land is simply listed for sale, the only person who can sell the land is the owner: *Johnson Bros. v. Wright*, 124 Iowa, 61, 99 N. W. 103. The agent has no authority to himself sell the owner's land, unless duly authorized in writing: *Rev. Civ. Code*, sec. 1238, subd. 5; *Brandrup v. Britten*, 11 N. D. 376, 92 N. W. 453; *Hickox v. Bacon*, 17 S. D. 563, 97 N. W. 847. The agent was only authorized to procure a purchaser to whom the owner might sell. The agent might procure from the proposed buyer a written executory contract, whereby such buyer agreed to

purchase from the owner, and which contract, when presented and tendered to the land owner, might be signed by him, and thus complete the transaction. The valid and binding contract which the agent was required to obtain in order to be entitled to his commission was a contract signed by the proposed buyer agreeing to purchase from the land owner (not from the agent) on the prescribed terms, and being such a contract on which the land owner might himself recover damages in case of breach thereof. The damage, if any, for breach of the contract would go to the land owner, and not to the agent.

Again, in the case of *Hayden v. Brillo*, 35 Mo. App. 647, the court said: "This contract on the part of a broker is complete when he delivers or tenders to the owner a valid written contract, containing the terms of the sale agreed on, signed by a party able to comply ⁴⁸⁵ therewith, or to answer in damages if he shall fail to perform. This is all the agent can do; and, when this is done, he is entitled to his commission. But the necessity of a written contract of sale may be rendered unnecessary if the agent bring the vendor, and vendee together, and the latter is able and willing and offers to complete the contract, provided the vendor will make the conveyance. In such a case the agent has done all that he can do; and, if the vendor, under such circumstances, refused to complete the sale, he will be compelled to pay the agent his commission. The reason of the rule is very apparent. The object of the vendor is to effect a sale of his property, and when the real estate broker produces a contract executed by a solvent purchaser, he is then entitled to pay for his services, whether the trade is finally consummated or not, because, if the vendee refuses to take the property, the vendor holds the contract, which renders the former liable for all damages (including commissions paid by the vendor to the broker) for a failure to comply." From the reason of the rule given in this case it necessarily follows that the contract must run in favor of the land owner, and be a contract he could enforce; not necessarily a contract that might be specifically enforced, but a contract sufficient in form and provisions that the land owner might recover the damages which he might sustain as a result of its breach, and including any commissions he might be compelled to pay. In this case no contract was ever obtained from the proposed buyer, H. T. Bell, in favor of defendant, and neither was such a contract ever furnished or tendered to defendant. The contract made with Bell was an unauthorized contract, and one which plaintiff had no right or authority to make,

unless expressly authorized in writing so to do, and was a contract in no manner binding upon defendant, unless he ratified and approved the same.

The plaintiff having failed to furnish or tender to defendant a contract of the proposed purchaser, it then became necessary for plaintiff, in order to recover, to produce and bring to the defendant a proposed purchaser who was ready, willing and able to purchase. There is no evidence of any kind that plaintiff ever produced or attempted to get the defendant and Bell together so that they might contract. There is no evidence that Bell was ready and ^{also} willing to make the purchase. The listing contract provided for "all cash over the encumbrance." Evidence that the proposed purchaser has an abundance of property, out of which the required payment might be made, is not sufficient evidence that he was ready and willing to purchase. The proof must show that he had the cash in hand: 19 Cyc. 246; *Neiderlander v. Starr*, 50 Kan. 766, 32 Pac. 359; *Dent v. Powell*, 93 Iowa. 711, 61 N. W. 1043. In this case the testimony showed that the proposed purchaser, Bell, at the time of this transaction in August, 1906, had about \$300 in cash, and about \$6,000 worth of personal property and growing crops in the state of Iowa, but which was insufficient for the purposes of this case.

There was a total lack of evidence on the trial of this case as to matters necessary to be shown before plaintiff was entitled to recover. A verdict is properly directed for defendant where the evidence, with all inferences which can justifiably be drawn therefrom, is insufficient to support a verdict for plaintiff: *McKeever v. Homestake Min. Co.*, 10 S. D. 599, 74 N. W. 1053.

Finding no error in the record, the judgment of the circuit court is affirmed.

Whiting, J., took no part in the decision of this case.

As to When a Broker has Earned His Commission, see the note to *Chaffee v. Widman*, ante, p. 225.

WHITTAKER v. DEADWOOD.

[23 S. D. 538, 122 N. W. 590.]

SPECIAL ASSESSMENTS.—Property Owned by the United States government is exempt from municipal assessment for street improvement. (p. 1077.)

SPECIAL ASSESSMENTS—Exemption of Public Property.—A special assessment for local street improvement is not taxation, within the meaning of section 5, article 11, state constitution of South Dakota, providing that the property of the state, county, and municipal corporations shall be exempt from taxation. (p. 1078.)

MUNICIPAL CORPORATIONS—City Council—Voting—Minutes of Proceedings.—Where the city council of a municipality is composed of eight members, and it appears from the minutes of a meeting that the eight members voted in favor of a resolution relating to a public improvement, this is equivalent to stating that eight members voted "yea," and there is a substantial and sufficient compliance with Revised Political Code of South Dakota, section 1209, requiring a yea and nay vote to be taken upon any resolution declaring the necessity of a public improvement. (p. 1078.)

SPECIAL ASSESSMENTS.—The "Front-foot" Rule for Computing the amount of special assessments, established by Revised Political Code of South Dakota, section 1304, is not unconstitutional on the ground of being unequal and unjust. (pp. 1078, 1079.)

SPECIAL ASSESSMENTS—Improvement Districts.—Under Revised Political Code of South Dakota, section 1303, providing that "Whenever a city council shall deem it necessary to pave . . . or otherwise improve any street, alley or highway . . . within the city limits, for which a special assessment is to be levied, the city council shall by resolution declare such work or improvement necessary," no authority or power is granted to include more than one street in a single pavement improvement or district. (p. 1079.)

SPECIAL ASSESSMENTS—Description of Improvement.—A Resolution of a city council by which a special assessment is declared to be necessary should specify the extent of the work or improvement, by showing height, width, and thickness, or should appropriately refer to the plans and specifications therefor then on file, so that the property owner may determine for himself what the probable expense will be, in order that he may determine whether or not to enter protest against the improvement. (p. 1080.)

SPECIAL ASSESSMENTS—Schedule and Estimate by City Auditor.—Revised Political Code of South Dakota, section 1246, providing that "The city auditor shall make or cause to be made an estimate of the work proposed to be done by the city . . . and before the levy by the city council of any special tax upon property in the city, of any part thereof, shall report to the city council a schedule of all parcels or lots of land which may be subject to the proposed special tax or assessment, and also the amount of such special tax or assessment which it may be necessary to levy on such lots and parcels of land," is mandatory, and constitutes the schedule and estimate therein provided for a condition precedent to the making of a valid special assessment. (p. 1081.)

Samuel C. Polley, for the appellants.

Norman T. Mason, for the respondent.

⁵⁴¹ McCOY, J. This action involves the validity of certain special assessments made for local improvements in paving certain streets in the city of Deadwood. The plaintiffs, protesting property owners affected by such assessments, brought this action in the circuit court of Lawrence county for the purpose of having set aside and declared unlawful the said assessments, and to permanently enjoin the city treasurer from collecting the same. The defendants answered, and a trial was had before the circuit court without a jury, resulting in findings and judgment in favor of the defendants. The plaintiffs, as appellants, bring the cause to this court by appeal, challenging the legality of the findings and judgment of the trial court.

⁵⁴² It is contended by the appellants that, after the city council of the city of Deadwood had passed resolutions declaring such public improvement necessary, more than a majority of the property owners affected by such special assessment filed with the city auditor written protests against such improvement. It appears from the record that the said public improvement comprises a total frontage of 7,475 feet, and that within the time prescribed by section 1303, Revised Political Code, owners of 3,374 feet of the property fronting on the portions of said streets intended to be paved filed their written protests against the said improvement. The plaintiffs further contend that 774 feet of the amount of said frontage is public property not liable for such special assessment, and should not be counted in estimating a majority of the ownership of the property affected, and that, after deducting the said 774 feet frontage, the protesting plaintiffs constituted a majority of the property owners affected by such special assessment, and that by reason thereof the defendant, its city council and officers, had no authority or jurisdiction to proceed with or complete said special assessment. In this contention we are of the opinion that the plaintiffs are in error. It appears from the record that, of the said 774 feet claimed to be exempt from said special assessment, 225 feet thereof belongs to the United States, and that the remaining 549 feet belongs to the city of Deadwood, the school district of Deadwood, and Lawrence county; and, while we are of the opinion that the 225 feet owned by the United States government is exempt from said special assessment, we are also of the opinion that the property fronting on such pavement owned by Lawrence county, the school district of Deadwood, and the city of Deadwood is not exempt. A special assessment for a local improvement by a municipal corporation against the property of the county or municipality is not within the meaning of section 5, article 11, state constitution, providing that the property of the state, county, and municipal corporations, both real and personal,

shall be exempt from taxation. It has been held by this court (*Winona & St. P. Ry. Co. v. Watertown*, 1 S. D. 46, 4 N. W. 1072) that special assessment for local street improvement is not taxation. It has been held in many other jurisdictions under similar provisions that special assessment for local improvement is ⁵⁴³ not taxation, and that such special assessment is not in conflict with a constitution or statute exempting such property from taxation: *McLean County v. Bloomington*, 106 Ill. 209; *Adams Co. v. Quincy*, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155, and note; *Children's Mission v. Mayor*, 116 Mass. 181; *Sioux City v. School Dist.*, 55 Iowa, 150, 7 N. W. 488; *Edwards & Walsh C. Co. v. Jasper Co.*, 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006; *Washburn M. O. Asylum v. Minnesota*, 73 Minn. 343, 76 N. W. 204; *New Orleans v. Warner*, 175 U. S. 120, 20 Sup. Ct. Rep. 44, 44 L. ed. 96; *Yates v. Milwaukee*, 92 Wis. 352, 66 N. W. 248. In *McLean County v. Bloomington*, 106 Ill. 209, it is held that the municipality was authorized to make special assessment for local improvements, without restriction to the ownership of the property to be assessed. The power conferred upon cities to make special assessments under section 1299, Revised Political Code, is not restricted as to the ownership of the property against which the levy may be made.

It is further contended by the appellants that, when the resolution to declare the said public improvement necessary was before the city council, no yea and nay vote was taken upon the passage of said resolution, as required by section 1209, Revised Political Code; but in this contention we are of the opinion that the appellants are in error. It appears from the record that the city auditor made the following entry in the minutes of the proceedings relative to the passage of said resolution: "Roll was called on the above resolution, with the following result: Members voting in favor of said resolution: Messrs. Fargo, Croghan, Benner, Moffitt, Schlichting, Seim, Treber, and Hogarth. The entire council being present and voting, the resolution was declared passed." It was held in the case of *Milbank v. Western Surety Co.*, 21 S. D. 261, 111 N. W. 561, that a resolution with the same record thereof as in the case at bar was in substantial compliance with section 1209, Revised Political Code. It appears from the record that the city of Deadwood has eight members of the council. It appears that eight members voted in favor of this resolution. That is equivalent to stating that eight members voted yea.

Plaintiffs attack the "front-foot" rule for computing the amount of the special assessment against each parcel of land as unequal ⁵⁴⁴ and unjust. The "front-foot" rule is established by the statute of this state (Rev. Pol. Code, sec.

1304), and the following of any other rule of computation would be invalid: *Bluffton v. Miller*, 33 Ind. App. 521, 70 N. E. 989. The constitutionality of the "front-foot" rule has many times been assailed in other jurisdictions, and the great weight of authority seems to be in favor of its validity: 28 Cyc. 1157. The identical statute exists in North Dakota, and was assailed in *Rolph v. Fargo*, 7 N. D. 640, 76 N. W. 242, 42 L. R. A. 646, and again in *Webster v. Fargo*, 9 N. D. 208, 82 N. W. 732, 56 L. R. A. 156, and by able and exhaustive opinions held constitutional.

Appellants further contend that the special assessment in question is void, because more than one street, and streets of different widths, were included in the resolution and in the same paving district. In this contention we are of the opinion that appellants are right. This species of special taxation, under whatever rule, is fraught with such opportunities of confiscation and inequality that justice to property owners demands that statutes on this subject should receive a strict construction, and that every statutory requirement should be strictly complied with, and construed to the end that inequalities and confiscations should be reduced to the minimum. We are of the opinion that under section 1303, Revised Political Code, no authority or power is granted to include more than one street in a single pavement improvement or district. The language of the statute is: "Whenever a city council shall deem it necessary to pave . . . or otherwise improve any street, alley, or highway . . . within the city limits, for which a special assessment is to be levied, the city council shall by resolution declare such work or improvement necessary." We think the legislature used the singular "street" advisedly and intentionally, and could not have intended that two or more streets of unequal widths might be coupled together and made to constitute a single assessment district, thereby compelling the property owner of a little, narrow, cross or side street to pay a portion of the expense of paying the big, wide main street: *Hutchinson v. Omaha*, 52 Neb. 345, 72 N. W. 218. It appears from the record that the paved portion of West Lee street is eight feet wide, and that the paved portion of Main ⁶⁴⁵ street is forty-three feet wide, and that the actual cost of pavement varied from \$1.60 per front foot on West Lee to \$9.49 on Main; but by including all these streets together in one paving district, and dividing the total expense by the total number of front feet on all the streets included in the district, the average cost per front foot is \$7.64. A party owning a twenty-five foot lot facing Main street, and also abutting lengthwise 100 feet on West Lee street, would pay \$955 special assessment, while his neighbor, on an inside lot, of the same size, facing on Main street, would pay \$191. The party whose

lot abutted lengthwise on West Lee street, would pay \$604 more than the cost of the 100-foot pavement abutting on West Lee street, and which \$604 would go to pay the expense of paving on Main or other wider street. We are of the opinion that the legislature never contemplated any such inequality, and that no more than one street should be included in a single paving district. In some jurisdictions it is held that streets of different widths may be joined in one improvement district. In speaking of this rule in Illinois, the court, in *Springfield v. Green*, 120 Ill. 269, 11 N. E. 261, and in *Wilbur v. Springfield*, 123 Ill. 395, 14 N. E. 871, says: "While many streets and parts of streets are embraced in one scheme of improvement adopted in the city, yet we regard them as parts of the same improvement. The city authorities, in adopting the ordinance, must have found as a matter of fact that these streets were all similarly situated with respect to the improvement proposed, so as to justify the treatment of them as one single improvement. They were all to be paved with the same material in the same manner, and the fact that there was a difference of a few feet in the width of some of them, in our opinion, would make no difference." But if such streets were so situated as not to justify such procedure, by not being similarly situated and the difference in width being very materially different, the Illinois court does not state what the rule would be. This rule in Illinois seems to be hedged around and qualified by such conditions that would make it inapplicable to the case at bar.

It is contended further by appellants that the resolution by which the said special assessment was declared to be necessary did ⁵⁴⁶ not sufficiently describe the improvement of work to be done, in that it did not specify the thickness of the concrete foundation or the height of the curbing. While section 1303 does not prescribe what the form or substance of the resolution shall be, yet it seems to be generally held, in the absence of statutory requirement, that the resolution must reasonably inform the property owner that he is to be assessed, and must describe generally the nature and extent of the improvement, and the resolution may refer to plans and specifications on file. If the improvement is a sewer, the diameter should be stated, and if a curbing, the height, length and thickness, so that the property owner might determine for himself what the probable expense might be, in order that he might determine whether or not to enter protest against the improvement: 28 Cyc. 981; *Atlanta v. Gabbett*, 93 Ga. 266, 20 S. E. 306; *Holden v. Chicago*, 172 Ill. 263, 50 N. E. 181. Although this last case is based upon a statute of Illinois requiring that the ordinance should show the nature and description of the improvement, still this statute is the same as, and is not broader or different than, the rule in the

absence of such a statute prescribing such form. We are of the opinion that this objection to the said resolution is well taken—that a resolution of this character should specify the extent of the work or improvement, by showing height, width and thickness, or should appropriately refer to the plans and specifications therefor then on file. The matter of the height or thickness goes to the extent of the improvement, and should be stated in the resolution.

It is next contended by the appellants that the assessments in question are void because the city auditor did not have on file an estimate of the work to be done. Section 1246, Revised Political Code, provides that: "The city auditor shall make or cause to be made an estimate of the work proposed to be done by the city, . . . and before the levy by the city council of any special tax upon property in the city, of any part thereof, shall report to the city council a schedule of all parcels or lots of land which may be subjected to the proposed special tax or assessment, and also the amount of such special tax or assessment which it may be necessary to levy on such lots and parcels of land." This section of our statute, ⁵⁴⁷ by its express terms, is a component part of and relates to the procedure of special assessments, and should be construed in connection with all the other parts of the statute relating to that subject. It seems to be generally held that a statutory provision of this character is mandatory, and constitutes a condition precedent to the making of such special assessment: 28 Cyc. 986; *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304; *Moss v. Fairbury*, 66 Neb. 671, 92 N. W. 721; *Pound v. Chipewa Co.*, 43 Wis. 63; *Boonville v. Cosgrove* (Mo. App.), 95 S. W. 314; *Dallas v. Atkins* (Tex. Civ. App.), 32 S. W. 780; *Ives v. Irey*, 51 Neb. 136, 70 N. W. 961; *Henderson v. Omaha*, 60 Neb. 125, 82 N. W. 315; *Kirksville v. Coleman*, 103 Mo. App. 215, 77 S. W. 120; *Paterson etc. Ry. Co. v. Nutley*, 72 N. J. L. 123, 59 Atl. 1032. The plain import of the statute is that before any levy is made the city auditor shall make a schedule showing all lots of land against which the assessment or levy is to be made, and showing an estimate of the amount which it may be necessary to assess against each lot. This must be done while the matter is in the "proposed" stage, and as a necessary step preceding the levy. The utility and purpose of such schedule is obvious. It furnishes a basis for the contract and levy, and after having been made becomes a public record for the inspection of interested parties, that they may be informed as to what is proposed to be done, what the estimated cost of the improvement will be, and what property is proposed to be taxed. This schedule or estimate, thus prepared by the auditor, by the express terms of the statute must be certified under oath of the auditor, and is the prima facie evidence of what prop-

erty is liable to the special assessment. From the record it appears that no schedule of estimate, as required by section 1246 or otherwise, was ever made or kept on file by the city auditor, and we are of the opinion that without such schedule and estimate the said contract and special assessments are absolutely void.

It is further contended by appellants that the resolution declaring the said pavement necessary, passed April 8, 1907, and under which said contract was made and said work done, was repealed by a subsequent resolution, passed June 3d following; but we are inclined to the view that the subsequent resolution was intended as supplementary or amendatory to the resolution of April 8th.

⁵⁴⁸ It is contended by respondents that some of the questions raised by appellants in their briefs are not sufficiently raised by proper assignment of error; and, while the assignments of error are not so specific in some particulars as they might be, yet we are of the opinion that the assignments of error are sufficient to raise all the questions passed upon by this decision.

The judgment of the circuit court is reversed and the cause remanded, and the circuit court is hereby ordered and directed to enter judgment permanently enjoining the collection of said special assessments.

As to Whether Property of the United States, Though Exempt from Taxation, is Exempt from liability for local assessments, see the note to Herriek & Stevens v. Sargent & Lahr, 132 Am. St. Rep. 307.

For the Distinction Between Taxes and Assessments, see Reinken v. Fuehring, 130 Ind. 382, 30 Am. St. Rep. 247; notes to Board of Commissioners etc. v. Ottawa, 33 Am. St. Rep. 410; Herriek & Stevens v. Sargent & Lahr, 132 Am. St. Rep. 308. The exemption of property from taxation does not include its exemption from special assessments for street improvements: Edwards etc. Co. v. Jasper County, 117 Iowa, 365, 94 Am. St. Rep. 301.

Assessments for Local Improvements Against Abutting Property in Proportion to Frontage are valid and constitutional: Northern Pac. Ry. Co. v. City of Seattle, 46 Wash. 674, 123 Am. St. Rep. 955. As to when an assessment on the front-foot rule is invalid, see Adams v. Shelbyville, 154 Ind. 467, 77 Am. St. Rep. 484; Hutcheson v. Storrie, 92 Tex. 685, 71 Am. St. Rep. 884; Hayes v. Douglas County, 92 Wis. 429, 53 Am. St. Rep. 926.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

**SIEMERS v. MEEME MUTUAL HOME PROTECTION
INSURANCE COMPANY.**

[143 Wis. 114, 126 N. W. 669.]

FIRE INSURANCE—Ownership of Property—Waiver of Condition.—Where at the time a policy was written the secretary of the insurer knew that the title to property insured in the name of a widow stood in her children, subject to her rights of dower and homestead, a provision that all property must be insured in the names of all the owners will be deemed to have been waived. (p. 1037.)

FIRE INSURANCE—Increased Risk—Proximate Cause of Loss.—A finding of the jury that the running of a steam engine without a spark-arrester did not increase the risk will be sustained, where there was no evidence to show that the removal of the spark-arrester was the proximate cause of the fire. (p. 1037.)

FIRE INSURANCE—Ordinary Risks Covered by Policy.—People insure against their own negligence as well as that of their neighbors, and against those untoward events which human foresight is unable to prevent; against accidents which cannot be avoided and from acts of omission or commission on their part which might have been guarded against, and the dangers of carrying on of business operations in the ordinary way, and such must, in general, be considered a necessary part or incident of the risk which the insurer has undertaken to bear. (p. 1038.)

FIRE INSURANCE—Extraordinary or Increased Risk.—A provision or condition avoiding a policy if the risk is increased means that the insured shall not allow or permit a change to be made in the structure, nature, or habitual use of the insured property materially different from that which the insurer has agreed to undertake. But trivial or temporary variations in the risk, incident to the ordinary use of the property, are presupposed by the contracting parties to be likely to occur. (p. 1038.)

FIRE INSURANCE—Increased Risk—Use of Steam Engine.—Insurance must be presumed to be made with reference to the character of the property insured and to the owner's use of it in the ordinary way and for the purpose for which the property is ordinarily held and used, and therefore, the use of a steam engine for the cutting of ensilage, such being ordinary and usual in running a farm, cannot

be considered to have increased the risk contemplated by a policy of insurance on farm buildings, within the meaning of a provision that an increase of risk shall avoid the policy. (pp. 1088, 1089.)

FIRE INSURANCE—Use of Steam Engine.—A Clause in a fire insurance policy prohibiting the use of "steam-threshing machines" without certain precautions does not prohibit the use of steam-threshing machine engines for purposes other than threshing, but does prohibit the use of such engines for such other purposes without the required precautions. (p. 1089.)

FIRE INSURANCE—Saving and Preservation of Property.—A provision in a fire insurance policy that "it shall be the duty of the insured to use their best endeavors for saving and preserving the property" defines the duty of the insured when the property covered by the policy is on fire, or when it is so menaced by fire in its vicinity that damage is likely to result, and does not apply to some action by which the risk of the property taking fire might be increased. (pp. 1089, 1090.)

TRIAL—Order of Proof in Discretion of Court.—It is not error for the court to allow the plaintiff, after the close of the defendant's case, to prove a fact he should have proved as part of his case in chief. Such matters rest in the sound discretion of the trial court. (p. 1090.)

Hougen & Brady, for the appellant.

Nash & Nash, for the respondents.

115 BARNES, J. The plaintiff Ida Siemers is the mother of Fred and Edward F. Siemers, her coplaintiffs. F. A. Siemers, the husband and father, died intestate on March 29, 1896, leaving six children and the widow living. The estate was administered in the county court, and in 1900 the lands and personal property were assigned to the six children subject to the homestead and dower rights of the widow. The farm and personal property were occupied and used by the widow until December 1, 1903, when she leased the farm to her two sons, who are her coplaintiffs herein. On December 11, 1908, the widow, by bill of sale, sold the farm machinery, grain, hay, and livestock to her two sons, Fred and Edward F. Siemers. On July 28, 1903, said widow applied to the defendant company for a policy of insurance for a term of five years in the sum of six thousand dollars covering farm buildings, hay, grain, farm implements, livestock, and household goods, which policy was thereafter issued to the plaintiff Ida Siemers. The defendant is a town mutual insurance company. On January 18, 1904, the widow assigned her rights in the insurance policy to her sons Fred and Edward F., except in so far as it covered buildings, household goods, wearing apparel, provisions, and musical instruments, which assignment was approved by the defendant. All of the buildings insured were located on the homestead forty.

On September 27, 1907, the plaintiffs Fred and Edward
116 F. Siemers were cutting ensilage, the power used to drive

the feed-cutter being a steam engine ordinarily used for the purpose of running a threshing machine. The smokestack of the engine where it was set in place was twenty feet distant from the nearest corner of an adjacent building. The engine was a wood burner. The fire occurred shortly after the workmen went into the house to dinner. Some minutes before quitting at noon, the plaintiff Edward F. Siemers took the spark-arrester out of the smokestack of the engine and operated the same without the use of the screen or spark-arrester, and left the engine with the spark-arrester removed when he and the others went in to dinner. Very shortly after the parties went to dinner the fire was discovered in a barn about sixty feet distant from the smokestack of the engine. All of the farm buildings were destroyed and most of the personal property. On the trial there was no controversy as to the amount of the loss.

The defendant, after receiving notice of the loss, proceeded to investigate the same, all nine of its directors being present on the twenty-seventh day of September, 1907, when such investigation was being carried on. Some testimony was taken, and it was unanimously decided by the directors that the company was not liable for the loss because no watchman had been employed, and because the spark-catcher was removed from the engine while the same was in operation. On October 2, 1907, two of the plaintiffs were notified of such conclusion, the grounds stated in the letter of notification being that plaintiffs did not "comply with our by-laws, section 21, as to a watchman, and by removing the spark-catcher while the engine was in operation."

The plaintiff Ida Siemers brought an action to recover the sum of four thousand one hundred dollars, because of loss on the items of property insured in her name, consisting of the various buildings and household furniture, wearing apparel, and musical instruments. The plaintiffs Fred Siemers and Edward F. Siemers ¹¹⁷ commenced another action against the defendant to recover the sum of nineteen hundred dollars because of the loss of certain personal property consisting of hay, grain, farming utensils, and livestock. The actions were consolidated. On the part of the defendant it was contended on the trial that it was not liable because (1) the property was not insured in the name of the owner as required by the terms of the policy; (2) because the risk was increased by placing and operating an engine at the time, in the manner, and for the purpose for which it was operated, in violation of the terms of the policy; (3) because the insured violated the clause in the policy requiring the insured to use their best endeavors for saving and preserving the property; (4) because the insured failed to keep a watchman around the engine as required by the terms of the policy.

The jury found (1) that at the time the policy in suit was issued William Fenn, the secretary of the company, who issued the policy, knew that the children of the plaintiff Ida Siemers were the owners of the lands on which the insured buildings stood, subject to her dower and homestead rights in said lands as widow; (2) that the removal of the spark-arrester from the smokestack on the day of the fire, and the subsequent operation of the engine for a period of five or six minutes without the arrester, under the existing circumstances, did not materially increase the risk; (3) that the removal of such spark-arrester and the subsequent operation of the engine while it was removed did not constitute failure on the part of the insured to exercise ordinary care; (4) that one Louis Voss acted for plaintiffs in the capacity of watchman in attendance to watch the engine during all the time it was in operation on the forenoon of the day on which the fire occurred.

On the verdict so returned, judgment was rendered in favor of the plaintiff Ida Siemers for three thousand four hundred and forty-one dollars and ninety cents damages, with interest and costs, and in favor of the plaintiffs Fred ¹¹⁸ and Edward F. Siemers for fourteen hundred and six dollars, together with interest and costs. From the judgment so entered this appeal is taken.

The appellant contends that the policy of insurance became void because the following clause found therein was violated by the insured: "All property must be insured in the names of all the owners, and the application must state the name of each owner or the policy will be void."

In this case the insured buildings, being a part of the homestead, descended to the widow during widowhood: Stats. 1898, sec. 2271. Whether it was a violation of the terms of the insurance contract to insure the property in her name, rather than in the joint names of the widow and the remaindermen, is a doubtful question in view of the following cases decided in this court: *Johannes v. Standard* ¹¹⁹ Fire Office, 70 Wis. 196, 5 Am. St. Rep. 159, 35 N. W. 298; *Vankirk v. Citizens' Ins. Co.*, 79 Wis. 627, 48 N. W. 798; *Carey v. Liverpool & L. & G. Ins. Co.*, 92 Wis. 538, 66 N. W. 693; *Schultz v. Caledonian Ins. Co.*, 94 Wis. 42, 68 N. W. 414; *Davis v. Pioneer F. Co.*, 102 Wis. 394, 78 N. W. 596; *Matthews v. Capital F. Ins. Co.*, 115 Wis. 272, 91 N. W. 675; *Wolf v. Theresa Village Mut. F. Ins. Co.*, 115 Wis. 402, 91 N. W. 1014; *Evans v. Crawford County F. Mut. F. Ins. Co.*, 130 Wis. 189, 118 Am. St. Rep. 1009, 109 N. W. 952, 9 L. R. A., N. S., 485. It is unnecessary to decide the point.

The jury found that William Fenn, the secretary of the defendant company, who wrote the policy in suit, knew at the time the policy was written that the children of the

plaintiff Ida Siemers were the owners of the real estate insured, subject to the homestead and dower rights of said plaintiff. Appellant's counsel vigorously attack this finding as not being supported by the evidence. The evidence was sufficient to warrant the jury in reaching the conclusion which it did reach. Mr. Fenn was a near neighbor of the insured for many years, and it would not be at all remarkable that he should know or be entirely satisfied as to where the title to the property rested, and he testified that as a matter of fact he did know when he wrote the policy. That such knowledge was an effectual waiver of the requirement of the insurance company, as regards title to the insured real property, is established beyond cavil. Many of the cases so holding are cited in *Metcalf v. Mutual F. Ins. Co.*, 132 Wis. 67, 73, 112 N. W. 22. Other cases to the same effect are *McFetridge v. American F. Ins. Co.*, 90 Wis. 138, 62 N. W. 938; *Goss v. Agricultural Ins. Co.*, 92 Wis. 233, 65 N. W. 1036; *Schultz v. Caledonian Ins. Co.*, 94 Wis. 42, 68 N. W. 414; *St. Clara F. Acad. v. Northwestern Nat. Ins. Co.*, 98 Wis. 257, 73 N. W. 767.

2. It is next urged that by placing and operating the engine ¹²⁰ at the time, in the manner, and for the purpose for which it was operated, the policy became void because the following provision of the insurance contract was violated: "If . . . the risk should be increased by any means whatever within the control of the assured, or be occupied in any way whatever so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect."

The contention is that the foregoing clause in the insurance policy was violated in two respects: (1) By running the engine for a few minutes without the spark-arrester; and (2) because of running the engine at all for the purpose of cutting ensilage. The jury found that the risk was not increased because of running the engine without the spark-arrester. There was very little evidence introduced on either side bearing on the question, and there is no evidence to show that the removal of the spark-arrester was the proximate cause of the fire. This court would not be warranted in setting the finding aside.

The second objection presents a much broader proposition and necessitates a construction of the policy. There was no direct evidence in the case as to what caused the fire. The inference is strong that the steam engine was responsible for it. If so, if the engine had not been operated, the fire would not have occurred. Therefore, by operating the engine, the plaintiffs increased the fire hazard and they cannot recover. Such is the construction which the defendant now places on its contract, although it did not so construe it when it de-

clined to pay the loss, and such is the construction which it asks the court to place thereon. The provision is one commonly found in policies of insurance, and is in substance embodied in the standard fire insurance policy adopted by the legislature of Wisconsin: Stats. 1898, sec. 1941—46. People insure against their own negligence as well as that of their neighbors, and against those untoward events which human ¹²¹ foresight is unable to prevent. Farmers have little to apprehend in the way of fire hazard from neighboring property. Their losses occur from accidental causes which cannot be avoided and from acts of omission or commission on their part which might have been guarded against. It is safe to say that by far the larger proportion of losses occur from the causes last named. If a fire is started by reason of an additional stove being set up after a policy is written, or by reason of the lighting of a match or the building of a mosquito smudge, or the use of a kerosene lantern around outbuildings, has the insured increased the risk by a means within his control and thus forfeited his right to recover? Owners of farm property hardly understand that by insuring their property they are debarring themselves of the right of carrying on their operations in the ordinary way.

Fire hazard is a variable quantity. It changes constantly from day to day, and sometimes imperceptibly, from the operation of the laws of nature and from various circumstances beyond the control of the insured. Such influences must, in general, unless unusual or extraordinary, be considered as a necessary part or incident of the risk which the insurer has undertaken to bear. It is not to be supposed that the insured has guaranteed that no improvements or changes shall be made anywhere in the vicinity of the insured property during the life of the insurance, but it is reasonable to exact an obligation from him that he shall not allow or permit a change to be made in the structure, nature or habitual use of the insured property materially different from that which the insurer has agreed to undertake: Richards on Insurance, 3d ed., p. 329. But trivial or temporary variations in the risk incident to the ordinary use of the insured property are presupposed by the contracting parties to be likely to occur: *Kircher v. Milwaukee M. Mut. Ins. Co.*, 74 Wis. 470, 43 N. W. 487, 5 L. R. A. 779. Insurance must be presumed to be made with reference to the character of the property insured and to the ¹²² owner's use of it in the ordinary way, and for the purpose for which such property is ordinarily held and used, or to cover risks incident to such use: 1 May on Insurance, 4th ed., sec. 219, and cases cited.

It is a matter of common knowledge that cutting fodder by hand, horse, steam, or gas-engine power is a very customary operation on farms. We think that when the contract was made it was fairly within the contemplation of the par-

ties that such work might be carried on, and that a steam engine might be employed in doing such work unless its use was specifically forbidden by the policy, and that the court committed no error in refusing to submit a question to the jury asking whether the risk had been increased by its use. The clause in question has reference to some permanent change in the character or condition of the insured property, and not to a temporary change in the risk, which was a mere incident to the ordinary use of the property.

We think the position of the appellant is not sound for another reason. The policy expressly provided that the company should not be liable for loss caused by the use of steam-threshing machines unless (1) a ladder was kept between the engine and the separator; (2) one barrel of water and two pails were kept between the engine and the barn ready for use; and (3) a watchman was always in attendance to watch the engine during its operation. The policy of insurance should be liberally construed in favor of the insured, particularly when a strict construction would work a forfeiture: *Redman v. Hartford F. Ins. Co.*, 47 Wis. 89, 32 Am. Rep. 751, 1 N. W. 393; 19 Cyc. 656, 657, and cases cited.

It is apparent that the hazard which the defendant sought to minimize was the use of steam engines around farm buildings. While the policy uses the words "steam-threshing machines," yet, taking the provision as a whole, we think it was its intent and meaning that steam-threshing machine engines should not be employed in the ordinary operations carried on around farm buildings unless the required precautions¹²³ were taken. This is a fair construction of the policy to the insured and the insurer. It seems to be acquiesced in, to some extent, at least, by counsel for the appellant, as it is urged as one of the grounds of error that no recovery can be had because the required precautions were not taken. The converse of the proposition stated would be, not that the use of steam engines was forbidden for other purposes than threshing, but that as to other kinds of work which might be done by them the precautions stipulated for in the policy need not be adopted.

3. It is next claimed that the plaintiffs violated the following clause in the insurance policy: "In case of fire . . . or exposure to loss or damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property."

The contention is that by taking off the spark-arrester the plaintiffs did not comply with the foregoing requirement. It is manifest that this provision defines the duty of the insured when the property covered by the policy is on fire, or when it is so menaced by fire in its vicinity that damage is likely to result. In such a case the policy-holder is obli-

gated to minimize his damages by using all reasonable efforts to prevent unnecessary loss. The insured did their full duty under this clause by saving all of the insured property that they could after they discovered the fire.

4. It is further urged that the insured violated the conditions of the policy by failing to keep a watchman, a barrel of water and pails, and a ladder as provided thereby. The jury found on sufficient evidence that a watchman was employed as required by the policy. The evidence to show that a ladder, an abundance of water, and the prescribed number of pails were provided as required was convincing and was uncontradicted, and as to such requirements the evidence presented no controversy and no issue was raised for the jury to pass upon.

5. It is also argued that the court erred in permitting the ¹²⁴ plaintiffs to introduce evidence that was not rebuttal after the defendant rested. In view of the fact that the evidence showed the condition of the title before plaintiffs rested their case in chief, it was incumbent on them to show a waiver of the forfeiture before resting rather than after the defendant rested. This they did not do. But it was entirely proper for the court to permit the evidence to be offered later. Courts are established for the purpose of getting at the rights of the parties who come before them with controversies, and such rights should not be defeated by technical rules. It is necessary that the trials be carried on in an orderly way. However, where counsel, through some inadvertence, fail to prove some vital fact at the proper time, the client should not be turned out of court because of such failure if he in fact has a meritorious cause of action.

By the COURT. Judgment affirmed.

That an Increase of Risk Avoids a Policy of Fire Insurance, see Insurance Co. v. McDowell, 50 Ill. 120, 99 Am. Dec. 497; Moore v. Protection Ins. Co., 29 Me. 97, 48 Am. Dec. 514; Houghton v. Manufacturers' Mut. Fire Ins. Co., 8 Met. 114, 41 Am. Dec. 489; Long v. Beeber, 106 Pa. 466, 51 Am. Rep. 532; Dittmer & Pelle v. Germania Ins. Co., 23 La. Ann. 458, 8 Am. Rep. 600.

An Increase of Hazard is Some Alteration or Change in the Situation or condition of the property insured which tends to increase the risk—something of duration, and not a casual change of a temporary character: Angier v. Western Assur. Co., 10 S. D. 82, 66 Am. St. Rep. 685. One brief violation of the terms of a policy of fire insurance for necessary work incidental to the preservation of the insured property will not be considered a breach of a condition prescribing the use of the premises: Krug v. German Fire Ins. Co., 147 Pa. 272, 30 Am. St. Rep. 729. The mere temporary use of a threshing machine for a few hours on premises where the insured property is located does not, of itself, work either a forfeiture or suspension of a policy of fire insurance: Adair v. Southern Mut. Ins. Co., 107 Ga. 297, 73 Am. St. Rep. 122. As to what use of dangerous machines, processes, or articles will not avoid a policy of fire insurance, see, also, note to Angier v. Western Assur. Co., 66 Am. St. Rep. 698.

WILL OF HAWKINSON.

[143 Wis. 136, 126 N. W. 683.]

WILLS—Admission to Probate—Essential Findings.—Before a will can be admitted to probate and before there can properly be any conclusion of law that an instrument "is the last will and testament" of anyone, the court must be convinced that the testator signed it in the presence of witnesses and that they attested it with the formalities prescribed by law, and the statute requires a written finding on the subject. (p. 1092.)

APPEAL—Erroneous Procedure of the Trial Court does not require the reversal of a judgment based thereon, if it is clear that justice has been done. (p. 1092.)

STARE DECISIS—Application of Doctrine.—When a court of last resort has persistently declared approval of a rule of law, it should not lightly be ignored, especially when, in the presence of conflicting decisions in other jurisdictions, such declarations amount to the adoption of the views of those courts approving the rule. (p. 1093.)

WILLS—Due Execution—Presumption from Due Attestation.—The due attestation of a will is itself prima facie proof of all facts essential to due execution, to which attesting witnesses could depose if present, including the authenticity of the testator's signature, whether autographic, by mark, or in the handwriting of another, also his volition in signing and his mental capacity and understanding of his act. (p. 1095.)

WILLS—Due Execution—Presumption not Destroyed.—The presumption of the due execution of a will from the attestation thereof is not destroyed or overcome by a showing that the testator could not read or write English, qualified by a showing that he had lived in this country thirty years, served in the Civil War, and was a prosperous farmer of average intelligence. (p. 1095.)

Orton & Osborn and J. H. Clary, for the appellants.

Carey & McDaniel, for the respondent.

¹³⁶ DODGE, J. Appeal from probate of alleged will of Christian Hawkinson, dated September 5, 1896, to which his name appears in the handwriting of the scrivener, Michael Doyle, who is also the first subscribing witness. The will bears a full attestation ¹³⁷ clause certifying, inter alia, the signing by Christian Hawkinson. His name as subscribed to the will is interrupted by a cross and the words "his mark." There is no bill of exceptions, and the court made certain findings of fact which in the main are mere recitation of the evidence. There is no finding of fact as to whether deceased was competent, as to whether undue influence was exerted upon him, as to whether he knew the contents of the instrument, nor as to whether he in fact signed the same by making his mark, or otherwise. It is found, however, that he died May 6, 1907; that his widow survived him about six months; that immediately after his death she made the usual petition for letters of administration, alleging intestacy; that on July

2, 1907, she, together with one of the daughters, petitioned for the probate of this instrument and filed it in county court; that Hawkinson was eighty-one years old at the time of his death, a native of Norway, came to this country before the Civil War, could read Norwegian but could not write it, and could neither read nor write English, was a prosperous farmer and of average intelligence; that the subscribing witnesses both died before testator; that their signatures are authentic; and that the whole document, other than the signature of the other subscribing witness, is in the handwriting of Michael Doyle, the first subscribing witness, who was a man of good standing, resided in the same village with the testator for many years before the date of the will, and was or had been a justice of the peace and drew conveyances and wills. As conclusion of law it is declared that the instrument is the last will and testament of Christian Hawkinson. From judgment affirming the order of the county court admitting the will to probate certain of the heirs at law of the deceased appeal.

¹³⁸ The judgment is *prima facie* erroneous because not supported by the findings. Before a will can be admitted to probate and before there can properly be any conclusion of law that an instrument "is the last will and testament" of anyone, it is essential that the court must be convinced that the testator signed it in the presence of witnesses and that they attested with the formalities prescribed by law. The trial court is required by statute to make written decision declaring his finding on this subject: *Young v. Miner*, 141 Wis. 501, 124 N. W. 660. Why the trial court should have refrained from performing this duty, or counsel entering the judgment should not have at least requested a finding on this vital question, essential to the record validity of their judgment, is not apparent. Nevertheless, however erroneous the procedure, we may refrain from reversing ¹³⁹ a judgment based thereon if it is clear that justice has been done: *Brown v. Griswold*, 109 Wis. 275, 85 N. W. 363.

The concrete question is whether, upon proof of the authenticity of the signatures of deceased or necessarily absent attesting witnesses, there is a legitimate inference or presumption of fact that those acts which they purport to attest did occur. Those acts include the signing or acknowledgment by the testator in the presence of the witnesses, his declaration of his purpose, his request to the witnesses to attest, and their signing for that purpose in his presence and in presence of each other. It is undeniable that an affirmative answer to this question in its broadest scope has been repeatedly declared, in words at least, by this court: *Meurer's Will*, 44 Wis. 392, 399, 28 Am. Rep. 591; *Lewis' Will*, 51 Wis. 101, 113, 7 N. W. 829; *Allen v. Griffin*, 69 Wis.

529, 536, 35 N. W. 21; *In re O'Hagan's Will*, 73 Wis. 78, 82, 40 N. W. 649; *In re Gillmor's Will*, 117 Wis. 302, 94 N. W. 32; *Hanley v. Kraftezyk*, 119 Wis. 352, 361, 96 N. W. 820; *In re Arneson's Will*, 128 Wis. 112, 116, 107 N. W. 21. However, it is also true, as appellant urges, that in none of those cases was the effect of such evidence to prove the fact of signing by the testator necessarily involved, because in each of them the fact was either undisputed or otherwise established. As a result the conclusiveness of such utterances is perhaps open to debate. But when the court of last resort has persistently declared approval of a rule of law, it should not lightly be ignored, especially when, in presence of conflicting decisions in other jurisdictions, such declarations amount to adoption of the views of those courts approving the rule. In the light of what has been said, are we justified in departing from the rule and policy of the past?

Appellant contends that our cases overlook the fact that in case of wills their validity and existence depend on two facts, namely, execution by the testator and attestation with certain formalities by witnesses. He insists that proof of the authenticity¹⁴⁰ of the witnesses' signatures justifies no inference further than that they wrote them with the proper formalities. In other words, they are merely attested. To this limitation are cited numerous very direct decisions by the New York courts. Such cases, however, are all predicated on statutes of that state to the effect that if subscribing witnesses are dead the will may be established on proof of handwriting of the testator and of the witnesses and under such circumstances as would be sufficient to prove the will on the trial of an action. This is held to require, in the conjunctive, proof of authenticity of both the testator's and the witnesses' signatures, and thus to limit the inference or presumption to the regularity of other acts: *Jackson v. Luquere*, 5 Cow. (N. Y.) 221; *Jackson v. Vickory*, 1 Wend. 406, 19 Am. Dec. 522; *Jackson v. Le Grange*, 19 Johns. 386, 10 Am. Dec. 237; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Burbank's Will*, 104 App. Div. 312, 93 N. Y. Supp. 866, affirmed 185 N. Y. 559, 77 N. E. 1183. The New York cases seem to have been followed, without noticing the statute, in *Clafin's Will*, 73 Vt. 129, 87 Am. St. Rep. 693, 50 Atl. 815, where, however, there was no decision that the testator's signature could not be presumed from the attestation. Certain other cases cited by appellant declare a presumption in favor of due execution to arise upon proof of authenticity of signatures of testator and witnesses, but do not expressly negative such presumption from witnesses' signatures alone: *Gould v. Chicago T. Sem.*, 189 Ill. 282, 59 N. E. 536; *More v. More*, 211 Ill. 268, 71 N. E. 988; *Mead v. Presbyterian Church*, 229 Ill. 526, 82 N. E. 371, 14 L. R. A., N. S., 255, 11

Ann. Cas. 426. In one case not cited is declared necessity of proof of a maker's signature in addition. It seems to be merely a ruling by a justice on a trial, and not a decision on review or after deliberate consideration: *Collins v. Nicols*, 1 Har. & J. (Md.) 399. The decisions in New York are, by reason of their statute, of little or no weight in Wisconsin, where we have no statute to modify general rules of evidence in case of contested wills, section 3788, Statutes of 1898, having no application: ¹⁴¹ *Jones v. Roberts*, 96 Wis. 427, 432, 70 N. W. 685, 71 N. W. 883. We have, therefore, to consider the effect of proof of authenticity of the signature of an attesting witness in case his presence or memory is not obtainable. It is not questioned that it supports prima facie an inference of the attestation required by will statutes. That is declared in cases cited by appellant and generally: 2 Wigmore on Evidence, secs. 1505, 1511. Upon the question of the further fact of execution by testator, admissibility and effect are controlled by the rule that in absence of primary evidence the best evidence obtainable is admissible and must be produced. The ancient rule was that, when an instrument was attested, the best and only evidence was that of the attesting witnesses. When they were gone, after first doubting if the document could be proved at all (2 Wigmore on Evidence, sec. 1287), it was concluded that their solemn act in joining by attesting contemporaneously the very instrument was admissible as their declaration of the facts therein declared expressly or by implication, under a relaxation of the anti-hearsay rule indulged in deference to necessity and in order that duly executed instruments might not frequently fail of proof: 2 Wigmore on Evidence, secs. 1306, 1505, 1506, 1511; *Adam v. Kerr*, 1 Bos. & P. (Eng.) 360; *Losee v. Losee*, 2 Hill (N. Y.), 609; *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567; *Clark v. Boyd*, 2 Ohio, 56; *Kirk v. Carr*, 54 Pa. 285, 290; *Boyeus' Will*, 23 Iowa, 354, 357; *Murdock v. Hunter*, 1 Brock. 135, Fed. Cas. No. 9941; *Garrison v. Owens*, 1 Pinn. (Wis.) 544. This view is held by the great majority of courts with regard to all documents bearing attestation, whether required by law or not, and in many jurisdictions the view that the written attestation is the best evidence in absence of the witnesses has led logically to the holding that no other evidence of testator's signature is admissible: 2 Wigmore on Evidence, sec. 1320. Such technical exclusion of other evidence of the authenticity of a grantor's or maker's signature has not been general, and ¹⁴² several courts have concluded that other proof of authenticity is superior to the hearsay declarations of witnesses to instruments not required by law to be attested: *Tagiasco v. Molinari's Heirs*, 9 La. 512; *Chaffe v. Cupp*, 5 La. Ann. 684; *Shiver v. Johnson*, 2 Brev. (S. C.) 397. As

to wills, however, the rule seems to be general, except for the decisions above mentioned, that the attestation itself is prima facie proof of all facts essential to due execution, to which attesting witnesses could depose if present, including the authenticity of testator's signature, whether autographic, by mark, or in handwriting of another, also his volition in signing and his mental capacity and understanding of his act: *Hays v. Harden*, 6 Pa. 409, 412; *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567; *Barker v. McFerran*, 26 Pa. 211; *McKee v. White*, 50 Pa. 354; *Leckey v. Cunningham*, 56 Pa. 370; *Snider v. Burks*, 84 Ala. 53, 4 South. 225; *Stevens v. Leonard*, 154 Ind. 67, 76, 77 Am. St. Rep. 446, 56 N. E. 27; *Carpenter v. Denoon*, 29 Ohio St. 379, 391; *More v. More*, 211 Ill. 268, 71 N. E. 988; *Scott v. Hawk*, 107 Iowa, 723, 70 Am. St. Rep. 228, 77 N. W. 467; *Eliot v. Eliot*, 10 Allen (Mass.), 357; *Nickerson v. Buck*, 12 Cush. (Mass.) 332; *Farleigh v. Kelley*, 28 Mont. 321, 72 Pac. 756; *Clarke v. Dunnavant*, 10 Leigh (Va.), 13; *Murdock v. Hunter*, 1 Brock. 135, Fed. Cas. No. 9941; *Croft v. Pawlet*, 2 Strange, 1109; *Wright v. Tatham*, 1 Ad. & E. 3. In view of this array of authority and the reasons underlying it, we are not at all inclined to change the attitude of this court so long and so persistently declared, even though such declarations were not entirely necessary to decision of the cases wherein uttered.

An objection that a signature by mark is not within the general rule, but should be supported by further proof, is overruled by many of the cases cited. Under the reasons of the rule as stated, the attestation quite as much declares that the testator made the mark as and for his signature as that he wrote the letters spelling his name when that appears. Indeed, some courts which would require further proof of the¹⁴³ authenticity of an apparent autograph hold it unnecessary for a mark, which has no individual characteristics, because of the impossibility of authenticating the latter by any but an eye-witness: *Howard v. Snelling*, 32 Ga. 195; *Shiver v. Johnson*, 2 Brev. (S. C.) 397; *Tagiasco v. Molinari's Heirs*, 9 La. 512; *Chaffe v. Cupp*, 5 La. Ann. 684. The fact urged by appellant that testator could not read or write the English language, qualified by the further facts that he had lived in this country thirty years, served in the Civil War, and was a prosperous farmer of average intelligence, neither prevents, nor in our opinion suffices to overcome, the inference that he executed the will with due understanding of its purport: *Walter's Will*, 64 Wis. 487, 54 Am. Rep. 640, 25 N. W. 538; *Arneson's Will*, 128 Wis. 112, 115, 107 N. W. 21.

Our conclusion is, therefore, that from the evidentiary facts found by the trial court arises prima facie an inference in favor of the ultimate fact that the deceased executed the will as required by law. Such inference, being without

contradiction, constitutes a preponderance of evidence and therefore supports the judgment.

By the COURT. Judgment affirmed.

The Law Presumes Testamentary Capacity, due execution, and that the will contains the unrestrained wishes of the testator, and the burden of proof is upon the person attacking it to show otherwise: In re Shafter's Estate, 35 Colo. 578, 117 Am. St. Rep. 216. The presumption of the due execution of a will is not one of law, but of fact, which is for the jury to determine: Woodruff v. Hundley, 127 Ala. 640, 85 Am. St. Rep. 145. As to the presumption of due execution, see, also, In re Clafin's Will, 73 Vt. 129, 87 Am. St. Rep. 693.

Proof of the Handwriting of a Deceased Witness to a Will is prima facie sufficient, especially where the signatures of the witnesses are attached to a clause stating that the will was written, signed and sealed in their presence: Hobart v. Hobart, 154 Ill. 610, 45 Am. St. Rep. 151. As to what will raise a strong presumption of the due execution of a will, see In re Clafin's Will, 73 Vt. 129, 87 Am. St. Rep. 693.

The Due Execution of a Will may be Inferred from Circumstances, without direct evidence, and against the positive testimony of some, or even of all, the witnesses: Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220. Where a will is regular on its face, the performance of the necessary requisites to its due execution will, in the absence of an attestation clause, be implied from proof of the signature of the witnesses thereto: Note to Lane v. Lane, 114 Am. St. Rep. 239.

The Attestation and Witnessing of Wills is the subject of a note to Lane v. Lane, 114 Am. St. Rep. 239. The subscribing witnesses to wills, their competency, and the effect of their evidence supporting or opposing a will, is the subject of a note to Stevens v. Leonard, 77 Am. St. Rep. 459.

MASSY v. MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY.

[143 Wis. 220, 126 N. W. 544.]

MASTER AND SERVANT—Safe Place—Assumption of Risk. At common law the master owed the servant the duty to provide a reasonably safe place to work and reasonably safe appliances to work with, and the employee assumed the ordinary risks of the business which he knew, or as an ordinary, careful and intelligent man ought to have anticipated; among them, the likelihood of human infirmity in his fellow-workmen, so that they may be careless. (p. 1098.)

MASTER AND SERVANT—Fellow-servants—Electrical Industries.—In such employments as the electrical industries, where constantly employees must work in places which are rendered safe or unsafe by other agents or employees hired to do the determining act for the very purpose of creating the safety, with whom the exposed workmen have no contact or community save being employed to carry on the general business of the master, the two employees cannot be considered fellow-servants. (p. 1099.)

MASTER AND SERVANT—Switch Attendant and Lineman not Fellow-servants.—A distinct and independent employee to whom is delegated the duty to disconnect and make safe the wires of an electrical industry on which others must work is ordinarily a vice-principal, not a fellow-servant with the linemen and other like workmen. (p. 1100.)

Houghton, Neelen & Houghton and Samuel Wright, for the appellant.

Clarke M. Rosecrantz, for the respondent.

²²¹ **DODGE, J.** On May 13, 1907, plaintiff's decedent, then twenty years of age, had been employed for a month as lineman's helper by the defendant, his work consisting in the handling of apparatus and materials to facilitate the lineman, deceased working on the ground and the lineman both on the ground and on the poles. Deceased had never handled live wires. On that date decedent's lineman and some other employees went to West Allis to readjust the wires and change brackets in a certain region. The wires included a "feed.wire" ordinarily carrying electricity to the dangerous extent of two thousand three hundred volts. Deceased and his lineman went to a substation where was an operator who controlled the switchboard connecting and disconnecting wires. They found there the assistant superintendent of the lighting department, and requested that the feed wire might be killed during their operations; that is, disconnected from the current. They were informed that it was already dead, and in their presence the assistant superintendent directed the operator of the switchboard, Waldmann, not to turn electric current into that feed until he received direct word from the decedent's lineman. It appeared that a certain other employee, Dietz, having certain repairs or adjustments to make in the substation, had previously, the same day, requested Waldmann to disconnect this feed wire; that Dietz finished his job at about half past 1 of the same day and notified Waldmann of that fact, remarking, "You can call up Commerce street, and tell him to put the current on the line again." Waldmann did so and switched into connection said feed wire, momentarily forgetting the instruction to keep the wire dead for the protection of the line crew, of which deceased was one. Deceased at that moment, two or three blocks away, had hold of the wire with his bare hands and was instantly killed. At the close of the plaintiff's evidence a judgment of nonsuit was entered, from which the plaintiff appeals.

²²² This case presents a situation not unfamiliar but of rather recent development since the greatly enlarged use of electricity transmitted over wires for the creation of light and power at various and remote places. There, as we know,

men are constantly employed in stringing, connecting, repairing, and rearranging such wires, sometimes on one post and sometimes on another. When the wires on or about which such men must work are highly charged with electricity they endanger the men. The place of work becomes, in some degree, unsafe. On whom rests the risk from such danger if it is unreasonable? There are two well-established rules of the common law which in the early stages of industry were quite distinct and unlikely to conflict. We have, first, the rule that the employer owes the duty to provide a reasonably safe place to work and reasonably safe appliances to work with, and is liable for the proximate consequences to the servant from omission so to do. On the other hand, we have the rule that the employee assumes the ordinary risks of the business which he knows or, as an ordinary careful and intelligent man, ought to anticipate; among those risks is the likelihood of human infirmity in his fellow-workmen, so that they may be careless. Hence the concrete rule that a master is not liable to his servant for negligence of a fellow-servant in the common employment.

As the size of industrial enterprises increased, complications arose. The master did not by his own hand build or equip the place for his employees nor even personally supervise the doing of such things, but hired men to do them: especially so in case of corporations, which can act only through some employee or delegate. The question at once presented ²²³ itself, Are persons so employed to perform the master's duty toward other employees fellow-servants of the latter within the rule above stated? and, broadly stated, the answer of the courts has been negative; but the line of distinction has been most difficult of definition and has been crowded to one side or the other of individual situations by different courts and sometimes by the same court without very clear coherence of reason. The layers of the track over which the trainmen are to run have been held to be fellow-servants in the common enterprise of operating the railway, instead of representatives of the master in performing the latter's duty to provide a safe track for the trainmen to perform the particular work of running their train: *Cooper v. M. & P. du C. R. Co.*, 23 Wis. 668. The same view is held as to a switchman who fails to keep turned a switch and thereby allows a train to run upon a car-repairer at work on the switch: *Smith v. C., M. & St. P. R. Co.*, 91 Wis. 503, 65 N. W. 183. Other situations located upon the same side of the line are *Okonski v. Pennsylvania & Ohio F. Co.*, 114 Wis. 448, 90 N. W. 429; *Williams v. Northern Wis. L. Co.*, 124 Wis. 328, 102 N. W. 589; *Miller v. Centralia P. & W. P. Co.*, 134 Wis. 316, 113 N. W. 954, 13 L. R. A., N. S., 742. Some

cases presenting the antithetic condition where the negligent employee was held not to be a fellow-servant engaged in common undertaking, but the representative of the master in performing, or failing to perform, the latter's duty to the plaintiff, are *Cadden v. American S. B. Co.*, 88 Wis. 409, 60 N. W. 800; *Eingartner v. Illinois S. Co.*, 94 Wis. 70, 59 Am. St. Rep. 859, 68 N. W. 664, 34 L. R. A. 503; *McMahon v. Ida M. Co.*, 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478; *Jarneke v. Manitowoc C. & D. Co.*, 97 Wis. 537, 73 N. W. 62; *Zentner v. Oshkosh G. L. Co.*, 126 Wis. 196, 105 N. W. 911; *Smith v. Milwaukee E. R. & L. Co.*, 127 Wis. 253, 106 N. W. 829; *Rankel v. Buckstaff-Edwards Co.*, 138 Wis. 442, 120 N. W. 269, 20 L. R. A., N. S., 1180; *Halwas v. American G. Co.*, 141 Wis. 127, 137, 123 N. W. 789.

It is undeniable that some of these decisions and many others in other jurisdictions have extended the meaning of ²²⁴ the community of service essential to coemployeeship vastly beyond the original conception of a relation which gave opportunity for mutual acquaintance and watchfulness between fellow-servants greater than exists between master and servant. We now confront an industry relatively new, at least in present development, where constantly employees must work in places which are rendered safe or unsafe by other agents or employees hired to do the determining act for the very purpose of creating the safety: employees with whom the exposed workmen have no contract or community save that both are employed to carry on the general business of generating and distributing the master's merchandise, as are traveling salesmen and the janitor or elevator operator in his master's store. Reasons which may have led to classing as fellow-servants men employed in conduct of railroads may fail to control situations in this field, though apparently closely analogous. One distinction is in the sudden and unavoidable nature of the peril from a failure to take the proper and easy precautions, as in this case. A man at one moment is handling a cold and harmless wire which it is the duty of his master to keep so; the next he is in contact with a deadly peril, unforeseeable and unescapable by reason of the act of another whom his master has employed to perform the duty resting on the latter to make and keep safe the place of work. We think reasons to hold that the persons so employed are agents performing a nondelegable duty are very apparent. We think, too, that they are recognized and applied in such cases as *Zentner v. Oshkosh G. L. Co.*, 126 Wis. 196, 105 N. W. 911, and *Smith v. Milwaukee E. R. & L. Co.*, 127 Wis. 253, 106 N. W. 829, and that they should control this situation, although no very clear distinction may exist in principle from *Williams v. Northern Wis. L. Co.*, 124

Wis. 328, 102 N. W. 589, and *Miller v. Centralia P. & W. P. Co.*, 134 Wis. 316, 113 N. W. 954, 13 L. R. A., N. S., 742. It is at least apparent that this court has not yet established by clear precedent how far the recognized principles of co-employment extend in their application to the particular situations existing in this industry. ²²⁵ They have, we think been carried in some industries to the full extent compatible with either reason, public policy, or humanity, but such precedents should not lead to further extension to new conditions, even though a pretty close analogy appear. We hold, therefore, that a distinct and independent employee to whom is delegated the duty to disconnect and make safe the wires on which others must work is ordinarily a vice-principal and not a fellow-servant with the linemen and other like workmen. Whether Waldmann was such in this case was at least susceptible of affirmative answer by the jury, as also whether the place or appliances furnished decedent were rendered not reasonably safe by failure of the master's duty intrusted to Waldmann. It was error, therefore, to enter judgment of nonsuit.

By the COURT. Judgment reversed, and cause remanded for new trial.

Whether an Employee is a Vice-principal depends upon his authority to represent the master: *Grattis v. Kansas City etc. R. R. Co.*, 153 Mo. 380, 77 Am. St. Rep. 721. A person employed by a master and given power to superintend, control and direct other employees engaged in the performance of certain work for the master is, as to the men under him, a vice-principal, whatever he may be called: *Bloyd v. St. Louis etc. Ry. Co.*, 58 Ark. 66, 41 Am. St. Rep. 85. A general manager, having entire charge of the business of the master, is his alter ego, and the master is answerable to other employees for his acts: *Alabama etc. R. R. Co. v. Vail*, 142 Ala. 134, 110 Am. St. Rep. 23. As to who is a vice-principal and who is a fellow-servant, see notes to *Bloyd v. St. Louis etc. Ry. Co.*, 41 Am. St. Rep. 94; *Mast v. Kern*, 75 Am. St. Rep. 584. As to who are vice-principals, see *Cincinnati etc. Ry. Co. v. Curd*, 133 Ky. 138, 134 Am. St. Rep. 444; *Gould Construction Co. v. Childer's Admr.*, 129 Ky. 536, 130 Am. St. Rep. 473; *Meier v. Way, Johnson, Lee & Co.*, 136 Iowa, 302, 125 Am. St. Rep. 254. Persons working together as fellow-servants may be fellow-servants as to some part of the employment and principal or master with regard to some other part: *Shroufe v. Moran Bros. Co.*, 28 Wash. 381, 92 Am. St. Rep. 847; *Lincoln v. Central Vt. Ry. Co.*, 82 Vt. 187, 137 Am. St. Rep. 998.

WILL OF BATTIS.

[143 Wis. 234, 126 N. W. 9.]

WILLS.—In a Proceeding for the Admission of a Will to Probate, the question is whether the writing propounded as the decedent's will is entitled to probate as such, and no other question is involved. The legal effect and validity of the contents of the writing are not involved. (p. 1103.)

WILLS—Question of Revocation—How Presented.—The question whether any part of a paper admitted to probate as a will should be rejected as revoked may properly be raised by a petition to the county court, by one entitled to the residue of the estate, to have such part adjudged annulled. (p. 1103.)

WILLS—Implied Revocation—Changed Conditions and Circumstances.—The subsequent changes in the condition and circumstances of the testator which will revoke a will, or a part thereof, by implication have commonly been applied to a change in the testator's property, in his family, or in the beneficiaries, as such changes, imposing different moral and legal duties, afford strong evidence that the testator intended that his will should become revoked as to provisions affected by such change. (p. 1104.)

WILLS—Implied Revocation—Divorce.—The change in the condition and circumstances of one who has made a will, brought about by a divorce accompanied by an adjudication making a final division and distribution of his estate, both real and personal, as between him and his wife, in the light of their legal and equitable rights, is of such probative force as to sustain the conclusion that the husband intended that the provision he had theretofore made in his will for his wife's benefit should be revoked thereby. (p. 1105.)

WILLS—Implied Revocation—Changed Conditions—Presumption.—Evidence cannot be received to rebut the presumption of an implied revocation of the provisions in a will, or to show the testator meant his will to stand as written, unless such evidence amounts to a republication of it. (p. 1106.)

Weed & Hollister and Charles Barber, for the appellant.

Eaton & Eaton, for the respondent.

²³⁴ SIEBECKER, J. On April 28, 1890, Allan P. Battis and the respondent were married. On December, 13, 1902, Allan P. Battis, the testator, made his will. Thereby he gave to a cousin all his interest in his boiler-shop business, the buildings in which it was conducted, and the lots upon which the buildings stood. He gave to Helen Wiesenbergh, a stranger, certain bank stock and money or real estate mortgages sufficient to make the ²³⁵ sum of eight thousand dollars. The fourth and fifth paragraphs of the will are as follows:

"Fourth. I give and bequeath unto my wife Frances May Battis, of the city of Oshkosh, the sum of ten thousand dollars. To have and to hold the same unto her, the said Frances May Battis, her heirs, executors, administrators and assigns forever.

"Fifth. I hereby give, devise and bequeath unto my brother, Martin T. Battis, of the city of Oshkosh, all the rest, residue and remainder of my property of every name and nature, real, personal or mixed, to have and to hold the same unto him the said Martin T. Battis, his heirs, executors, administrators and assigns forever."

On July 5, 1903, the respondent secured a divorce from Allan P. Battis on the ground of cruel and inhuman treatment. The judgment provided that the plaintiff should retain the piano and household furniture, and that the defendant should pay her her disbursements and two thousand five hundred dollars "as her full and final share and allowance in the final division and distribution of the estate and property, real and personal, of the defendant, and that the plaintiff, upon payment of said" sum, should be "divested of all right, title, and interest in and to the property of the defendant, either real or personal." Subsequent to the divorce Allan P. Battis visited at the home of his former wife, manifested a solicitude for her health and happiness, and made her small gifts. He also sustained friendly relations with her mother and family, visited regularly at the home of her mother and sister, made presents to them, and stated to them that he had made such provision in his will for his former wife that she would not suffer from want. To the knowledge of Allan P. Battis, his former wife married Abe Montaba. On January 16, 1907, Allan P. Battis was sick and addressed a letter to his former wife's mother, expressing a desire to see Frankie before he died, asked that she be given his regards, and wished her good luck as long as she lived. Allan P. Battis died May 4, 1908, leaving no ²³⁶ brothers or sisters except the brother Martin T. Battis, and no widow or issue.

The will was admitted to probate. The executor complied with some of the provisions of the will, and, while he still had some fifty thousand dollars in his hands for distribution, the residuary legatee, the brother of the deceased, petitioned the county court to have it adjudged that the divorce and the final distribution of the estate and property of Allan P. Battis in 1903 had annulled and revoked the fourth paragraph of his will, and that the residue of the estate, after compliance with the other provisions of the will, should be awarded to the petitioner. The county court entered judgment adjudging that the bequest to the respondent was annulled by the divorce and final division and distribution of the estate and property of Allan P. Battis, and that Frances May Montaba should take nothing under the will. Upon appeal to the circuit court the court entered judgment dismissing the petition. This is an appeal from the judgment of the circuit court.

The respondent avers that the admission of the will to probate precludes the appellant by his petition from invoking the power of the court to declare the fourth paragraph of the will to have been revoked and annulled. The argument is made that the admission of the will to probate established the whole writing and made it operative and effective in all its parts, and hence that appellant cannot in this manner establish a revocation of any part thereof. The question raised by the petitioner is whether or not paragraph 4 ²³⁷ of the will was revoked by the judgment awarding a divorce between the husband and wife, and pursuant to section 2364, Statutes of 1898, a final division and distribution of the testator's estate. No attempt is made to annul the probate of the will or to have the will declared ineffective because of its revocation. It need not, therefore, be determined whether this proceeding would lie to assail a will in its entirety after probate. The inquiry for determination is whether this is a proper and appropriate proceeding wherein the court may ascertain whether or not paragraph 4 of the will was revoked by the subsequently changed condition and circumstances of the testator respecting his relations to his divorced wife. This in no way affects the validity of the other parts of the will, its execution, or the admission to probate. Manifestly the writing probated embodies the will of the testator. If paragraph 4 is found to have been annulled under the condition and circumstances submitted to the court, all the other parts of the writing will stand as the will of the testator. In the proceeding admitting the will to probate the question actually presented to the court was whether the writing propounded as decedent's will was entitled to probate, and no other question was presented. The determination of this question in no way specifically included a determination respecting the annulment of paragraph 4. The legal effect and the validity of the contents of the writing are not involved. As a matter of practice, such questions are usually considered separately in probate and administration proceedings: *Farmer v. Sprague*, 57 Wis. 324, 15 N. W. 382. The statutes impose on the county courts the duty of ascertaining what persons are entitled to receive a testator's estate under his will. This necessarily involves a determination of whether any part of the writing presented as the will should be rejected as annulled, in order that distribution of the estate may be directed pursuant to the effective parts of the writing. This proceeding appropriately presents these considerations ²³⁸ to the court. We are therefore of opinion that appellant's petition was properly entertained, and that the court thereby acquired jurisdiction to determine whether this paragraph of the written paper admitted to probate as the will had been impliedly

revoked and annulled under the provisions of section 2290, Statutes of 1898, by the changed condition and circumstances of the testator subsequent to the making of the will.

This section enacts that no will shall be revoked except as therein provided, with the intention of revoking it; "excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." In *Will of Ward*, 70 Wis. 251, 5 Am. St. Rep. 174, 35 N. W. 731, it was held that this exception from the operation of this section manifestly means such as had previously been implied at common law": *Will of Lyon*, 96 Wis. 339, 65 Am. St. Rep. 52, 71 N. W. 362; *Glascott v. Bragg*, 111 Wis. 605, 87 N. W. 853, 56 L. R. A. 258. These cases call attention to the fact that in the common law the marriage of a female, and the marriage and birth of issue in case of a man, were recognized as "subsequent changes in the condition or circumstances of the testator," which implied a revocation of the will. The appellant contends that this exception was not intended to be limited to those cases which had arisen for adjudication in the courts prior to the adoption of the statute law of this state, but that the statute is declaratory of a rule of justice imposed on testators respecting the disposition of their property by will in the light of their relations and duties toward persons who would naturally be the objects of their bounty. The decisions of the courts of this country are not in harmony as to the application and scope of the rule. There has been much discussion of the subject in various jurisdictions, and we call attention to the foregoing cases in this court and the following recent adjudications in other jurisdictions: *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699; *Wirth v. Wirth*, 149 ²³⁹ Mich. 687, 113 N. W. 306; *Baacke v. Baacke*, 50 Neb. 18, 69 N. W. 303; *Estate of Brown*, 139 Iowa, 219, 117 N. W. 260; *Donaldson v. Hall*, 106 Minn. 502, 130 Am. St. Rep. 621, 119 N. W. 219, 20 L. R. A., N. S., 1073, 16 Ann. Cas. 541. What subsequent changes in the condition and circumstances of the testator revoke a will or a part thereof by implication, within the rule embodied in this statute, has commonly been applied to a change in the testator's property, in his family, or in the beneficiaries: See note to *Graham v. Burch*, 28 Am. St. Rep. 356. The rule rests on the idea that the changed condition and circumstances of the testator respecting his property, his family, or beneficiaries, imposing different moral and legal duties, affords strong evidence that the testator intended that his will should become revoked as to the provisions affected by such subsequent change in the testator's condition and circumstances.

Is the change in the condition and circumstances of one who has made a will, brought about by a divorce accompanied by an adjudication making a final division and distribution of his estate, both real and personal, as between him and his wife, in the light of their legal and equitable rights, their character and situation under all the circumstances of the case, of such probative force as to sustain the conclusion that the husband intended that the provision he had theretofore made in his will for his wife's benefit should be revoked thereby? The change in the condition and circumstances of a testator incident to a separation of the parties and a division and distribution of the husband's estate operates to produce a complete destruction of their legal and moral relations and consequent obligations and duties. It is difficult to conceive of a condition and circumstances which are pregnant with as strong an intent to annul the testamentary provision made for the benefit of a testator's wife and from which he would be led to conclude that the wife's claim upon his estate and his bounty had been fully discharged. These changed conditions and circumstances of a testator are of a nature which naturally ²⁴⁰ implies a different intent respecting his wife as the object of his bounty. The decree divorcing them and awarding a final division and distribution of his estate makes them strangers to each other, and the bestowal on her of such a portion of his estate as he ought in justice and right under the conditions and circumstances to bestow on her operates to discharge all his moral and legal duties toward her. It was upon such considerations that courts acted in establishing the doctrine of implied revocation of wills. The changed condition and circumstances of a testator thus brought about are of a nature and, in effect, of such probative force as to imply that the testator intended that the testamentary provisions theretofore made for the wife should become revoked thereby.

At the trial respondent offered evidence to show that after the divorce the testator entertained a friendly feeling for his former wife and did things evincing affection for her, and that he declared to her mother and sister that he had made provision in his will for her comfort and needs for the remainder of her life. It is contended that this evidence was competent to rebut any presumption of implied revocation of the provision made for her in the will. In many of the earlier English and American cases the right to rebut the presumption of such revocation was recognized. In recent times, however, this right has been denied in many cases. An exhaustive and full discussion is found in *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506; *Marston v. Roe*, 8 Ad. & E. 14, and cases cited above. In *Glascott v. Bragg*, 111 Wis.

605, 607, 87 N. W. 854, 56 L. R. A. 258, this court in commenting on this phase of this question stated:

"The earlier cases seemed to go upon the theory that such marriage and birth raised a mere presumption of an intent to revoke, but the rule held in the later cases was finally confirmed in the privy council in the last case cited (*Israell v. Rodon*, 2 Moore P. C. 51), where it was expressly held that 'marriage and birth of a child do not afford presumptive evidence of intention to revoke, but are in themselves an absolute ²⁴¹ revocation of a will made previous to the marriage but not in contemplation of it.'"

This declaration gives approval to the rule that must be deemed to have been applied in the case then under consideration. We have discovered no good and sufficient reason to depart from the rule thus applied in this court, and hence must hold that evidence cannot be received to rebut the presumption of an implied revocation of the provision in a will, or to show that the testator meant his will to stand as written, unless such evidence amounts to a republication of it. It is not claimed that the evidence offered shows that the testator republished his will after being divorced from his wife. In *Wirth v. Wirth*, 149 Mich. 687, 113 N. W. 306, the question was presented to the court in a case like the instant one. The holding of the court is stated in the headnote, as follows: "A divorce and settlement of their property rights between husband and wife operates ipso facto to revoke his will previously made, and no subsequent act of the testator not accompanied by the solemnities requisite for the making of a valid will will revive it."

The evidence offered by the respondent is not proof that the testator revived the provision in the will which had been revoked by the divorce proceeding.

These considerations lead to the conclusion that the circuit court erred in dismissing the proceeding on the petition of Martin T. Battis.

By the COURT. The judgment appealed from is reversed and the cause remanded to the circuit court, with directions that the court enter judgment affirming the judgment of the county court of Winnebago county.

The Implied Revocation of Wills from a Change in the condition and circumstances of the testator, other than marriage or by birth of issue, is discussed in the notes to Donaldson v. Hall, 130 Am. St. Rep. 628; Graham v. Burch, 28 Am. St. Rep. 356. When, at the time that a decree of divorce is granted, the parties to the action have settled their property rights by mutual agreement in writing, without mentioning mutual wills made by them ten years before, by which each devised to the other all of his or her property, the decree of divorce and settlement constitute an implied revocation of the wills: Lansing v. Haynes, 95 Mich. 16, 35 Am. St. Rep. 545.

ALLEN v. CENTRAL WISCONSIN TRUST COMPANY.

[143 Wis. 381, 127 N. W. 1003.]

LIFE INSURANCE—Character of Policy—Exemption from Execution.—By the withdrawal of the surplus at the end of the tontine period, and the continuance of the policy as fully paid up, with the wife of the assured named as beneficiary, a tontine policy becomes strictly a life insurance policy, and as such exempt from the claims of creditors. (p. 1109.)

BANKRUPTCY—Exemptions.—A Life Insurance Policy payable to the wife of the bankrupt is exempt under section 6 of the bankruptcy act, adopting the exemption laws of the several states, and section 70a of the same act. (p. 1109.)

BANKRUPTCY.—The Exemption of a Life Insurance Policy payable to the wife of the bankrupt is not affected by a reservation in the policy of a right of the insured to change the beneficiary. (p. 1110.)

LIFE INSURANCE—Effect of Dividends on Character of Policy.—The sharing in annual dividends, varying from year to year, does not destroy the essential character of a policy as a purely life insurance contract, the dividends being but a mere incident of the policy, the right to receive which is in the beneficiary. (p. 1110.)

Rufus B. Smith, for the plaintiff.

Richmond, Jackman & Swansen, for the defendant.

382 VINJE, J. Action of replevin to recover a policy of insurance issued by the Northwestern Mutual Life Insurance Company of Milwaukee upon the life of Philip Allen, Jr., February 21, 1888, for the sum of \$2,000. The policy provided for the payment of an annual premium of \$118.34 for ten years. At the end of twenty years, and prior to the time plaintiff was made the beneficiary, the insured exercised an option to withdraw in cash the accumulated surplus, then amounting to \$705.31, apportioned by the company to this policy, and it was then continued as a fully paid-up life insurance policy for the sum of \$2,000 and became entitled to annual dividends until all contributions to the surplus fund had been returned. The annual dividend for 1910 amounted to \$11.40. The value of the policy at the time of the commencement of the action was \$1,159.83.

From the time the policy was issued until February 23, 1908, it was payable to the executors, administrators, or assigns of Philip Allen, Jr. On that day, at the request of the insured, the plaintiff was made the beneficiary, and the following indorsement placed upon the policy by the company:

“Milwaukee, Wis., Feb. 27, 1908.

“At the request of the insured, dated February 23, 1908, Edith L. Allen, wife of the insured, is hereby made beneficiary in this policy, subject to the right of the insured to change beneficiary as provided on the second page of this

policy. If no beneficiary survive the said insured, payment shall be made when due to the executors, administrators, or assigns of the said insured."

The second page of the policy contained this provision: "The insured may, subject to the rights of any assignee, change the beneficiary or beneficiaries at any time during the continuance of this policy by filing with the company a written request accompanied by this policy; such change to take effect upon the indorsement of the same on the policy by the company."

On November 20, 1909, said Allen was adjudged a voluntary bankrupt, and thereafter the defendant was duly ³⁸³ elected the trustee of the bankrupt estate and is still acting as such trustee.

The trial court held that the policy did not pass to the Central Wisconsin Trust Company as trustee in bankruptcy of Philip Allen, Jr., as a part of the assets of said bankrupt, but that upon the death of said Philip Allen, Jr., if the same shall occur during the life of the plaintiff, the latter will be entitled to recover the insurance provided for in said policy. It further held that the Central Wisconsin Trust Company, as trustee, was entitled to recover the insurance provided for in said policy upon the death of said Philip Allen, Jr., if he shall die after the decease of Edith L. Allen, the plaintiff, and that said trustee in bankruptcy was also entitled to collect each year the annual dividends that shall be paid on said policy and is entitled to retain possession of said policy until the death of said Allen, and that in case the plaintiff shall still be living, the defendant is to deliver said policy to the plaintiff; and dismissed the complaint with costs.

The plaintiff appeals from that portion of the judgment which provides that the defendant will be entitled to recover the insurance provided in said policy upon the death of said Philip Allen, if he shall die after the decease of Edith L. Allen, the plaintiff, and from that portion of the judgment which adjudges that the defendant is entitled to collect the annual dividends which shall be paid on said policy, and from that portion of the judgment which adjudges that defendant is entitled to retain possession of said policy until the death of said Allen, and from the dismissal of the plaintiff's complaint. The defendant appeals from the judgment on the ground that the trial court should have decreed that the policy of insurance in question, as to the trustee in bankruptcy of Philip Allen, Jr., is a part of the assets in bankruptcy.

³⁸⁴ 1. Counsel for plaintiff contends that when the plaintiff became the beneficiary of the policy she thereby became vested with the sole, absolute, and indefeasible title thereto by virtue of the provisions of section 2347, Statutes of 1898,

notwithstanding the reservation in the policy of the right of the insured to change beneficiary at any time during the life of the policy. In the view the court has taken of this case it does not become necessary to decide that question, and it is expressly reserved for consideration and decision when the occasion therefor shall arise.

The policy, after the surplus was withdrawn at the end of the tontine period, and the wife made the beneficiary, was and remained strictly a life insurance policy payable to the wife of the insured. As such it was exempt from the claims of the creditors of the husband: Stats. 1898, sec. 2982, subd. 19, and sec. 2347. Section 6 of the bankruptcy law (Act July 1, 1898, 30 U. S. Stats. at Large, c. 541) adopts, for purposes of bankruptcy proceedings, the exemptions allowed by the laws of the several states: *1 Remington on Bankruptcy*, sec. 1003; *Holden v. Stratton*, 198 U. S. 202, 25 Sup. Ct. Rep. 656, 49 L. ed. 1018. The ³⁸⁵ policy was, therefore, exempt from the creditors of the husband in the bankruptcy proceedings and did not pass to the trustee.

But it is claimed by counsel for defendant that, inasmuch as the insured reserved to himself the right or power to change the beneficiary, such right or power passed to the trustee, and the cases of *In re Welling*, 113 Fed. 189, 51 C. C. A. 151, *In re Holden*, 114 Fed. 650, 52 C. C. A. 346, *In re Hettling*, 175 Fed. 65, 99 C. C. A. 87, *In re Wolff*, 165 Fed. 984, 21 Am. Bank. Rep. 452, *Matter of White*, 174 Fed. 333, 98 C. C. A. 205, 26 L. R. A., N. S., 451, 23 Am. Bank. Rep. 90, and *In re Schofield*, 147 Fed. 862, are cited to sustain the claim. Reference to those cases will show that the policy in each of them was in the nature of an endowment policy, and provided for the payment to the insured, at the end of a stated period, of a fixed, definite sum, and it was held that the insured had property rights in the policy that passed to the trustee notwithstanding it was made payable to the wife in the event of her surviving the husband. We have no such case here. The investment feature of the policy in behalf of the insured was entirely eliminated when the surplus was paid him. Moreover, the bankruptcy act itself specifically declares that such a policy does not pass to the trustee. Section 70 (a) of the bankruptcy law provides that the trustee of a bankrupt shall "be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt," and then specifies different classes of property that pass to the trustee. The federal courts have repeatedly held that the bankruptcy act does not affect ordinary life insurance policies payable to the wife of the bankrupt. In *Re Scheld*, 104 Fed. 870, 871, 44 C. C. A. 233, 52 L. R. A. 188, the court says: "It will be seen that the

clause of section 70 above quoted does not include policies of insurance payable to the wife, children, or other kin of the bankrupt, but is limited to policies the proceeds of which are payable to the bankrupt himself, his estate, or personal representatives. The enactment does not deprive ³⁸⁶ the family of a debtor of the protection which he may have secured to them in taking out policies for their benefit payable at his death, but it does prevent debtors from availing themselves of the opportunity of making investments for their own benefit in the form of endowment policies, or policies payable to themselves, and holding the same while seeking a discharge from their debts through the bankrupt act."

This language is quoted with approval in *Re Holden*, 114 Fed. 650, 52 C. C. A. 348.

It is further claimed that, inasmuch as the insured reserved the right to change the beneficiary, he may yet do so, and convert the policy into property that may pass to the trustee. Conceding, but not deciding, that he still has the right to change the beneficiary, and assuming that he may do so, yet it is not easy to perceive upon what ground it can be claimed that the trustee is at all concerned with what may afterward become of exempt property. The trustee is vested with the title to the property of the bankrupt, if at all, as of the date he was adjudged a bankrupt. At that time this policy was exempt and did not pass to the trustee. It cannot pass later, no matter what the bankrupt may do.

2. It may be said that, inasmuch as this paid-up policy shares in the annual dividends, it is not purely a life insurance policy. Its value at the time of the commencement of the action was \$1,159.83 and the annual dividend for 1910 was \$11.40. The amount of the dividend is likely to vary from year to year, depending upon interest rates and the cost of conducting the business. It is deemed, therefore, that the dividend is a mere incident of the policy and that it does not destroy its essential character as a purely life insurance contract: *Ellison v. Straw*, 119 Wis. 502, 508, 97 N. W. 168. The right to receive such dividend is in the beneficiary.

It follows from what has been said that the plaintiff is entitled to judgment awarding the possession of the policy to her.

³⁸⁷ By the COURT. Judgment reversed, and cause remanded with directions to enter judgment in accordance with this opinion.

Barnes, J., took no part.

As to Tontine or "Ten-year Dividend System" of Insurance, see Uhlman v. New York Life Ins. Co., 109 N. Y. 421, 4 Am. St. Rep. 482.

That Exempt Property Does not Pass to the Assignee in Bankruptcy, see Wilkinson v. Wait, 44 Vt. 503, 8 Am. Rep. 391; Robinson v. Wilson, 15 Kan. 595, 22 Am. Rep. 272.

ESTATE OF BARLASS.

[143 Wis. 497, 128 N. W. 58.]

ESTATE OF DECEDENT—Jurisdictional Facts.—The county court has jurisdiction to act in the probate of wills and the granting of letters testamentary and of administration, (1) when it is shown that an inhabitant of or resident in the county has died; (2) when it is shown that a person has died without the state having any estate within such county to be administered. The jurisdictional facts are, in the first case, domicile and death; in the second, the existence of an estate within the county to be administered, and death without the state, and these facts must be established before the court acquires jurisdiction to act. (p. 1112.)

ESTATE OF DECEDENT—Administration—Existence of Property.—A prima facie showing that there is an estate, or a bona fide claim that the deceased left property to be administered, or the prima facie showing of any other statutory ground, is all that is necessary to authorize the granting of letters of administration in the case of the death of a resident of the county. (p. 1112.)

ESTATE OF DECEDENT—Administration—Claim to Property. On an application for letters of administration the court will not inquire into the validity of a claim that the deceased owned certain property. (p. 1112.)

ESTATE OF DECEDENT.—The Mere Existence of Local Assets, irrespective of amount or value, will support a grant of administration. (p. 1113.)

The appeal is from a judgment of the circuit court reversing an order of the county court of Rock county appointing David M. Barlass an administrator of the estate of Thomas Barlass, deceased.

J. J. Cunningham, for the appellant.

E. D. McGowan, for the respondent.

⁴⁹⁷ VINJE, J. The verified petition of David M. Barlass for administration alleges that Thomas Barlass, deceased, left personal estate of the value of five thousand dollars and real estate of the value of twenty-one thousand dollars. The contestant, John T. Barlass, claims that the deceased in his lifetime executed a bill of sale of all his personal property to him and that the real estate was likewise deeded to him and his sister, Janette Irish. The petitioner contends that such instruments were executed through fraud and undue influence and that the deeds were never delivered. The validity of these conveyances was litigated in the circuit court upon the appeal from the order of the county court appointing an administrator, and the circuit court found as facts (1) that Thomas Barlass, deceased, was an inhabitant of Rock county, Wisconsin, and died intestate November 12, 1908; (2) that he left him surviving John T. Barlass, David M. Barlass, his sons, ⁴⁹⁸ and Janette Irish, his daughter, all

adults, as his only heirs at law; (3) that he left no personal estate; (4) that he left no real estate; (5) that he left thirty-six dollars which was used to pay funeral expenses; and (6) that there were no debts or claims chargeable against or due the deceased or the estate; and entered judgment as above stated. The petitioner appealed.

Section 2443, Statutes of 1898, provides that: "The jurisdiction of the county court shall extend to the probate of wills and granting letters testamentary and of administration on the estates of all persons deceased who were at the time of their decease inhabitants of or residents in the same county and of all who shall die without the state having any estate within such county to be administered. . . ."

And section 3806, Statutes of 1898, says: "When any person shall die intestate, being an inhabitant of this state, letters of administration of his estate shall be granted by the county court of the county of which he was an inhabitant at the time of his death. . . ."

These provisions confer jurisdiction upon the county court to act (1) when it is shown that an inhabitant of or resident in the same county has died; (2) when it is shown that a person has died without the state having any estate within such county to be administered. In the first case the jurisdictional facts are domicile and death; in the second, the existence of an estate within the county to be administered, and death without the state. In each case such jurisdictional facts may be controverted upon the hearing of a petition for letters testamentary or of administration, and they must be established before the court acquires jurisdiction to act. Not so, however, as to the existence of an estate in the case of the death of a resident of the county. A prima facie showing that there is an estate, or a bona fide claim that deceased left property ⁴⁹⁹ to be administered, or the prima facie showing of any other statutory ground for the granting of letters of administration, is all that is necessary. Thus it was held in *Perkins v. Owen*, 123 Wis. 238, 101 N. W. 415, that intestacy was not a fact that must exist in order to confer jurisdiction upon the county court to administer an estate as intestate estate. In a case like the one at bar a bona fide claim that there is an estate to administer will support the granting of letters, and the court should not proceed to adjudge the validity of the claim. That must be left for future litigation in the proper forum and between the proper parties: *Parsons v. Spaulding*, 130 Mass. 83, 86; *Grimes v. Talbert*, 14 Md. 169, 172; *In re Brooks' Estate*, 110 Mich. 8, 67 N. W. 975; *Schouler on Executors*, sec. 93; 1 *Woerner on Administration*, sec. 204. Moreover, in this case the court found that deceased left thirty-six dollars. The fact that it was after-

ward used, and properly so, for funeral expenses, is immaterial. The status at the time of death governs. It has been held that the mere existence of local assets, irrespective of amount or value, will support a local grant of administration: *Pinney v. McGregory*, 102 Mass. 186; *Missouri Pac. R. Co. v. Bradley*, 51 Neb. 596, 66 Am. St. Rep. 473, 71 N. W. 283; *Horton v. Trompeter*, 53 Kan. 150, 35 Pac. 1106.

In *Flood v. Pilgrim*, 32 Wis. 378, Lyon, J., was strongly inclined to think that a local grant of letters, where there is no estate, is absolutely null and void; and in *Filbey v. Carrier*, 45 Wis. 469, he reiterated this opinion. In neither case, however, was the question involved. Both cases turned upon the right of the administrator to the possession or use of real estate. While it would undoubtedly be an abuse of discretion on the part of the county court to appoint an administrator in a case where it is conceded there is no estate or other statutory ground for the appointment, the deceased being a resident, yet it cannot be said that the act of appointment is beyond the jurisdiction of the court.

Counsel for contestant cites *Jordan v. C. & N. W. R. Co.*, 500 125 Wis. 581, 110 Am. St. Rep. 865, 104 N. W. 803, 1 L. R. A., N. S., 885, 4 Ann. Cas. 1113, *Grimes v. Talbert*, 14 Md. 169, *Pinney v. McGregory*, 102 Mass. 186, *Beach's Appeal*, 76 Conn. 118, 55 Atl. 596, *Van Giessen v. Bridgford*, 83 N. Y. 348, and *Wright v. Smith*, 19 Nev. 143, 7 Pac. 365, to show that in each of those cases the question of the existence of an estate was litigated upon the hearing of the petition for the appointment of an administrator. In all but the last two cases the deceased was a nonresident, and of course the question of the existence of an estate within the territorial limits of the court had to be settled to determine its jurisdiction. In *Van Giessen v. Bridgford*, 83 N. Y. 348, the deceased died in 1663, and when the application for administration was made in 1887 the court presumed ancient administration, especially in view of the fact that the family Bible and pair of earrings sought to be administered upon were not satisfactorily shown ever to have belonged to the deceased. The case of *Wright v. Smith*, 19 Nev. 143, 7 Pac. 365, was decided under a special statute in force in Nevada as to community property, and has no application to the question under consideration.

By the COURT. The judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment affirming the order of the county court.

If the Probate Court Finds That a Decedent Did Leave an Estate which can be administered upon in the county where letters of administration are granted, its order granting letters for that purpose can-

not be avoided in a collateral proceeding by evidence showing that the decedent did not leave assets in the county, or at all: See note to *Dobler v. Strobel*, 81 Am. St. Rep. 557; and see *Jordan v. Chicago etc. R. R. Co.*, 125 Wis. 581, 110 Am. St. Rep. 865; *Bradley v. Missouri Pac. Ry. Co.*, 51 Neb. 653, 66 Am. St. Rep. 473.

ESTATE OF BULLEN.

[143 Wis. 512, 128 N. W. 109.]

INHERITANCE TAX—Nature of the Tax.—An inheritance tax is not a tax upon property or property rights in any sense, but purely an excise tax levied upon the "transfer" or transaction, and merely measured in amount by the amount of property transferred. (p. 1118.)

STATUTES—Construction When Taken from Another State.—When a statute has received a judicial construction in another state, and is then adopted, it is taken with the construction which has been so given it. (p. 1119.)

INHERITANCE TAX—Situs of Personalty.—The inheritance tax law of Wisconsin was borrowed from New York, and prior to its adoption by Wisconsin had received judicial construction in New York that in respect to personal property not within the state at the time of the resident decedent's death the court will apply the maxim, "*Mobilia sequuntur personam*," the effect of which is to make the legal situs of personal property at the domicile of the decedent, and this construction was adopted with the statute. (p. 1119.)

INHERITANCE TAX—Situs—Personal Property Transferred to Trustee—Transfer in Contemplation of Death.—Where one formerly a resident of Chicago took up his residence in Wisconsin, but continued to transact some business in Chicago and had money in banks and other personal property, including stocks, bonds, life insurance policies, notes, etc., situated there, which were never actually brought into the state of Wisconsin, some two years after his removal to Wisconsin executed at Chicago a deed or assignment in trust to an Illinois trust company transferring the property in Chicago to it, and delivered to it the stocks, bonds, notes and securities properly indorsed, the assignment providing for the investment of the trust fund and the payment of the income thereof, but reserving to the maker the right to the income and control of the property and the right to at any time revoke the trust during his life, and providing for the distribution of the property held by the trustee at the death of the maker, and the maker thereafter, after having become technically repossessed of the property, executed a second deed or assignment to the trustee, the manual possession of the securities being at all times in the trustee, it holding the legal title at the time of the maker's death, the maker at the time of the creation of the trust knowing himself to be afflicted with locomotor ataxia, it must be held that the legal situs of the property affected by the deed or assignment was in the state of Wisconsin, where the maker lived and died; that the transfer was one made in contemplation of death, and, therefore, subject to the Wisconsin inheritance tax. (p. 1120.)

INHERITANCE TAX—Payment in Foreign State—Double Taxation.—The fact that personal property is situated in another state where an inheritance tax has been imposed upon it does not prevent the imposition of an inheritance tax in the state of the deceased

owner's domicile, although such may result in a double taxation. (p. 1120.)

INHERITANCE TAX—Transfer in Contemplation of Death—When Liability Accrues.—The liability to the inheritance tax in case of a transfer made in contemplation of death accrues at the time of the transfer, and hence is not affected by the circumstance that at the time of the maker's death the property was in another state. (p. 1121.)

INHERITANCE TAX.—A Life Insurance Policy payable to the wife of the insured is no part of his estate, and is therefore not liable to the payment of an inheritance tax, nor is this affected by the wife joining with the insured in an assignment in trust of the policy, she not relinquishing any of her rights thereunder. (p. 1122.)

Montgomery, Hart & Smith, Frame & Blackstone and C. W. Newbury, for the appellants.

Frank L. Gilbert, attorney general, Russell Jackson, deputy attorney general, A. C. Titus, first assistant attorney general, and T. W. Haight, for the state.

514 VINJE, J. The circuit court for Waukesha county fixed an inheritance tax upon the estate of George Bullen, deceased, at \$20,184.71. The Bullen heirs, and the state appealed, which appeals were heard together. It appears from the established facts that George Bullen, a citizen of Wisconsin, died at his home near Oconomowoc September 10, 1908, aged sixty-two years. He left a widow and four sons, three of whom are minors. At the time of his death he had on deposit in checking accounts in Chicago banks \$12,109.77, and was possessed of his home known as "Minnewoc" in Waukesha county, valued at \$56,000, and the chattels appurtenant thereto, agreed to be worth \$20,000. The remaining property in which Mr. Bullen had any interest, prior to his death consisted of certain stocks, bonds, notes, life insurance policies, etc., the title to which was vested in the Northern Trust Company, an Illinois corporation, as trustee, for the benefit of Mrs. Bullen and her four sons, who now appeal, and of Lucy E. Cleghorn, Annie Graham, Mary T. Harris, Victoria Bullen, and Helen Mary Harris, all nonresident aliens. They did not, nor did the Northern Trust Company, appear in either of the courts below or join in this appeal. No personal service was ever had on any of them. The Illinois property held by the Northern Trust Company, exclusive of the \$25,000 insurance policy, was valued at \$936,761.70. In 1892 Mr. Bullen, who formerly lived in Chicago, moved to Oconomowoc, but continued to transact some business in Chicago down to the time of his death. In 1900 he began negotiations with the Northern Trust Company with a view of transferring his property to it under a trust agreement. Various drafts of the instrument were made and discussed by the parties down to December 11, 1902, when an agree-

ment denominated "an assignment in trust" was entered into in Chicago, and the bonds, stocks, notes, insurance policies, and other securities ⁵¹⁵ therein mentioned were delivered to the trust company. The transfer of the securities was made on the date last mentioned by the delivery to the Northern Trust Company of the assignment in trust, together with the securities themselves. Such of the securities as did not pass by delivery were also assigned by independent instruments, such as the usual indorsement on a stock certificate and the usual form of assignment of insurance policy. The trust assignment was dated December 11, 1902, and the receipt of the Northern Trust Company appended to it bears the same date. A certificate of acknowledgment, however, was made afterward on April 4, 1903. These securities had always been in a safety deposit box in Chicago, and the legal title to them was held by the trustee at the time of Mr. Bullen's death, and the securities themselves had never been within the state of Wisconsin.

The assignment in trust provided for the investment and reinvestment of the trust estate, and directed the payment of \$900 per annum to Lucy E. Cleghorn, a niece, and \$9,000 per annum to Annie Graham, a sister, both of whom resided out of the United States at the time of Mr. Bullen's death. It directed the trustee to pay the cost of maintenance of a house in London, Canada, during the lives of Mr. Bullen's two sisters, Mary T. Harris and Victoria Bullen, and his niece Helen Mary Harris. It directed the trustee to hold his house and farm known as "Minnewoc" and the chattels appurtenant thereto, and to spend the necessary amount in maintaining them, for the benefit of Mrs. Bullen and the children. It gave to Mrs. Bullen for life one-third of the remainder of the income from the trust estate, and directed that the other two-thirds should be paid to Mr. Bullen during his lifetime and after his death should be set apart for his four sons; and it directed the distribution of the principal to the sons, each to have one-third of his share when he should reach the age of twenty-five years, and the other two-thirds when he should reach the age of thirty years. It reserved the right to direct ⁵¹⁶ and control the distribution of the trust property and to revoke and vacate the trust at any time during Mr. Bullen's lifetime.

Mr. Bullen, having technically repossessed himself of the securities for a brief period, executed a further assignment in trust, dated May 22, 1907, but the manual possession of the securities had remained at all times since 1902 with the Northern Trust Company, Mr. Bullen having repossessed himself of them merely by directing the trust company to hold them for him as his agent instead of trustee. Prior to the death of George Bullen the Northern Trust Company

made returns to the tax assessor of Cook county, Illinois, of the value of the trust estate, and paid the taxes thereon levied on the valuation made by said assessors. The trust company also paid, after Mr. Bullen's death, an inheritance tax on all of said property in Illinois, including the bank deposits. When the assignment in trust was drawn Mr. Bullen was suffering from locomotor ataxia and was aware of the fact. Mrs. Bullen was also in ill-health; and the fourteenth paragraph of the trust agreement declares the intention of giving the trustee "full power and authority to manage the said trust estate for the benefit of the several beneficiaries thereof, particularly my said wife during her lifetime, in the event I should be unable, at any time prior to my death, to give my affairs such attention as they may demand, and at all events, after my death, in like manner as I myself might or could manage it, if living and in good health." The sixteenth paragraph provides for the distribution of any trust estate not specifically disposed of, "among my heirs at law, as provided by the laws of Illinois with reference to intestate property, and the laws of said state shall govern in the interpretation of this instrument." In addition to the personal property which passed under the assignment in trust there was certain real estate, one parcel of which, "Minnewoc," Mr. Bullen's residence, is located in Wisconsin. Mrs. Bullen declined to ⁵¹⁷ sign the deeds of the real estate, refusing to relinquish her dower and other rights therein, unless Mr. Bullen should make some provision in the trust assignment for an income for her mother. Mrs. Bullen refused at first to assign the insurance policy for \$25,000, and the policy, being payable to her, could not be transferred without her consent. She finally reached an agreement as to this policy with Mr. Bullen and executed the assignment of it. The deeds having never been signed, the deed of "Minnewoc" to the trustee did not pass the homestead rights. The Northern Trust Company, having no right to do business in Wisconsin, has confined itself to the trust estate delivered to it in Illinois, and has avoided coming within the jurisdiction of this court. The only interested parties over whose persons the court has jurisdiction are Mary Lenore Bullen and her four sons, the three minors appearing through Mr. Newbury, their guardian ad litem.

We shall first consider the appeal on the part of the Bullen heirs. Counsel say in their brief that there is ⁵¹⁸ but one question for determination by this court, namely: "Can the state of Wisconsin tax a contract made by one of its residents when in a foreign state, whereby he transfers property which is then in the foreign state and which never has been in the state of Wisconsin, even though constructively the transfer was 'intended to take effect in possession or enjoyment at

or after the death of the transferrer?" It is argued that the tax is not a tax of property, but an excise tax imposed on the transfer, and, the transfer being made in a foreign state of property within that state, this state cannot tax such property held by the Northern Trust Company. It is said that the tax is "not a tax on the person who transmits, or the person who receives, but it is a tax on the right of transmission." This question was considered and discussed by this court in *Nunnemacher v. State*, 129 Wis. 190, 108 N. W. 627, 9 L. R. A., N. S., 121, 9 Ann. Cas. 711, and the conclusion arrived at, after a review of the authorities, that inheritance taxes are not taxes upon property, "but upon the right to receive property." And in *Beals v. State*, 139 Wis. 544 (121 N. W. 347), at page 552, this court, referring to the *Nunnemacher* case, said: "Inheritance taxation was held to be constitutional in the *Nunnemacher* case on the ground that it is excise taxation levied on the transfer of property and not on the property itself. . . ." And in summing up the points decided the court said: "The inheritance tax levied by chapter 44, Laws of 1903, is not a tax upon property or property rights in any sense, but purely an excise tax levied upon the 'transfer' or transaction, and merely measured in amount by the amount of property transferred." Again, in *State v. Pabst*, 139 Wis. 561, 121 N. W. 351, the rule laid down in the *Nunnemacher* and *Beals* cases was referred to and approved. The tax, therefore, under the decisions of this and other courts is a tax upon the transfer, transaction, or right to receive property: *Nunnemacher v. State*, 129 Wis. 190, 108 N. W. 627, 9 L. R. A., N. S., 121; *Beals v. State*, 139 Wis. 552, 121 N. W. 347. The theory of an inheritance tax is that it is not one on property, but upon the right of succession: 27 ⁵¹⁹ Am. & Eng. Ency. of Law, 2d ed., 338; *State v. Pabst*, 139 Wis. 561, 121 N. W. 351.

But it is strenuously argued by counsel for the heirs that the property taxed being in the state of Illinois, and the transfer from Bullen to the Northern Trust Company having been made in the state of Illinois and outside of the state of Wisconsin, the Wisconsin inheritance tax law does not reach such property. This contention involves the question of the situs of the property of Bullen transferred to the trust company and the application of our inheritance law to such situation. The following provisions of the inheritance law of this state—section 1087—1, Statutes (Supp. 1906; Laws of 1903, c. 44, sec. 1; Laws of 1903, c. 249, sec. 1; Laws of 1905, c. 96, sec. 1)—are pertinent to the present inquiry:

"A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, association or corporation, except county, town or municipal

ment denominated "an assignment in trust" was entered into in Chicago, and the bonds, stocks, notes, insurance policies, and other securities ⁵¹⁵ therein mentioned were delivered to the trust company. The transfer of the securities was made on the date last mentioned by the delivery to the Northern Trust Company of the assignment in trust, together with the securities themselves. Such of the securities as did not pass by delivery were also assigned by independent instruments, such as the usual indorsement on a stock certificate and the usual form of assignment of insurance policy. The trust assignment was dated December 11, 1902, and the receipt of the Northern Trust Company appended to it bears the same date. A certificate of acknowledgment, however, was made afterward on April 4, 1903. These securities had always been in a safety deposit box in Chicago, and the legal title to them was held by the trustee at the time of Mr. Bullen's death, and the securities themselves had never been within the state of Wisconsin.

The assignment in trust provided for the investment and reinvestment of the trust estate, and directed the payment of \$900 per annum to Lucy E. Cleghorn, a niece, and \$9,000 per annum to Annie Graham, a sister, both of whom resided out of the United States at the time of Mr. Bullen's death. It directed the trustee to pay the cost of maintenance of a house in London, Canada, during the lives of Mr. Bullen's two sisters, Mary T. Harris and Victoria Bullen, and his niece Helen Mary Harris. It directed the trustee to hold his house and farm known as "Minnewoc" and the chattels appurtenant thereto, and to spend the necessary amount in maintaining them, for the benefit of Mrs. Bullen and the children. It gave to Mrs. Bullen for life one-third of the remainder of the income from the trust estate, and directed that the other two-thirds should be paid to Mr. Bullen during his lifetime and after his death should be set apart for his four sons; and it directed the distribution of the principal to the sons, each to have one-third of his share when he should reach the age of twenty-five years, and the other two-thirds when he should reach the age of thirty years. It reserved the right to direct ⁵¹⁶ and control the distribution of the trust property and to revoke and vacate the trust at any time during Mr. Bullen's lifetime.

Mr. Bullen, having technically repossessed himself of the securities for a brief period, executed a further assignment in trust, dated May 22, 1907, but the manual possession of the securities had remained at all times since 1902 with the Northern Trust Company, Mr. Bullen having repossessed himself of them merely by directing the trust company to hold them for him as his agent instead of trustee. Prior to the death of George Bullen the Northern Trust Company

made returns to the tax assessor of Cook county, Illinois, of the value of the trust estate, and paid the taxes thereon levied on the valuation made by said assessors. The trust company also paid, after Mr. Bullen's death, an inheritance tax on all of said property in Illinois, including the bank deposits. When the assignment in trust was drawn Mr. Bullen was suffering from locomotor ataxia and was aware of the fact. Mrs. Bullen was also in ill-health; and the fourteenth paragraph of the trust agreement declares the intention of giving the trustee "full power and authority to manage the said trust estate for the benefit of the several beneficiaries thereof, particularly my said wife during her lifetime, in the event I should be unable, at any time prior to my death, to give my affairs such attention as they may demand, and at all events, after my death, in like manner as I myself might or could manage it, if living and in good health." The sixteenth paragraph provides for the distribution of any trust estate not specifically disposed of, "among my heirs at law, as provided by the laws of Illinois with reference to intestate property, and the laws of said state shall govern in the interpretation of this instrument." In addition to the personal property which passed under the assignment in trust there was certain real estate, one parcel of which, "Minnewoc," Mr. Bullen's residence, is located in Wisconsin. Mrs. Bullen declined to ⁵¹⁷ sign the deeds of the real estate, refusing to relinquish her dower and other rights therein, unless Mr. Bullen should make some provision in the trust assignment for an income for her mother. Mrs. Bullen refused at first to assign the insurance policy for \$25,000, and the policy, being payable to her, could not be transferred without her consent. She finally reached an agreement as to this policy with Mr. Bullen and executed the assignment of it. The deeds having never been signed, the deed of "Minnewoc" to the trustee did not pass the homestead rights. The Northern Trust Company, having no right to do business in Wisconsin, has confined itself to the trust estate delivered to it in Illinois, and has avoided coming within the jurisdiction of this court. The only interested parties over whose persons the court has jurisdiction are Mary Lenore Bullen and her four sons, the three minors appearing through Mr. Newbury, their guardian ad litem.

We shall first consider the appeal on the part of the Bullen heirs. Counsel say in their brief that there is ⁵¹⁸ but one question for determination by this court, namely: "Can the state of Wisconsin tax a contract made by one of its residents when in a foreign state, whereby he transfers property which is then in the foreign state and which never has been in the state of Wisconsin, even though constructively the transfer was 'intended to take effect in possession or enjoyment at

220, subdivision 3, which provides: "When the transfer is of property made by a resident or by a nonresident, when such nonresident's property is within this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect, in possession or enjoyment, at or after such death. Such tax shall also be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act. . . ." See, also, *Estate of Brandreth*, 169 N. Y. 437, 62 N. E. 563, 58 L. R. A. 148.

In *Estate of Keeney*, 194 N. Y. 281, 87 N. E. 428, under the transfer tax law before referred to, the court said (page 287): "It is a matter of common knowledge that for this purpose trusts or other conveyances are made whereby the grantor reserves to himself the beneficial enjoyment of his estate during life. Were it not for the provision of the statute which is challenged, it is clear that in many cases the estate, on the death of the grantor, would pass free from tax to the same persons who would take it had the grantor made a will or died intestate. It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is a transfer with reservation of a life estate. We think this fact justified the legislature in singling out this class of transfers as subject to a special tax.

"It is also urged that the trust property was at the time of the intestate's death in another state with the legal title in the trustee. This does not affect the liability of the transfer to taxation. The liability in this case accrued at the time of transfer, no matter when imposed."

In the instant case Bullen reserved and enjoyed a life estate in the property transferred to the Northern Trust Company. Section 2443, Statutes of 1898, provides that the jurisdiction of the county court extends to estates of all persons deceased who were at the time of their deaths inhabitants of or residents of the same county, or who shall die without the ⁵²³ state having any estate within such county to be administered. And by chapter 44, Laws of 1903 (the inheritance tax law), such courts are given authority to determine the inheritance tax which shall be paid by the estate of decedent. And in section 1087—24, Statutes (Supp. 1906; Laws of 1903, c. 44, sec. 23), the words "estate" and "property" are defined to mean "the real and personal property or interest therein of the testator, intestate, grantor, bargainor, vendor or donor passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees, vendees or successors, and shall include all personal property within or without the state."

We think it quite clear, upon the established facts, that the transfer was made "in contemplation of death" within the meaning of the law (*State v. Pabst*, 139 Wis. 561, 121 N. W. 351), and was also "intended to take effect in possession or enjoyment at or after such death": Sec. 1087—1, subd. 3. Stats. (Supp. 1906; Laws of 1903, c. 44, sec. 1); *Estate of Green*, 153 N. Y. 223, 47 N. E. 292; *Estate of Brandreth*, 169 N. Y. 437, 62 N. E. 563, 58 L. R. A. 148; *Estate of Cornell*, 170 N. Y. 423, 63 N. E. 445; *Estate of Keeney*, 194 N. Y. 281, 87 N. E. 428. We conclude that the property covered by the trust agreement was subject to the inheritance tax.

The only error urged on the state's appeal is, that the \$25,000 insurance policy assigned to the trust company should have been taxed. It appears that this policy was made payable to Mrs. Bullen as beneficiary, and no right reserved in it or otherwise to change the beneficiary. It was assigned to the trust company, but it does not appear that Mrs. Bullen relinquished her rights therein; therefore this property remained the property of Mrs. Bullen and was not a part of Mr. Bullen's estate. The court below, therefore, was right in refusing to tax it.

Some other points are made on both appeals, but from the view we take of the case consideration of them is unnecessary.

By the COURT. The judgment of the court below is affirmed on both appeals.

Inheritance Taxation is the subject of a note to *English v. Crenshaw*, 127 Am. St. Rep. 1035. In the case of *In re Estate of Culver*, 145 Iowa, 1, 123 N. W. 743, 25 L. R. A., N. S., 384, the question was whether the stock of a banking corporation of Iowa, represented by certificates held by the decedent in another state at the time of his death, remaining in the hands of the executrix in the latter state, were subject to the collateral inheritance tax of Iowa. The court said that such a corporation is under the jurisdiction and control of the state of its domicile, which directs the manner and form of its organization, exercising supervisory power and directing the manner of its dissolution; that the shares of stock represent an interest in the earnings and property of the corporation; and that while the certificates are not the stock itself, they are a representation of it, such representation being that of an interest in personal property. The court therefore held that the nonresident owner of the shares had an interest in the property of the corporation which was subject to the collateral inheritance tax law of Iowa.

In the *Matter of Majot*, 199 N. Y. 29, 92 N. E. 402, 29 L. R. A., N. S., 780, a husband and wife had married in France. In that country a wife is given a community interest in whatever property her husband has at the time of the marriage, and such as he afterward acquires. The husband and wife subsequently became residents of the state of New York and there acquired real and personal property of which he died seised and possessed. In deciding as to the liability of the property for a transfer tax, the court applied the principle that where there is a change of domicile by a husband and

wife, the law of the actual domicile, and not of the matrimonial domicile, will govern as to all future acquisitions of movable property; and as to all immovable property, the law of *rei sitae*. It was therefore held that the property acquired by the husband during his residence with his wife in New York was controlled by the laws of that state; that on his death it was transferred within the meaning of the laws of that state; and that it was liable to the payment of a transfer tax under the statute of New York.

ST. JOHN'S MILITARY ACADEMY v. EDWARDS.

[143 Wis. 551, 129 N. W. 113.]

TAXATION—Exemptions—Strict Construction of Law.—Laws exempting property from taxation are construed strictly against the privilege claimed; but strict construction does not mean that we are not to search for and ascertain, if possible, the true meaning of the language used. It comes into play only when the language, after analysis and subjection to the ordinary rules of interpretation, presents ambiguity. (p. 1125.)

TAXATION—Exemptions—"Association" Includes a Corporation.—The word "association," as used in subdivision 3, section 1038, Statutes of 1898, exempting from taxation property owned by any religious, scientific, literary or benevolent association, includes corporations of such character. (p. 1126.)

STATUTES—Construction—Change in Meaning of Words.—The popular meaning of words is constantly changing, but in construing a statute long in force and dealing with rights or things long established, the meaning of the words used must be taken as that given them at the enactment of the statute, in order that rights do not change with fashions in the use of words. (p. 1126.)

TAXATION—Exemption—School and Academy.—Under subdivision 3, section 1038, Statutes of 1898, exempting the property of any religious, scientific, literary or benevolent association from taxation, a school and academy is such an association, and entitled to the benefit of the exemption. (p. 1126.)

TAXATION—Exemption—School Corporation.—The Payment of Dividends for certain years, by a corporation conducting a school and academy, if subjecting its property to taxation for those years, would not affect its exemption in subsequent years for which no dividends are paid. (p. 1127.)

TAXATION—Exemption—"Use of Property" for School.—The creating of debts for the purpose of purchasing apparatus, building or repairing, and afterward paying these debts from the proceeds of tuition, by a school and academy, is using the property for the purposes of the school. (p. 1127.)

Milo Muckleston, district attorney, and Hendy Lockney, for the appellant.

Bloodgood, Kemper & Bloodgood, for the respondent.

552 TIMLIN, J. From the complaint in this action it appears that the respondent was incorporated under the gen-

eral incorporation law found in chapter 86, Revised Statutes of 1878 (Stats. 1898, c. 86). These statutes authorize a stock corporation to be ⁵⁵³ formed in the manner there provided to conduct, promote, and maintain high schools, academies, and other like institutions. The articles of incorporation of respondent declare the business and purposes of said corporation to consist in establishing, maintaining, and conducting an academic institution. In addition it purports to be authorized "to buy, sell, hold, convey, and deal in real estate; to buy, sell, and deal in all kinds of personal property and do and perform any act or thing and exercise any and all powers incident to the business and purposes above specified."

This incongruous combination of corporate powers is quite foreign to ancient legal conceptions. But section 1771, chapter 86, provides that a corporation may be formed "to conduct, pursue, promote or maintain any one or more of the following named purposes." Following this, the purposes specified in the respondent's articles are enumerated. Whether these corporate powers are properly joined in the articles is not before the court in this case except as it bears upon the question of construction hereinafter considered. Plaintiff has not attempted to exercise all these powers. It is further averred that the plaintiff has been since its incorporation engaged solely in the business of conducting a school or academy for boys wherein instruction is given in literary and scientific studies, in a general way equivalent to the courses in the public high schools of this state; that it has during the past five years averaged more than one hundred and fifty pupils in each year, with ten instructors. It owns less than ten acres of land in the town of Delafield in Waukesha county, which is used solely for the purposes of the plaintiff in its business of conducting this school or academy and has never been leased or otherwise used for pecuniary profit. It owns personal property of the value of about four thousand five hundred dollars, which property is and at all times has been used by the plaintiff solely for the purpose of conducting a school or academy and no other purpose. It has debts incurred for enlarging and improving its schools. No dividends ⁵⁵⁴ have ever been declared or paid to its stockholders except in the years 1900 and 1901. It is not expressly averred that the respondent is charging tuition fees or making other charges to its pupils, but this may be inferred from the averments of the complaint that it paid a dividend in each of the years mentioned out of the profits accruing from the business of conducting such school or academy, and that there has been usually a surplus of receipts over expenditures each year, which surplus was applied in decreasing the debts of the respondent. The

actual value of the real and personal property of the respondent is at least thirty-six thousand dollars.

Respondent on this showing alleges that it is a scientific and literary association within the meaning of subdivision 3, section 1038, Statutes of 1898, and therefore its property is exempt from taxation. Notwithstanding this, the authorities of the town of Delafield in the year 1909 assessed the property of the plaintiff for the omitted taxes of the years 1906, 1907, 1908, and for the taxes of the then current year, 1909. This tax the respondent refused to pay. It was returned delinquent into the hands of the county treasurer defendant, who threatens to sell the real estate of the plaintiff for such unpaid real estate taxes and to distrain its personal property to enforce the collection of the other taxes. An injunction is prayed for by the respondent, and the appellant in this court waives any objection he might have on the ground that there was an adequate remedy at law with reference to the personal property. The statute under which the plaintiff claims exemption from taxation is subdivision 3, section 1038, Statutes of 1898: "Personal property owned by any religious, scientific, literary or benevolent association, used exclusively for the purposes of such association, and the real property, if not leased or not otherwise used for pecuniary profit, necessary for the location and convenience of the buildings of such association and embracing the same, not exceeding ten acres."

It is contended that the plaintiff is a corporation, not merely an association, hence not within the exemption.

⁵⁵⁵ Laws exempting property from taxation are construed strictly against the privilege claimed; but strict construction does not mean that we are not to search for and ascertain, if possible, the true meaning of the language used in the statute. It comes into play only when such language, after analysis and subjection to the ordinary rules of interpretation, presents ambiguity. This is an old statute. It appeared in Revised Statutes of 1849 as subdivision 4, section 4, chapter 15, where the word "institution" is used instead of the word "association." Also Revised Statutes of 1858, chapter 18, section 4, subdivision 4. By chapter 130, Laws of 1868, the word "association" was substituted for the word "institution." We adopted this original statute from Michigan, which in turn adopted it from Massachusetts, and it will be found in subdivision 2, section 5, chapter 7, Revised Statutes of Massachusetts of 1836, and in earlier statutes. "Association" is a generic term which may include a corporation: *Thomas v. Dakin*, 22 Wend. (N. Y.) 9, 104; *United States v. Trinidad C. & C. Co.*, 137 U. S. 160, 11 Sup. Ct. Rep. 57, 34 L. ed. 640; *People ex rel. Parker Mills v. Commrs. of Taxes*, 23 N. Y. 242. The statutes of this state relative to

banking speak of a banking corporation as an association: Stats. 1898, c. 94. There is no apparent reason why a literary and scientific institution if merely associated should be exempted, but if incorporated it should be taxed. The reason for the exemption does not rest on the legal status of the persons operating or supporting the institution, but upon the fact that the institution is engaged in education. But it is not to be understood that the word 'association' always includes a corporation. This will depend upon the context and the subject matter of the law as well as upon an historical view of the statute. Private and parochial schools have not been taxed in this state during the long existence of this statute, and they have no other ground of exemption unless it be in those special cases where the statute provides for the organization of certain religious corporations, such as sections 1990, 1997, 2001—1, 2001—10, Statutes of 1898. But these are more modern statutes. ⁵⁵⁶ The present facility of incorporation and the great number of corporations now existing has increased the necessity for distinguishing between corporations and mere associations, and there is a tendency to narrow the meaning of the word "association" in this respect so as to designate only voluntary unincorporated confederacies or combinations. But this is the conservatism of the law which the unthinking sometimes make matter of reproach, that the popular meaning of words is constantly changing, but the law, dealing with things or rights long established, must look back to the more ancient meaning in order that rights do not change with fashions in the use of words. The plaintiff is within this statute notwithstanding that it is an incorporated association.

It is next contended that there is exempted only the property owned by religious, literary, or benevolent associations, and that the plaintiff is neither. This presents the question whether a school is a scientific or literary association. It is an institution. But there must ordinarily be an association of patrons, professors, or pupils in order to constitute a school. The word "school," except when applied to a building or place, implies plurality and consociation. Upon this point we follow and approve the case of *Detroit H. & D. School v. Detroit*, 76 Mich. 521, 43 N. W. 593, 6 L. R. A. 97, *Indianapolis v. Sturdevant*, 24 Ind. 391, and *Ramsey Co. v. Stryker*, 52 Minn. 144, 53 N. W. 1133. This is the construction which the similar statute has received in Massachusetts: Mass. Pub. Stats. 1882, c. 11, sec. 5, subd. 3; cases collected in 7 Mass. Dig., tit. "Taxation," sec. 55. The personal property of the plaintiff is used exclusively for scientific and literary purposes, and the real estate is not leased nor otherwise used for pecuniary profit and does not exceed the amount

specified in the statute. The dividends paid did not occur in either of the years in which taxes are paid. Payment of dividends, if it rendered ⁵⁵⁷ the association liable to taxation for these years, would not have the effect of making it forever afterward liable to taxation. Creating debts for the purpose of purchasing apparatus, building, or repairing, and afterward paying these debts from the proceeds of tuition, is using the property for the purposes of such association: *Mt. Hermon Boys' School v. Gill*, 145 Mass. 139, 13 N. E. 354. Whether this corporation was legally taxable for the years 1900 and 1901, or whether, in case it becomes in the future a money-making concern, distributing its profits to its stockholders in dividends or accumulating them in surplus, it would be taxable, is not decided. We do not adopt any precedent herein cited to that extent, but leave this question as a new question in this state to be met and decided when occasion requires.

By the COURT. Order affirmed.

All Property Within the State is Liable to Taxation, and When a Claim of Exemption is Made, it must clearly appear. The party claiming such exemption must be able to point out some provision of law plainly giving it: Note to *Herrick & Stevens v. Sargent & Lahr*, 132 Am. St. Rep. 293; *English v. Crenshaw*, 120 Tenn. 531, 127 Am. St. Rep. 1025.

The Exemption of School Property from Taxation is considered in the note to *Herrick & Stevens v. Sargent & Hahr*, 132 Am. St. Rep., at page 325, and the exemption of school property from assessment for local improvements is considered in the same note, at page 315.

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ACCOUNT, ACTION ON.

ACCOUNT, ACTION ON—Proof Required of Plaintiff.—When suit is brought upon an open account the plaintiff does not overcome the burden by merely showing the rendition of service and the value of the same, but must offer some proof that it was not paid for when rendered or when due. (Ala.) Pollak v. Winter, 33.

ACTIONS.

ACTION—Transfer to Law Calendar.—Where the relief asked in an action is such as equity only can grant, the cause will not be transferred to the law calendar, but will be dismissed, if the facts are not such as to entitle the plaintiff to such relief, although he might have a remedy in a proper action at law. (Iowa) Hall v. Henninger, 412.

ADMINISTRATION.

See Executors and Administrators.

ADULTERY.

See Fornication.

ADVERSE POSSESSION.

1. ADVERSE POSSESSION.—**Mere Possession.** continued however long, will not divest the owner of his property unless the possession is under a claim of title. Otherwise the possession will be presumed to be in subordination to the true legal title. (N. Y.) Lightfoot v. Davis, 817.

2. ADVERSE POSSESSION—Stolen Personalty.—A thief can acquire no title to the stolen property. Where a person obtains possession of property secretly by a common-law larceny and conceals that possession, no lapse of time should confer title on him. (N. Y.) Lightfoot v. Davis, 817.

3. ADVERSE POSSESSION—Personal Property.—By adverse possession, title to chattels may be acquired which will be paramount to that of the true owner, but this possession must be peaceable, undisturbed and open, with an assertion of ownership for the period which, under the law, would bar an action for its recovery by the real owner. (N. Y.) Lightfoot v. Davis, 817.

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APPEAL AND ERROR.

In General.

1. APPEAL—Constitutional Questions, How Preserved.—In a case submitted on an agreed statement of facts raising the question of the constitutionality of certain statutes, the question may be preserved
Am. St. Rep., Vol. 129—72 (1137).

for review by presentation in a motion for a new trial and a motion in arrest of judgment. (Mo.) *State v. Martin*, 628.

2. **APPEAL—Authentication of Case-made.**—The Statute Requiring the case-made to be attested by the clerk, and the seal of the court thereto attached, is mandatory, and without such authentication the case-made is not properly presented to this court. (Okl. Cr.) *Humphrey v. State*, 972.

3. **APPEAL—Vacating Order Inadvertently Made.**—The appellate court has power to vacate an order, inadvertently made by it, approving a corporation not authorized by law. (N. Y.) *In re Co-operative Law Co.*, 839.

4. **APPEAL—Review of Instructions.**—Where No Question as to the giving of an instruction is presented by the motion for a new trial, it will not be reviewed on appeal. (Ind.) *McDonald v. State*, 383.

5. **APPEAL—Review of Instructions—Evidence not in Record.**—Where there is no showing that the instructions contained in the record were all the instructions given and the evidence is not set out, the judgment will not be disturbed on account of certain instructions unless they were irrelevant and incorrect upon any supposable state of facts given in evidence. (Ind.) *McDonald v. State*, 383.

6. **APPEAL—Failure to Object in the Trial Court and afford it an opportunity to correct an alleged error will, as a general rule, preclude its being urged on appeal.** (Colo.) *Melcher v. Beeler*, 273.

7. **APPEAL—Erroneous Procedure of the Trial Court does not require the reversal of a judgment based thereon, if it is clear that justice has been done.** (Wis.) *Will of Hawkinson*, 1091.

8. **APPEAL—Record.**—A Demurrer is a Pleading and should be made part of the record proper; its preservation in the bill of exceptions is insufficient to preserve it for review in the appellate court. (Mo.) *State v. Martin*, 628.

9. **APPEAL—Nonprejudicial Error.**—An error which gives to the appellant more than he is entitled to is not prejudicial and will not, therefore, be reviewed. (Mich.) *A. M. Campau Realty Co. v. Detroit*, 555.

10. **APPEAL—Direction for New Trial.**—Although an appeal is taken on exceptions to the conclusions of law, the supreme court may direct a new trial of the cause. (Ind.) *Truelove v. Truelove*, 404.

Briefs.

11. **APPEAL—Briefs.**—Counsel for the Defendant in their briefs must clearly present the grounds upon which they rely for a reversal. (Okl. Cr.) *Price v. United States*, 930.

12. **APPEAL—Failure to File Briefs.**—The Reversal of a judgment may be ordered where the appellee fails to file a brief. (Ind.) *State v. Huff*, 355.

Escape of Prisoner Pending Appeal.

13. **APPEAL—Escape of Prisoner Pending—Right to Review.**—Where a defendant has been convicted of murder and sentenced to imprisonment for life at hard labor in the state penitentiary, and perfects an appeal to this court, and while said appeal is pending makes his escape from the custody of the law, he thereby waives his right of having said conviction reviewed by this court. (Okl. Cr.) *Jacobs v. State*, 985.

14. **APPEAL—Escape of Prisoner Pending—Dismissal of Appeal.** The criminal court of appeals will not consider an appeal, unless the defendant is where he can be made to respond to any judgment or order which may be rendered in the case, and where the defendant

makes his escape from the custody of the law, or is at large, as a fugitive from justice, this court will on motion dismiss his appeal. (Okl. Cr.) *Jacobs v. State*, 985.

Pardon of Defendant.

15. **APPEAL—Dismissal.**—Where a Pardon is Granted and accepted, and brought to the attention of this court pending an appeal, the appeal will be dismissed. (Okl. Cr.) *Gilmore v. State*, 981.

Appealable and Nonappealable Judgments.

16. **APPEAL—Decree of Restitution will Support.**—If a party has been deprived of land by a decree which is subsequently reversed, a decree restoring the land to him is such a final decree as will support an appeal. (Ala.) *Lehman-Durr Co. v. Folmar*, 37.

17. **APPEAL—Nonappealable Judgment.**—Appearance on appeal from a judgment which is not appealable may entitle the cause to be entered as pending on error. (Colo.) *Chaffee v. Widman*, 220.

18. **APPEAL—Nonappealable Judgment—Dismissed.**—If a case is appealed which is not appealable, and the appellee does not enter an appearance, the appeal may be dismissed, and thus the party seeking to have a case reviewed in the supreme court may lose his right to a review. (Colo.) *Chaffee v. Widman*, 220.

Direction for Judgment.

19. **APPEAL—Direction for Judgment.**—Where all the facts necessary to a complete determination of the controversy are found by the trial court, and there is no dispute as to the facts, the only questions being those of law, a new trial will not be ordered, but the entry of the proper judgment directed. (N. Y.) *Central New York Tel. & Tel. Co. v. Averill*, 878.

20. **APPEAL—Direction for Particular Judgment—Power of Trial Court.**—Where the mandate of an appellate court directs a specific judgment to be entered, the tribunal to which such mandate is directed must yield obedience thereto. No modification of the judgment so directed can be made by the trial court, nor can any provision be ingrafted upon or taken from it. (Colo.) *Galbreath v. Wallrich*, 263.

21. **APPEAL—Direction for Particular Judgment—Relief from Changed Conditions** or rights accruing pending the appeal on which the entry of a specific judgment is ordered can be had only by resort to some sort of original proceeding by which appropriate relief may be secured. It cannot be by way of defense to the judgment directed. (Colo.) *Galbreath v. Wallrich*, 263.

22. **APPEAL—Direction for Particular Judgment—Relief Against Execution** of a specific judgment directed by an appellate court may be granted in an independent action, where something has occurred which would render it inequitable to carry out the judgment directed. (Colo.) *Galbreath v. Wallrich*, 263.

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ASSIGNMENT.

AN ASSIGNMENT is a Good Equitable Assignment whenever, by its terms, the person to whom the obligation is due authorizes the payment thereof to another, either for his own use or for that of some other person, or authorizes anyone to receive or hold the moneys and to apply them to any specific purpose other than for the use and benefit of the assignor. (Ala.) *Canterbury & Gilder v. Marengo Abstract Co.*, 30.

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ASSUMPSIT.—Whenever There is a Legal Liability, the law infers a promise upon which an action of assumpsit will lie. (Ky.) *Merriwether v. Bell*, 488.

ATTACHMENT.

1. **ATTACHMENT—Property of Railroads.**—The mere fact that railroads are public service corporations does not render their property exempt from attachment. (N. H.) *De Rochemont v. New York Cent. etc. R. R.*, 673.

2. **ATTACHMENT—Railroad Cars—Interstate Commerce.**—The attachment of a freight-car, owned by a railroad company engaged in interstate commerce, when not in actual use, does not violate the commerce clause of the federal constitution. (N. H.) *De Rochemont v. New York Cent. etc. R. R.*, 673.

3. **ATTACHMENT—Railroad Cars—Interstate Commerce.**—The attachment of the property of railroads, such as freight-cars, when not in actual use in interstate commerce, is not forbidden by section 5258 of the United States Revised Statutes, nor is a statute allowing such attachment in conflict with the interstate commerce act. (N. H.) *De Rochemont v. New York Cent. etc. R. R.*, 673.

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ATTORNEY AND CLIENT.*Nature of Relation.*

1. **ATTORNEY AND CLIENT—Nature of Relation.**—The relation of attorney and client is that of master and servant in a limited and dignified sense, and involves the highest trust and confidence. It cannot be delegated without consent. (N. Y.) *In re Co-operative Law Co.*, 839.

2. **ATTORNEY AND CLIENT—Relation Personal.**—The relation of attorney and client cannot exist between an attorney at law employed by a corporation to practice law for it and a client of the corporation, as there would be neither contract nor privity between the attorney and the client. (N. Y.) *In re Co-operative Law Co.*, 839.

Right to Practice Law.

3. **ATTORNEYS.**—The Right to Practice Law, to be an "officer of the court," is not an absolute right, but is a privilege or license. Without any statutes upon the subject of admission to practice, a person cannot practice as an attorney without a license from the court. (S. D.) *Danforth v. Egan*, 1030.

4. ATTORNEYS AT LAW—Nature of Right to Practice.—The practice of law is not a business open to all who wish to engage in it, but a personal right limited to a few persons of good moral character, with special qualifications duly ascertained and certified. The right to practice law is in the nature of a franchise from the state conferred only for merit; it is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the court. (N. Y.) *In re Co-operative Law Co.*, 839.

Disbarment.

5. ATTORNEYS—Admission and Disbarment—Power of Courts.—The right to say who shall, as attorneys, be recognized as officers of the courts, together with the right to expel such persons whenever they have been adjudged unworthy or unfit for that trust, vested in the courts, is as much the law of the land, and of as much dignity as such, as any law found in the constitution or statutes. It does not depend upon either the constitution or statutes for its existence, but exists in all courts of record unless expressly restricted or taken away by express legislation. (S. D.) *Danforth v. Egan*, 1030.

6. ATTORNEYS—Disbarment.—The Effect of the Disbarment of an attorney is to deprive him of every privilege to which his license had entitled him, not only in the court making the order of disbarment, but also his privileges in all other courts. After disbarment he can appear in court only under circumstances authorizing any layman to appear. (S. D.) *Danforth v. Egan*, 1030.

See Corporations, 13, 14; Officers, 10-12.

AUTOMOBILES.

AUTOMOBILES—Unauthorized Use—Liability of Owner.—There is nothing so inherently dangerous about an automobile as to render the owner thereof liable for injuries inflicted thereby when in the possession of a third person without authority of the owner. (N. H.) *Danforth v. Fisher*, 670.

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RAIL.

1. BAIL—Right to on Habeas Corpus—Burden of Proof.—Upon an application for bail by writ of habeas corpus after commitment for a capital offense, the burden is upon the petitioner to show facts sufficient to entitle him to bail when those facts do not appear from the evidence adduced on the part of the prosecution. (Okl. Cr.) *In re Fraley*, 988.

2. BAIL—Presumption.—When the Homicide is Proven or admitted, the court on an application for bail will not presume for the prisoner either justification or mitigation merely because the evidence for the prosecution fails to show their absence. Unless the evidence for the prosecution shows the presence of facts tending to justify, excuse or mitigate the offense, the burden is on the petitioner to show them. (Okl. Cr.) *In re Fraley*, 988.

3. BAIL—Injury from Confinement—Opinion of Physicians.—Affidavits of physicians stating that in their opinion confinement in jail will result disastrously to the petitioner, and which state no facts upon which such opinion is based, make no sufficient showing for the admission of the prisoner to bail. (Okl. Cr.) *In re Fraley*, 988.

4. **BAIL**.—Evidence Examined and held to justify the refusal of bail. (Okl. Cr.) In re Fraley, 988.

BANKRUPTCY.

1. **BANKRUPTCY**.—Exemptions.—A Life Insurance Policy payable to the wife of the bankrupt is exempt under section 6 of the bankruptcy act, adopting the exemption laws of the several states, and section 70a of the same act. (Wis.) Allen v. Central Wisconsin Trust Co., 1107.

2. **BANKRUPTCY**.—The Exemption of a Life Insurance Policy payable to the wife of the bankrupt is not affected by a reservation in the policy of a right of the insured to change the beneficiary. (Wis.) Allen v. Central Wisconsin Trust Co., 1107.

BANKS AND BANKING.

BANKS.—Similarity of Names.—The Statutes (2 Comp. Laws, sec. 6091) prohibiting the use by a bank of a name similar to that of another bank, and Act No. 232 (Pub. Acts 1903), prohibiting the use by a corporation of a name similar to that of another corporation, were intended to prevent the public being misled or the older institution being defrauded, and to render resort to the courts for relief from such conditions unnecessary. (Mich.) Michigan Sav. Bank v. Dime Sav. Bank, 558.

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BONDS.

See Bail.

BOUNDARIES.

BOUNDARIES.—Lands Covered by Water.—The boundary line between two riparian owners, as to the land covered by water, is not in any way dependent upon the direction of the lines on land, but the lines from shore should run, as near as may be, perpendicular to the course of the stream. (Mich.) A. M. Campau Realty Co. v. Detroit, 555.

BRIEFS.

See Appeal and Error, 11, 12.

BROKERS.

1. **BROKER**.—When has Earned Commissions.—Before a real estate broker will be entitled to recover commissions, he must show that he has found and brought to the owner of the land a purchaser ready, willing, and able to enter into a contract of purchase on the prescribed terms; or in lieu of producing and presenting such a purchaser, he must show that he has obtained from him a valid and binding contract in favor of the land owner, and one that can be enforced by the land owner himself in case of a breach or default in the terms thereof. (S. D.) Watters v. Dancey, 1071.

2. **BROKER**.—Authority to Sell.—Commissions.—Where land is simply listed for sale with a real estate agent, the only person who can sell the land is the owner; the agent himself has no authority

to sell unless duly authorized in writing. A contract, therefore, made by the agent with a prospective purchaser to purchase the land from the agent does not bind the owner or entitle the agent to his commissions unless the owner approves and ratifies the contract. (S. D.) *Watters v. Dancey*, 1071.

3. BROKER—Cash Purchaser, What is not.—Where a real estate listing contract provides for "all cash over the encumbrance," evidence that the proposed purchaser, procured by the agent, has an abundance of property out of which the required payment might be made is not sufficient evidence that he is ready and willing to purchase. He must have the cash in hand. (S. D.) *Watters v. Dancey*, 1071.

4. BROKER—When Entitled to Commission.—In order for a real estate broker to be entitled to commission he must have accomplished all that he undertook to do—found and produced a person ready, willing and financially able to purchase at the price and upon the terms and conditions fixed by his employer, and he must have been the procuring cause of the sale, and the means employed by him and his efforts must have procured the sale. (Colo.) *Chaffee v. Widman*, 220.

5. BROKER—Commissions—Abandoned Negotiations—Subsequent Sale.—When a broker opens negotiations but fails to bring the prospective purchaser and owner together, and they are abandoned without fault of the owner, and the latter subsequently sells to the same party, without further effort on the part of the broker, the owner is not liable to the broker for commissions. (Colo.) *Chaffee v. Widman*, 220.

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BUILDING AND LOAN ASSOCIATIONS.

1. BUILDING AND LOAN ASSOCIATIONS—Character of Stock. Where but one kind of stock is contemplated by the charter and by-laws of a building and loan association, provisions of the by-laws for "full paid stock" upon the subscriber paying in cash the par value, and for "advance payment stock" where the subscriber pays installments in advance, the subscriber receiving, in the first instance, interest and in the latter a discount, constitute mere privileges given alike to all stockholders, and do not create a preferred stock, nor do such payments constitute, in any sense, loans to the association. (N. J. Eq.) *Fitzgerald v. State Mut. Bldg. etc. Assn.*, 743.

2. BUILDING AND LOAN ASSOCIATIONS.—Upon the Dissolution and Distribution of assets among the stockholders of a building and loan association, the holders of "full paid stock," that is, stock the par value of which was paid in cash, are not entitled to any preference. (N. J. Eq.) *Fitzgerald v. State Mut. Bldg. etc. Assn.*, 743.

3. BUILDING AND LOAN ASSOCIATIONS.—Upon the Dissolution and Distribution of assets among the stockholders of a building and loan association, the holders of "advance payment stock," that is, stock upon which installments have been paid in advance, are not entitled to any preference. (N. J. Eq.) *Fitzgerald v. State Mut. Bldg. etc. Assn.*, 743.

4. BUILDING AND LOAN ASSOCIATIONS—Dissolution—Distribution of Assets.—The fact that certain stockholders have given notice of withdrawal, in accordance with the by-laws of a building and loan association, does not give them a preference upon a dissolution and distribution of the assets of the association. (N. J. Eq.) *Fitzgerald v. State Mut. Bldg. etc. Assn.*, 743.

5. BUILDING AND LOAN ASSOCIATIONS.—The Right of Withdrawal from a building and loan association does not exist except when conferred by a by-law or statute, and when so conferred the right is restricted to the terms of the by-law or statute. (N. J. Eq.) *Fitzgerald v. State Mut. Bldg. etc. Assn.*, 743.

6. BUILDING AND LOAN ASSOCIATIONS.—Where Upon Dissolution the Assets of a building and loan association are insufficient to pay the stockholders in full, the only equitable plan for distribution is the pro rata division of the assets among all of the stockholders, giving to each share of stock a value, for purposes of distribution, of the amount paid upon it. (N. J. Eq.) *Fitzgerald v. State Mut. Bldg. etc. Assn.*, 743.

BUILDING CONTRACTS.

See Contracts, 11-14.

BURGLARY.*In General.*

1. BURGLARY—Degrees—Lesser and Distinct Offense.—Revised Penal Code of South Dakota, section 571, providing that "every person who, under circumstances not amounting to burglary, enters any building, etc., with intent to commit any felony, etc., is guilty of a misdemeanor," describes an offense which is not one of the degrees of the crime of burglary, but an entirely independent crime, and for that reason Revised Code of Criminal Procedure of South Dakota, section 357, providing that "when it appears that a defendant has committed a public offense, and there is a reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only," has no application to such distinct offense,

though it may be included in a greater offense charged. (S. D.) State v. Vierck, 1040.

Recent Possession of Stolen Goods.

2. **BURGLARY.**—Recent Possession of the Stolen Property, either in larceny or in burglary, is a circumstance which should be left to the jury, with instructions to give it such weight as they think it entitled to, when considered in connection with all the other evidence, in determining the guilt or innocence of the accused. (S. D.) State v. Vierck, 1040.

3. **BURGLARY.**—Recent Possession of Property—Instruction.—It is proper to refuse an instruction requested by the defendant in burglary that "you are further instructed that even if you should find from the evidence that the defendant had in his possession property that had been taken from the building, as was described in the information, a short time after it was taken, that fact does not raise a presumption of law that the defendant is guilty of the crime of breaking as charged in the information, nor does it shift the burden of proof upon the defendant to satisfactorily explain his possession of the property." (S. D.) State v. Vierck, 1040.

Breaking and Entry.

4. **BURGLARY.**—"Breaking," in the Law of Burglary, may consist in unlatching a door and opening it, or unlocking a door and opening it, or in opening a door which is shut but is neither locked nor latched. In fact, anything by which any obstruction to entering the building by the body is removed is a "breaking" within the meaning of the law. (S. D.) State v. Vierck, 1040.

5. **BURGLARY.**—What Constitutes—Breaking and Entering.—Under the provisions of Revised Penal Code of South Dakota, section 566, subdivision 2, which provides that "every person who breaks or enters, in the day or in the night time . . . any building, etc., with intent to steal therein or to commit any felony, is guilty of burglary in the third degree," "entering" alone is sufficient to constitute the crime, and, though the information charges both breaking and entering, the crime would be complete whether the entry was accomplished by means of force or without it. (S. D.) State v. Vierck, 1040.

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CARRIERS.

Of Goods—Interstate Business.

1. **CARRIERS—Right to Engage in Interstate Business.**—Section 5258 of the United States Revised Statutes gives railroads, no matter where they are incorporated, the right to engage in interstate business in all parts of the United States, and to become jointly interested with roads in other states, in the interstate business originating on their lines. (N. H.) *De Rochemont v. New York Cent. etc. R. R.*, 673.

2. **CARRIERS—Doing Business in State.**—A railroad company, owning no line within the state, by contracting with another company owning such a line, for the handling by each of the other's cars, paying each other for the use of the cars, with the right to load them on the return journey, constitutes itself a company doing business in the state. (N. H.) *De Rochemont v. New York Cent. etc. R. R.*, 673.

Of Livestock.

3. **CARRIER OF LIVESTOCK—Damages for Delay.**—In Case of Depreciation in the value of livestock, shipped on railway cars, through delay by the carrier in delivering them at their place of destination, their owner may recover of the carrier only the difference between their value when delivered at last and what value would have been theirs had they been transported with ordinary care, reasonable diligence, and within a reasonable time. (Ky.) *Southern Ry. Co. v. Graddy*, 499.

4. **CARRIER OF LIVESTOCK—Damages.**—The Pedigree of a Thoroughbred Colt is a material factor in fixing its value, and in an action for deterioration of stock of this sort, caused by a carrier's failing to make a prompt delivery of it when shipped for transportation, it is pertinent to allow witnesses to testify who know the value of the pedigree as well as the value of colts generally. (Ky.) *Southern Ry. Co. v. Graddy*, 499.

Of Passengers.

5. **CARRIERS—Passengers—When Relation Commences.**—A person who goes to the station of a railway company within a reasonable time prior to the hour set for the departure of a train, with the bona fide intention of taking passage thereon, and there, either by purchasing a ticket or in some other manner, indicates such intention to the

carrier, is considered a passenger and entitled to all the rights and privileges which the law attaches to that relation. (Iowa) Dieckmann v. Chicago etc. Ry. Co., 420.

6. **CARRIERS—Intention to Pay Fare—Presumption.**—When a person boards a train with money sufficient to pay his fare, it will be presumed that he intends to pay it until fare has been demanded, unless his conduct shows that he is trying to evade the demand; but the presumption ceases if he fails to pay after demand and opportunity to do so. (Ala.) Broyles v. Central of Georgia Ry. Co., 50.

7. **CARRIERS—Failure to Heat Car—Contributory Negligence.**—A passenger on a railroad who suffers injury from the car not being properly heated cannot recover therefor if guilty of contributory negligence in causing it; but the failure to protect himself from unnecessary cold, or to provide sufficient clothing, may or may not be contributory negligence, depending upon the peculiar facts of each particular case. (Ala.) Southern Ry. Co. v. Harrington, 59.

8. **CARRIERS—Personal Injuries—Proximate Cause.**—The right to recover of a carrier for personal injuries depends upon whether they were occasioned entirely by the negligence of the defendant, or whether the negligence of the plaintiff contributed to his injury in such a way that, but for such negligence, the injury would not have happened. (Ala.) Southern Ry. Co. v. Harrington, 59.

9. **CARRIERS—Personal Injuries—Contributory Negligence.**—In an action against a carrier for personal injuries, the defendant is liable, notwithstanding previous negligence of the plaintiff, if, when the injury was done, it might have been averted by the exercise of reasonable care and prudence on the part of the defendant. (Ala.) Southern Ry. Co. v. Harrington, 59.

10. **CARRIERS—Complaint by Passenger—Demurrer.**—If a count in a complaint for an injury to a passenger on a railroad train charges simple negligence only, and does not show that he was rightfully in the car of the defendant, a demurrer to the count is properly sustained, because, in the absence of such showing, it must be concluded that the plaintiff was a trespasser to whom the carrier owed no duty except not to willfully, wantonly or intentionally injure him. (Ala.) Broyles v. Central of Georgia Ry. Co., 50.

11. **CARRIERS—Negligence—Wantonness or Willfulness.**—In a Complaint for an injury to a passenger on a railroad train, caused by a wreck, simple negligence only is charged by allegations that the wreck was caused by the defendant's gross and reckless negligence, and that such negligence consisted in allowing rotten, unsound and insecure cross-ties to remain under the rails of the road at the place where the wreck occurred. Such allegations do not make a case of wantonness or willfulness. (Ala.) Broyles v. Central of Georgia Ry. Co., 50.

Riding on Pass Issued to Another.

12. **CARRIERS—Riding on Pass Issued to Another.**—A woman injured in a railroad wreck cannot recover for simple negligence, where it appears that her mother, when both of them were called upon for fare, handed the conductor passes for other persons, which he took, believing the parties entitled to ride thereon. In such a case a fraud was practiced upon the carrier, irrespective of the fact that the plaintiff did not know about the pass, and she was a mere trespasser. (Ala.) Broyles v. Central of Georgia Ry. Co., 50.

13. **CARRIERS—Riding on Pass Issued to Another.**—In an action for an injury to a person riding on a railroad train, where the issue is whether she was a trespasser by reason of her riding on a pass issued to another, she will not be allowed to answer a question

whether it was not customary for her to ride on a pass, as the question does not go far enough to state a custom that would include the case under consideration. (Ala.) *Broyles v. Central of Georgia Ry. Co.*, 50.

14. **CARRIERS—Riding on Pass Issued to Another.**—In an action for an injury to a person riding on a railroad train with her mother, the conductor may testify whether the mother, in handing him a pass issued to others, indicated for whom she was tendering the pass. (Ala.) *Broyles v. Central of Georgia Ry. Co.*, 50.

15. **CARRIERS—Riding on Pass Issued to Another.**—In an action for an injury to a person on a railroad train, where the whole question is whether she was rightfully on the train, the conductor should be allowed to testify whether the plaintiff, riding upon a pass presented to him, was the person to whom the pass was issued, and as to what a passenger must have to entitle him to ride. (Ala.) *Broyles v. Central of Georgia Ry. Co.*, 50.

16. **CARRIERS—Riding on Pass Issued to Another.**—In an action for an injury to a person who was riding on a pass issued to another, where the whole question is whether she was rightfully on the train, it is competent for the conductor to testify whether he agreed to let her ride without the payment of fare, or showing some other right to ride, or whether he had any right to let her ride without paying fare or being provided with a pass, for the purpose of showing that he did not knowingly consent to her riding on a pass issued to another and that he had no authority to do so. (Ala.) *Broyles v. Central of Georgia Ry. Co.*, 50.

17. **CARRIERS—Riding on Pass Issued to Another.**—In an action for an injury to a person riding on a train with her mother, where the company alleges that they were trespassers because riding on a pass issued to others, the conductor may properly testify that the mother said, in a tone loud enough to be heard by the daughter, that the pass presented to him by the mother was for herself and daughter. (Ala.) *Broyles v. Central of Georgia Ry. Co.*, 50.

18. **CARRIERS—Riding on Pass Issued to Another.**—In an action for an injury to a person riding on a train, caused by a wreck, where the issue is whether she was a mere trespasser by reason of riding on a pass issued to another, it is proper for the conductor to testify concerning his duty to compel persons tendering passes to identify themselves as the persons named in the passes. (Ala.) *Broyles v. Central of Georgia Ry. Co.*, 50.

Postal Clerks as Passengers.

19. **CARRIERS—Postal Clerks as Passengers.**—The relation of carrier and passenger, not that of master and servant, exists between railroads carrying United States mails, and the mail agents, postal clerks, and express messengers on the trains. (Ala.) *Southern Ry. Co. v. Harrington*, 59.

20. **CARRIERS—Liability to Postal Clerks or Mail Agents.**—While postal clerks, or mail agents, cannot avail themselves of the contract between a railroad carrier and the government, and make it a foundation for recovery, they can rest upon the breach of the duty which the law imposes upon every person who undertakes to perform a service for another, whether gratuitously or not, to exercise that degree of care and skill in its performance which the nature of the undertaking requires. (Ala.) *Southern Ry. Co. v. Harrington*, 59.

21. **CARRIERS—Duty to Warm Cars—Postal Clerks.**—It is the duty of a railroad company, as a common carrier, to warm its cars, including the one occupied by postal clerks, for the comfort and safety of passengers. (Ala.) *Southern Ry. Co. v. Harrington*, 59.

22. CARRIERS—Liability to Postal Clerks for Injuries.—A railroad company may be liable to a postal clerk on one of its cars for injuries caused by the negligence of its employees. He is entitled to the same degree of care as a passenger, in the absence of an express agreement exempting the carrier from such liability; and the power to contract for carrying the mails does not give the right to contract for such exemption. (Ala.) *Southern Ry. Co. v. Harrington*, 59.

23. CARRIERS—Failure to Heat Car.—As a Postal Clerk on a railroad must remain in the car provided for him while on duty, under a penalty imposed by the federal statute, he is not *prima facie* guilty of contributory negligence, nor does he assume the risk, by remaining in the car, though it is insufficiently heated, after he knows of its uncomfortable condition. (Ala.) *Southern Ry. Co. v. Harrington*, 59.

24. CARRIERS.—In an Action by a Postal Clerk against a railroad company for personal injuries sustained by reason of an improperly heated car, where the evidence shows defendant's negligence as alleged, the contributory negligence of the plaintiff in not wearing sufficient clothes, if relied upon, must be specially pleaded. (Ala.) *Southern Ry. Co. v. Harrington*, 59.

25. CARRIERS.—In an Action by a Postal Clerk against a railroad company for personal injuries sustained by reason of an improperly heated car, it is competent for the plaintiff to testify concerning his duties as postal clerk, and how long he had to remain in the car; to prove that the car was wet and damp; and to show that he made complaint to the defendant's agents of the condition of the car. (Ala.) *Southern Ry. Co. v. Harrington*, 59.

26. CARRIERS.—In an Action by a Postal Clerk against a railroad company for personal injuries by reason of an unheated car, it is not competent for the defendant to prove that the plaintiff was a "chronic kicker." (Ala.) *Southern Ry. Co. v. Harrington*, 59.

27. CARRIERS.—In an Action by a Postal Clerk against a railroad company for damages for a sickness caused by an unheated car, it is not competent for the defendant to prove the temperature of an express car, where it appears that the express car and the mail car were heated differently, in some respects, though each had steam pipes from the engines, if it also appears that these pipes were not heating the mail car, and that it was cold while the express car was warm; and, where the action is to recover for sickness on designated days in one month, it is not competent for the defendant to show that the plaintiff brought another suit against it for sickness occurring during the next succeeding month. In each case the evidence is irrelevant. (Ala.) *Southern Ry. Co. v. Harrington*, 59.

28. CARRIERS.—In an Action by a Postal Clerk against a railroad company for a sickness caused by an unheated car, an instruction directing a verdict for the defendant if it is found that the injuries of the plaintiff were proximately caused by insufficient clothing is properly refused where the question of adequate clothing has not been litigated. (Ala.) *Southern Ry. Co. v. Harrington*, 59.

Passenger at Station.

29. CARRIER—Injury of Passenger at Railway Station.—A person at a railroad station, within a reasonable time prior to the hour set for the departure of a train, with the bona fide intention of taking passage thereon, is entitled to the degree of care due a passenger; and when he is there injured by a train, the burden is cast on the carrier to negative the inference or presumption of negligence by it. (Iowa) *Dieckmann v. Chicago etc. Ry. Co.*, 420.

30. CARRIERS—Care Due Passenger at Station.—The rule of care due a passenger applies from the moment he enters the station for the purpose of embarking upon an approaching train, and he has the right to

expect that in going to the train and entering the cars at the place prepared for that purpose his safety will be vigilantly guarded. (Iowa) *Dieckmann v. Chicago etc. Ry. Co.*, 420.

31. CARRIERS—Care Due Passengers at Station.—Where the tracks at a station are so arranged that passengers intending to take a certain train must cross some of them, if due care requires the timely announcement of the approach of a train, the illumination of the path, or the services of a guide or escort, the failure to provide such safeguards, or properly to use the same, is negligence. (Iowa) *Dieckmann v. Chicago etc. Ry. Co.*, 420.

Passenger Crossing Tracks at Station.

32. CARRIERS—Invitation on Direction of Agent.—The untimely invitation or direction of an agent of a railroad company to passengers to cross certain tracks to embark on a waiting train, whereby they are led into danger and injured, constitutes negligence for which the carrier is liable unless relieved by showing want of care on the part of the passenger. (Iowa) *Dieckmann v. Chicago etc. Ry. Co.*, 420.

33. CARRIERS—Crossing Tracks at Station.—The fact that a passenger undertakes to cross a track at a station on which he knows a train is approaching is not necessarily negligence in law or in fact. (Iowa) *Dieckmann v. Chicago etc. Ry. Co.*, 420.

34. CARRIER—Crossing Tracks at Invitation of Agent.—Where a railroad station is so arranged that certain tracks must be crossed in order to reach a train, a waiting passenger is entitled to assume a reasonably safe way has been provided and that an announcement and invitation by the agent to cross is given in due time; and he is not, as a matter of law, guilty of contributory negligence in crossing the tracks, escorted by the agent, in the face of an approaching train. (Iowa) *Dieckmann v. Chicago etc. Ry. Co.*, 420.

35. CARRIERS—Crossing Tracks—Invitation of Agent.—An invitation, express or implied, by a gateman, station agent, conductor, or other employee of a railroad company, to cross a track, either for access to or exit from a train, excuses the person attempting the crossing from the ordinary obligation to stop, look, and listen for approaching trains, and he may ordinarily rely upon the invitation as an assurance of safety, and may assume that the movement of cars and trains over the crossing will be regulated with due regard to his safety. (Iowa) *Dieckmann v. Chicago etc. Ry. Co.*, 420.

See Ferries; Railroads; Sales, 3, 4.

CERTIORARI.

CERTIORARI.—That Proceedings are Void and subject to collateral attack is not a valid objection to a direct proceeding to set them aside, and certiorari may be maintained for that purpose. (N. H.) *Attorney General v. Crowley*, 725.

CHARITIES.

1. CHARITIES—Conveyance to Religious Society.—An agreement to convey land to trustees for an unincorporated religious society does not, in strictness, create a charitable use. (Ala.) *Gewin v. Mt. Pilgrim Baptist Church*, 41.

2. CHARITABLE INSTITUTION—Liability for Negligence.—The beneficiary of a charitable trust may not hold the corporation liable for the neglect of its servants, nor can an inmate, committed for punishment or reformation, hold a charitable institution of a quasi-penal character liable for such negligence. (N. Y.) *Hordern v. Salvation Army*, 889.

3. CHARITABLE INSTITUTION—Liability to Strangers.—A charitable or religious institution is liable to those persons who are not beneficiaries and who are injured by the negligence of its servants in the management of its property, to the same extent as any other owner of property. (N. Y.) *Hordern v. Salvation Army*, 889.

Note.

Charitable Institutions, care in selecting agents as affecting liability for torts, 899.

churches, liability for torts of agents, 905.

educational institutions, liability for torts of agents, 906.

exemption from liability for torts, and reasons therefor, 894, 895.

fire insurance patrol, liability for torts of agents, 907.

governmental agencies, liability for torts of agents, 906.

hospitals, liability for negligence of physicians, nurses and employees, 902-904.

hospitals receiving pay patients, liability in tort, 903.

hospitals conducted as adjunct of medical school, liability in tort, 904.

liability for torts of agents and servants, 894.

liability in tort to beneficiaries of charity, 900.

liability in tort to employees and strangers, 901.

liability in tort to persons not beneficiaries, 901.

railway hospitals, liability for negligence of physicians and nurses, 904.

reformatory institutions, liability for torts of agents, 906.

religious organizations, liability for torts of agents, 905.

CHILDREN.

See Constitutional Law, 19-23; Master and Servant, 7-12.

CHURCHES.

See Religious Societies.

COLORED PERSONS.

See Words and Phrases.

COMMERCE.

1. COMMERCE—Federal and State Jurisdiction.—The general subject of commerce for the purpose of defining federal and state jurisdiction in legislation may be divided into three fields: 1. That in which the power of the state is exclusive; 2. That in which the state may act in the absence of legislation by Congress; and 3. That in which the authority of Congress is exclusive. (N. Y.) *People v. Erie R. R. Co.*, 828.

2. INTERSTATE COMMERCE—Regulation of Hours of Labor.—Section 8 of the labor law in the consolidated laws, making it unlawful for an employee of a railroad company in charge of a block signal tower to be on duty more than eight hours in a day of twenty-four hours does not conflict with the act of Congress, approved March 4, 1907, making it unlawful for such employee, engaged in interstate commerce, to be on duty more than nine hours in any such day. (N. Y.) *People v. Erie R. R. Co.*, 828.

3. INTERSTATE COMMERCE—Statutes of Safety—Power of States.—Where Congress has prescribed a general minimum of safety applicable to average conditions throughout the country in the movement of interstate traffic, a state statute does not become obnoxious because, in response to special conditions prevailing within its limits,

it has raised such limit of safety. (N. Y.) *People v. Erie R. R. Co.*, 828.

4. INTERSTATE COMMERCE—Power Remaining With States.—A state law, whose effect upon interstate commerce is only incidental, is not forbidden by the commerce clause of the federal constitution, and may remain in force unless it is displaced by a congressional enactment dealing with the subject matter. (N. Y.) *New York Cent. etc. R. R. v. Williams*, 850.

5. INTERSTATE COMMERCE—Regulating Payment of Wages.—Until Congress shall intervene to regulate the payment of wages by interstate carriers, a state statute upon the subject is free from the objection that it constitutes a commercial regulation solely within the power of the federal government to prescribe. (N. Y.) *New York Cent. etc. R. R. v. Williams*, 850.

See Attachment, 2, 3.

COMPOUNDING FELONY.

See Contracts, 15.

CONDITIONS PRECEDENT AND SUBSEQUENT.

1. CONTRACTS—Condition Precedent to Right of Action.—When parties capable of contracting have deliberately entered into a written contract, by which there is created a condition precedent to a right of action, such condition must be performed or its requirements waived. (Ind.) *Korbly v. Loomis*, 379.

2. CONTRACT—Condition Precedent—Pleading.—In an action for the breach of a contract, the party seeking to enforce the same must allege, as to conditions precedent, that he has complied with all such conditions on his part, or state facts showing a proper excuse for not having performed the same. (Ind.) *Korbly v. Loomis*, 379.

3. CONTRACT—Condition Precedent—Pleading.—The performance of a condition precedent may be alleged by the general allegation provided for by statute (*Burns' Rev. Stats. 1908, sec. 376; Rev. Stats. 1881, sec. 370*); otherwise the performance must be alleged with the particularity required by the rules of the common law. (Ind.) *Korbly v. Loomis*, 379.

4. ESTATES—Condition Subsequent—Possibility of Reverter.—The only practical distinction between a right of entry for breach of a condition subsequent and a possibility of reverter upon a determinable fee is, that in the former the estate in fee does not terminate until entry by the person having the right, while in the latter the estate reverts at once upon the occurrence of the event by which it is limited. (N. H.) *Lyford v. Laconia*, 680.

CONSPIRACY.

CONSPIRACY.—Evidence of the Nature and Properties of Phosphorus is Admissible in a prosecution for conspiracy to defraud an express company by preparing and shipping a package, securely wrapped, represented to contain valuable papers, but in reality containing phosphorus and other materials so arranged that when sufficiently dried the phosphorus will ignite and the contents of the package be burned and consumed. (Ind.) *McDonald v. State*, 383.

CONSTITUTIONAL LAW.

In General.

1. CONSTITUTIONAL LAW—Security of Personal Liberty.—In the constitution of Oklahoma, the utmost pains have been taken to

preserve all the securities of individual liberty, and all provisions of the constitution designed to safeguard the liberty and security of the citizen should be liberally construed by the courts. (Okl. Cr.) *Salter v. State*, 935.

2. **CONSTITUTIONAL LAW.**—The Fourteenth Amendment to the federal constitution was made for the protection of natural persons and cannot be invoked by a corporation. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

3. **CONSTITUTIONAL LAW.**—The Fifth Amendment to the federal constitution operates exclusively in restriction of federal power, and has no application to the several states. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

4. **CONSTITUTIONAL AMENDMENT and Legislative Act Distinguished.**—The line of demarcation between a constitutional amendment and a purely legislative act is well defined. Constitutional provisions and amendments relate to the fundamental law and certain fixed first principles upon which government is founded; they are permanent, uniform and universal, and can be amended and revised only according to the provisions contained therein. (Mo.) *State v. Roach*, 369.

5. **CONSTITUTIONAL LAW.**—A Classification of Corporations with reference to their relations to the public is manifestly reasonable, and as long as all corporations of the same class are treated alike, the action of the legislature may not be condemned by the courts for inequality. (N. Y.) *New York Cent. etc. R. R. v. Williams*, 850.

6. **CONSTITUTIONAL LAW.**—It is the Duty of the Courts to Uphold a statute enacted by the legislature as constitutional, if it is possible to do so without disregarding the plain command or necessary implication of the fundamental law. (N. Y.) *New York Cent. etc. R. R. v. Williams*, 850.

7. **CONSTITUTIONAL LAW.**—Presumption in Favor of Statutes. While it is the duty of the courts to uphold any statute enacted in the ordinary exercise of the legislative power, unless the constitutional objections to it are clear and indisputable, yet when it is proposed by a statute to deny, modify or diminish a right or immunity secured to the people by a clear and explicit constitutional provision, then the presumption is against the validity of the statute, and the courts should enforce the constitutional provision. (Okl. Cr.) *Salter v. State*, 935.

Retrospective and Curative.

8. **CONSTITUTIONAL LAW.**—Retrospective Statute.—Any statute which, acting retrospectively, deprives one of vested property rights is unconstitutional. (Ill.) *Sears v. Chicago*, 319.

9. **CONSTITUTIONAL LAW.**—Act to Cure Plat.—Prior Conveyances.—The curative act of 1843, intended to remedy omissions and defects in the plat of School Section Addition to Chicago, did not vest the fee in the streets of the city. The title of the abutting lot owners who purchased lots in that addition before the passage of the act had become vested to the center of the streets, and that act could not disturb the vested rights acquired to the center of the streets by deed from the owner. (Ill.) *Sears v. Chicago*, 319.

Change in Senatorial Districts.

10. **CONSTITUTIONAL LAW.**—Change in Senatorial Districts.—The constitutional provisions applicable to redistricting the senatorial districts of the state simply points out a plan or method for such redistricting, and prescribes permanent rules and principles for carrying

out such plans or method, while the matter of actually redistricting is a subject of a very temporary character demanding frequent alterations and changes, and it was never contemplated to incorporate as a part of the permanent and fundamental law of the state a provision which must of necessity demand frequent alterations and changes. (Mo.) *State v. Roach*, 639.

11. CONSTITUTIONAL LAW—Senatorial Districts—Temporary Provision.—Section 11 of article 4 of the constitution, providing for the division of the state into senatorial districts prior to the census of 1880, was for a temporary purpose, and its existence limited until appropriate provisions could be made for the organization of the state into proper senatorial districts. The section was self-terminating and has had no existence since 1881. (Mo.) *State v. Roach*, 639.

12. CONSTITUTIONAL LAW—Change in Senatorial Districts.—Section 7, article 4 of the constitution provides for the division of the state into senatorial districts and for revision and adjustment every ten years, and this section must be amended before any other division than that there provided for can be made by legislative action, whether by the people under the initiative law or otherwise. (Mo.) *State v. Roach*, 639.

Right to Contract.

13. CONSTITUTIONAL LAW—Right to Contract.—It is the inherent right of every man to freely deal, or refuse to deal, with his fellow-men, and this right is not to be destroyed or abridged by acts involving the elements of the common-law action for deceit. (N. H.) *Huskie v. Griffin*, 718.

14. CONSTITUTIONAL LAW—Contracts—Open Market.—As the right to deal or not to deal with others is inherent in the idea of Anglo-Saxon liberty, prima facie a man can demand an open market; and one who interferes with this free market must justify his acts or respond in damages. (N. H.) *Huskie v. Griffin*, 718.

Regulating Hours of Labor.

15. CONSTITUTIONAL LAW—Regulation of Hours of Labor.—The doctrine that the legislature, under proper circumstances and within reasonable limits, may exercise its police power in the regulation of hours and conditions of labor is now thoroughly and broadly established. One form of such class of legislation has for its object the promotion of the health and welfare of the employee, and another seeks to protect the safety of the public by limiting the hours of labor of those who are in control of dangerous agencies. (N. Y.) *People v. Erie R. R. Co.*, 828.

16. CONSTITUTIONAL LAW—Hours of Labor—Train-dispatchers. A statute making it unlawful for an employee of a railroad company in charge of a block signal tower to be on duty more than eight hours in a day of twenty-four hours is valid as an exercise of the police power to protect the safety of the public by limiting the hours of labor of those who are in control of dangerous agencies, lest by excessive periods of duty they become fatigued and indifferent, and cause accidents leading to injuries and destruction of life. (N. Y.) *People v. Erie R. R. Co.*, 828.

17. CONSTITUTIONAL LAW—Hours of Labor—Train-dispatchers. A statute making it unlawful for an employee of a railroad company in charge of a block signal tower to be on duty more than eight hours in a day of twenty-four hours cannot be said to be an unreasonable exercise of the power and discretion of the legislature, when considered with relation to the duties performed by such employees. (N. Y.) *People v. Erie R. R. Co.*, 828.

18. CONSTITUTIONAL LAW—Hours of Labor—Corporations.—Under the reserved control of the state over corporations, the legislature has power to limit the hours of labor of employees of a railroad company in charge of a block signal tower. (N. Y.) *People v. Erie R. R. Co.*, 828.

Regulating Employment of Children.

19. CONSTITUTIONAL LAW—Children.—A Statute Regulating the Hours of Employment in manufacturing establishments of persons under sixteen years of age, and forbidding the employment therein of children under fourteen years, is constitutional. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

20. CONSTITUTIONAL LAW—Employment of Children.—The fourteenth amendment to the federal constitution is not violated by the law regulating the employment of children: *Burns' Rev. Stats.* 1908, sec. 8021 et seq.; *Acts* 1899, p. 231, secs. 1, 2. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

21. CONSTITUTIONAL LAW—Employment of Children.—Children under the age of sixteen years are wards of the state, and are pre-eminently fit subjects for the protecting care of its police power; and laws prohibiting or regulating their employment constitute a valid exercise of that power. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

22. CONSTITUTIONAL LAW—Employment of Children.—The length to which the state may go in providing measures looking toward the physical, moral and intellectual well-being of its helpless wards is a question of expediency and propriety, which it is the province of the legislature to determine. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

23. CONSTITUTIONAL LAW—Employment of Children.—The law regulating the employment of children (*Burns' Rev. Stats.* 1908, sec. 8021 et seq.; *Acts* 1899, p. 231, secs. 1, 2) is not unconstitutional as class legislation. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

Regulating Payment of Wages.

See Commerce, 5.

24. CONSTITUTIONAL LAW—Statute Regulating Payment of Wages.—A statute requiring all railroad corporations in the state to pay the wages of their employees semi-monthly and in cash does not have the effect of depriving the corporations affected thereby of liberty or property without due process of law or deny to them equal protection of the laws. (N. Y.) *New York Cent. etc. R. R. v. Williams*, 850.

25. CONSTITUTIONAL LAW—Regulation of Payment of Wages. Sections 10 and 11 of the labor laws (*Consol. Laws*, c. 31), requiring the semi-monthly payment of wages by certain corporations is a constitutional enactment under the reserved power of the legislature over corporations. It does not confiscate corporate property, directly or indirectly. (N. Y.) *New York Cent. etc. R. R. v. Williams*, 850.

26. CONSTITUTIONAL LAW—Labor Laws—Statute Void in Part. Assuming that sections 10 and 11 of the labor laws (*Consol. Laws*, c. 31), requiring the wages of employees of railroads to be paid semi-monthly and in cash, to be unconstitutional so far as individual owners of railroads are concerned, the provision relating to them is readily separable from the rest of the statute relating to corporations, and its validity in this respect need not affect the application of the provision to steam surface railroad corporations. (N. Y.) *New York Cent. etc. R. R. v. Williams*, 850.

See Appeal and Error, 1; Corporations, 4-8; Elections; Initiative and Referendum; Officers, 2-9; Peddlers.

Note.

Constitutional Law, wages, validity of statute prescribing time of payment, 864.

wages, validity of statute prescribing method of payment, 868.

wages, validity of statute fixing amount, 873.

wages, validity of statute prescribing manner of determining amount, 874.

wages, validity of statute imposing penalty affecting amount, 874.

wages, validity of statute prohibiting assignment, 875.

wages, validity of statute making wages preferred claim, 877.

wages, validity of statute forbidding garnishment, 876.

CONTRACTS.*In General.*

1. **CONTRACTS—Parties—Name of Third Person at End.**—If a contract states distinctly that it is between two designated parties, the fact that another person's name appears at the end of the contract with that of one of the parties does not make it his contract. (Ala.) *Shriner v. Craft*, 19.

2. **CONTRACTS—Void in Part—Separable Provisions.**—A contract is not altogether void because of a void provision, if that provision can be separated from the rest of the contract. A lawful promise made for a lawful consideration is not invalid by reason only of an unlawful promise being made at the same time and for the same consideration. (N. Y.) *Central New York Tel. & Tel. Co. v. Averill*, 878.

3. **CONTRACT—Refusal to Perform Unless Paid More.**—If a party refuses to do the work which his contract requires him to do, or even threatens to abandon the work unless he is paid more, and the other promises, while the original contract is still subsisting, to pay more, such promise is merely one to pay for what the promisee was already obliged to do, and a nudum pactum. (Ala.) *Shriner v. Craft*, 19.

4. **CONTRACTS—Rescission, What Constitutes—New Contract.**—It is essential to the mutual assent to a written contract that there be something to be assented and agreed to on each side; and if the parties agree to rescind the contract, and each one gives up the provisions for his benefit, the mutual assent is complete, and the parties are then competent to make any new contract that may suit them. (Ala.) *Shriner v. Craft*, 19.

5. **CONTRACTS—Payment—Pleading and Proof.**—Payment, after the breach of a contract, is new matter to be specially pleaded and proved by the defendant. Payment after breach cannot be shown under the general issue. (Ala.) *Pollak v. Winter*, 33.

6. **CONTRACTS—Breach—Proof Required of Plaintiff.**—In an action on a contract the plaintiff must prove a breach of the contract by showing that his debt was not paid when contracted or at maturity. (Ala.) *Pollak v. Winter*, 33.

7. **CONTRACTS—General Charge.**—In an Action on a contract, the plaintiff is not entitled to the general charge where a plea of the general issue has been interposed, and he has not shown a breach of the contract sued on. (Ala.) *Pollak v. Winter*, 33.

Modification by Parol Agreement.

8. **CONTRACTS—Modification by Oral Agreement.**—The parties to a written contract may, by mutual parol agreement, modify the contract; but such modification can be nothing but a new contract and must be supported by a consideration like every other contract. (Ala.) *Shriner v. Craft*, 19.

9. CONTRACTS—Modification by Parol Agreement—Consideration.—Where the parties to a written contract seek to modify it by a parol agreement, the mutual obligations assumed by the parties, at the time of the modification, constitute a sufficient consideration. If one piece of contract work is substituted for another, the contractor is released from doing one in consideration that he will do the other. (Ala.) *Shriner v. Craft*, 19.

10. CONTRACTS—Modification by Parol Agreement—Nudum Pactum.—Where the parties to a written contract seek to modify it by a parol agreement, but one of the parties does not assume any obligation or release any right, then a promise by the other is a nudum pactum and void. (Ala.) *Shriner v. Craft*, 19.

Building Contract—Architect's Certificate.

11. CONTRACT TO BUILD—Action for Breach—Demurrer to Plea. There is no error in sustaining a demurrer to a plea, in an action for the breach of a contract to build, alleging a breach of the plaintiff's agreement to have an ordinance passed taking out of the fire limits the lots on which the contractor was to build in time to enable him to begin work as required by the contract, where such plea alleges that the ordinance was not passed until two weeks after the time when the defendant was to commence work on the houses according to the contract; and where the contract, set out in the complaint, does not fix any time when work was to be commenced. Such plea is also subject to demurrer in not showing whether the agreement to have the ordinance passed was made at the time of the original contract or afterward, and in not showing whether there was any consideration for it. (Ala.) *Shriner v. Craft*, 19.

12. CONTRACT TO BUILD—Architect's Certificate—Evidence.—Where the owner brings an action for the breach of a building contract by abandonment, the certificate of the architect is admissible in evidence if the contract provides that the certificate as to the expenses incurred by the owner and the damages incurred through default shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties. (Ala.) *Shriner v. Craft*, 19.

13. CONTRACT TO BUILD—Architect's Certificate—Conclusiveness.—The mere admission in evidence of an architect's certificate does not necessarily make it conclusive evidence of the facts recited; but where a building contract specially provides that such certificate shall be final and conclusive, it is so in its legal effect on the parties to the contract, and can be impeached only for fraud, or such gross mistakes as would imply bad faith or a failure to exercise an honest judgment. (Ala.) *Shriner v. Craft*, 19.

14. BUILDING CONTRACT—Architect's Certificate—Pleading.—When the parties to a building contract have made the certificate of an architect or engineer a condition precedent to the assertion of a right thereunder, such provision is valid, and the party claiming such right must show, by proper allegations, the performance of the conditions, a valid reason for noncompliance therewith, or a waiver thereof. (Ind.) *Korbly v. Loomis*, 379.

Public Policy—Compounding Felony.

15. CONTRACTS—Compounding Felony.—A Contract by which property is conveyed in satisfaction of an embezzlement, with a provision against prosecution, is void, and will not sustain an action either to compel performance or to recover back the property. (N. J. Eq.) *Jourdan v. Burstow*, 741.

16. CONTRACTS—Enforcement Against Public Policy.—Courts will not help a plaintiff to recover money where the recovery is sought upon the footing of an agreement contrary to public policy. (N. J. Eq.) *Jourdan v. Burstow*, 741.

Restraint of Trade.

17. **RESTRAINT OF TRADE—Partial Restraint.**—While a Contract in general restraint of trade is illegal and void, the law permits contracts in partial restraint of trade, under some circumstances, where they are not unreasonable and are supported by sufficient consideration. (N. Y.) *Central New York Tel. & Tel. Co. v. Averill*, 878.

18. **RESTRAINT OF TRADE—Partial Restraint.**—Where the Business to which a contract relates is of such a character that it cannot be subjected even to the partial restraint which is contemplated without injury to the public interest, then such partial restraint cannot be tolerated. (N. Y.) *Central New York Tel. & Tel. Co. v. Averill*, 878.

19. **RESTRAINT OF TRADE—Contracts Void in Part.**—The provisions of a contract whereby a telephone company installs a system in a hotel upon a covenant by the hotel proprietor to subscribe to the service for nine years, and a provision of the same contract prohibiting him during such time from installing or using the system of any other telephone company, are separable, and while the latter is void as being in restraint of trade, such invalidity does not affect the other provision. (N. Y.) *Central New York Tel. & Tel. Co. v. Averill*, 878.

See Conditions Precedent and Subsequent.

CORPORATIONS.*In General.*

1. **CORPORATIONS—Purposes of Incorporation—"Lawful Business."**—A statute allowing the formation of a corporation to carry on "any lawful business" does not intend to include the work of the learned professions. Business in its ordinary sense is all that is intended. (N. Y.) *In re Co-operative Law Co.*, 839.

2. **CORPORATIONS—Application for Approval—Appearance of Attorney General.**—By reason of his ancient common-law duty to represent the people, the appearance of the attorney general is proper in a proceeding to obtain the approval of the existence, organization and incorporation of a corporation by the appellate division, the people being concerned therein. (N. Y.) *In re Co-operative Law Co.*, 839.

3. **CORPORATIONS—Proof of Existence and Citizenship.**—The introduction of a certified copy of articles of incorporation of a corporation showing it to be duly organized and existing under the laws of Colorado is sufficient proof of its existence and of the citizenship of its stockholders. (Colo.) *Duncan v. Eagle Rock Gold Min. etc. Co.*, 288.

Reserved Power of Legislature.

4. **CORPORATIONS—Reserved Power of Legislature—Amendment of Charter.**—In exercising the reserved power to amend corporate charters, the legislature may not deprive a corporation of property already acquired or the proceeds of lawful contracts previously made, or destroy or substantially impair the purposes of the grant or rights which are vested in the corporation thereunder; but it may make any alteration or amendment of a charter which will not defeat or impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right. (N. Y.) *New York Cent. etc. R. R. v. Williams*, 850.

5. **CORPORATIONS—Reserved Power of Legislature—Right of Contract.**—In the case of corporations, such as railroad companies,

which are clothed to some extent with a public trust and are under an obligation to discharge duties which affect the community at large, the legislature may make amendments to their charters in furtherance of the public interest for the benefit of their employees, even though such amendments operate as limitations upon the right to contract. (N. Y.) New York Cent. etc. R. R. v. Williams, 850.

6. **CORPORATIONS—Reserved Power of Legislature.—Increase of Burdens** imposed by an amendment of a corporate charter must be deemed to have been contemplated by the corporators at the organization of the corporation. (N. Y.) New York Cent. etc. R. R. v. Williams, 850.

7. **CORPORATIONS—Reserved Power of Legislature—Amendment of Charter.**—Under its reserved power over corporations the legislature may amend the charter of a corporation by a general law which does not specifically refer to such charter. (N. Y.) New York Cent. etc. R. R. v. Williams, 850.

8. **CORPORATIONS—Statute Regulating Payment of Employees.** The clause of the New York statute requiring railroad corporations to pay employees semi-monthly, being applicable to all steam surface railroad corporations, operated as a repeal of all the charters of such corporations, if any there were, which provided a different time for the payment of employees and as an amendment or addition to all charters in which no time of payment was prescribed. (N. Y.) New York Cent. etc. R. R. v. Williams, 850.

9. **CORPORATIONS—Statute Regulating Payment of Employees.** Statutes requiring corporations to pay their employees in lawful money fall within the reserved power to amend corporate charters. (N. Y.) New York Cent. etc. R. R. v. Williams, 850.

Similarity of Names—Injunction.

10. **CORPORATIONS—Use of Similar Names.—Relief in Equity** against the use by one corporation of a name similar to that of another corporation carrying on the same character of business is granted, because experience has demonstrated that the public is misled, and the corporation first established is defrauded on account of the similarity of the names. (Mich.) Michigan Sav. Bank v. Dime Sav. Bank, 558.

11. **CORPORATIONS—Similarity of Names—Injunction.**—In an action to enjoin the use of a name by a corporation upon the ground that it is too similar to that of another corporation, the inquiry must be whether it is likely that the public will be misled, and whether the complaining corporation is likely to be injured. Experience, not in the particular case, but in other cases, must be employed in determining the fact. Mere conjecture is not sufficient. (Mich.) Michigan Sav. Bank v. Dime Sav. Bank, 558.

12. **CORPORATIONS—Similarity of Names.**—The name "Bank of Michigan" is not so similar to "Michigan Savings Bank," in the absence of fraud or estoppel, as to prevent the use of the former. (Mich.) Michigan Sav. Bank v. Dime Sav. Bank, 558.

Practice of Law.

13. **CORPORATIONS.—The Practice of the Law** is not a lawful business for a corporation to engage in, as the conditions required by statute and the rules of courts of those engaged in the practice of the law cannot be fulfilled by a corporation. (N. Y.) In re Co-operative Law Co., 839.

14. **CORPORATIONS—Practice of Law—Approval by Court.**—A corporation formed for the purpose of practicing law is not one "engaged in a business authorized by the provisions of any existing statute." within the meaning of section 280, Penal Laws (Laws 1909,

c. 483), and therefore not one whose "existence, organization or incorporation" can be lawfully approved by the appellate division. (N. Y.) *In re Co-operative Law Co.*, 839.

Incorporation Under Laws of Another State.

15. **CORPORATION—Incorporation Under Laws of Another State.** The fact that a corporation is formed in one state with the declared purpose of doing business partly in another state justifies the assumption that with regard to the business to be done in that other state the incorporators agree to be bound by its laws, and it matters not whether it is all or only a part of their business that they intend to do there. (Cal.) *Thomas v. Wentworth Hotel Co.*, 120.

16. **CORPORATION—Place of Business in Sister State.**—The naming, in articles of incorporation, of a locality outside of the state as one of the corporation's principal places of doing business is equivalent to declaring that the corporation is to do business in part in the state in which that locality is. (Cal.) *Thomas v. Wentworth Hotel Co.*, 120.

Stockholders' Liability.

17. **CORPORATION—Stockholder's Liability—Pleading.**—The measure of the liability of a stockholder is the proportion his stock bears to all the stock subscribed. Hence in an action against him for his proportionate part of an indebtedness of the corporation, the complaint should aver the total number of shares subscribed. (Cal.) *Thomas v. Wentworth Hotel Co.*, 120.

18. **CORPORATION—Stockholder's Liability—Pleading.**—Where, in an action against a stockholder, the complaint should aver the total number of shares of stock of the corporation subscribed, the use of "outstanding" instead of "subscribed" may subject the averment to objection as being, at most, imperfect or ambiguous, which objection, to be good, must be raised before trial and judgment. (Cal.) *Thomas v. Wentworth Hotel Co.*, 120.

19. **CORPORATION—Stockholder's Liability—Conflict of Laws.**—A member of an extrastate corporation which has duly filed certified copies of its articles in California and done business there accordingly cannot, as to such business, escape liability properly his under the laws of California, on the ground of the contrary effect of the laws of the state of the incorporation. (Cal.) *Thomas v. Wentworth Hotel Co.*, 120.

20. **CORPORATION—Stockholder's Liability—What Law Enters into.**—It is true that the liability of a stockholder rests upon contract and that the terms of the contract between incorporators are to be ascertained from the articles of incorporation read in the light of the statute which authorized the creation of the corporate body; but when a contract is made with reference to a jurisdiction other than that of the place of contracting, the parties will be deemed to have inserted in their agreement the law of that other jurisdiction, and it is so with members of a corporation whose articles contemplate doing business in a sister state. (Cal.) *Thomas v. Wentworth Hotel Co.*, 120.

21. **CORPORATION—Stockholder's Liability—Conflict of Laws.**—The filing in due form in California of certified copies of articles of an extrastate corporation, by which articles a stockholder is expressly exempt from liability for corporate debts—all in conformity with the laws of the state of the incorporation—does not, as to business done by the company in California, estop a creditor in the latter state to sue a member of such corporation, in the face of the laws of California which expressly withhold such exemption. (Cal.) *Thomas v. Wentworth Hotel Co.*, 120.

Purchase of Stock from Agent.

22. CORPORATE STOCK—Purchase from Agent.—Where a pledgee or a purchaser takes stock with notice that the capacity of the party he deals with is that only of an agent, he cannot deny the rights therein of the principal. (Pa.) *Sloan v. Brown*, 1019.

23. CORPORATE STOCK—Purchase from Agent.—A Broker Buying Stock not of its owner but of his agent is bound to inquire into that agent's authority. (Pa.) *Sloan v. Brown*, 1019.

24. CORPORATE STOCK—Purchase from Agent.—A Broker, After Buying Stock of an agent at a price under that fixed by the agent's authority, must, on tender of that price back with interest, restore the stock of the principal. (Pa.) *Sloan v. Brown*, 1019.

25. CORPORATE STOCK—Leaving With Agent to Sell.—Laches cannot be imputed to an owner of stock who leaves it in his agent's hands, with a power of attorney, for the purpose of selling or pledging it, provided he instructs the agent as to the figure at which he is to part with it. (Pa.) *Sloan v. Brown*, 1019.

Declaration of Dividends.

26. CORPORATIONS—Declaration of Dividends.—A Resolution will be construed as equivalent to a declaration of a dividend, where any other construction would amount to an illegal preference among the stockholders. (Mich.) *Barnes v. Spencer & Barnes Co.*, 587.

27. CORPORATIONS—Declaration of Dividends—Informal Action. A dividend may be legal even though not formally declared, it being paid by common consent. The stockholders may agree among themselves informally to distribute a certain sum as dividends without being through the form of corporate action. (Mich.) *Barnes v. Spencer & Barnes Co.*, 587.

28. CORPORATIONS—Declaration of Dividends—Promissory Note. Where all of the stockholders of a corporation have, by common consent, been paid money as dividends in proportion to the stock carried by them, except one to whom a promissory note was given, and all of the stockholders and directors knew of and approved that course of procedure, such note will not be held void as given without consideration or authority. (Mich.) *Barnes v. Spencer & Barnes Co.*, 587.

Sale of Corporate Property.

29. CORPORATION—Sale of Corporate Property by Directors.—It is statutory in Pennsylvania that in the absence of fraud or collusion a sale of corporate property by the board of directors, a majority of the stockholders consenting, cannot be assailed by the minority, since in becoming a stockholder one has notice of the power of the board so to sell. (Pa.) *Koehler v. St. Mary's Brew. Co.*, 1024.

30. CORPORATION—Sale of Corporate Property by Directors.—Although a minority stockholder may not protest a sale of corporate property by the directors on the sole ground of inadequacy of price, he may on the ground of the nature of what represents the price, if it is other than money. A sale contemplates a money return for the thing transferred. (Pa.) *Koehler v. St. Mary's Brew. Co.*, 1024.

31. CORPORATION—Sale of Property.—Where the Consideration for a conveyance of corporate property consists of mortgage bonds of another corporation, instead of money, a dissatisfied stockholder must be paid off in cash according to the ratio his stock bears in value to what would be his proportion of the bonds. (Pa.) *Koehler v. St. Mary's Brew. Co.*, 1024.

Dealings with Officer—Promissory Note.

32. CORPORATIONS—Promissory Note to President.—A promissory note of a corporation, executed by its president to himself, for property sold to the corporation in good faith and for a fair value, and with the knowledge and subsequent approval of the directors and stockholders, is valid. (Mich.) *Barnes v. Spencer & Barnes Co.*, 587.

33. CORPORATION—Dealings With Officer.—An officer of a corporation may deal with it if his acts are open and fair and known to the directors and stockholders. (Mich.) *Barnes v. Spencer & Barnes Co.*, 587.

34. CORPORATIONS—Profits by Officer—Remedy.—Where it is claimed an officer of a corporation has made a profit from his dealings with the corporation, the remedy, if any, is a suit in equity for an accounting. (Mich.) *Barnes v. Spencer & Barnes Co.*, 587.

35. CORPORATION—Promissory Note.—A Failure to Deny, under oath, the execution of a promissory note executed by the president of a corporation, in its behalf, set out in the complaint, makes the note competent evidence, and when introduced in evidence, it makes a prima facie case against the corporation. (Mich.) *Barnes v. Spencer & Barnes Co.*, 587.

See Libel and Slander, 7-10; Venue, 1.

Note.

Corporations, affirmation of transaction between officer and corporation, 612.

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transaction between officer and corporation, validity of, 598-627.

transactions between officer and corporation, when valid, 608-612.

trust relation between officers and corporation, 599-605.

COURTS.*Rules of Court.*

1. RULES OF COURT—Adoption and Promulgation.—There can properly be no such thing as an oral rule of court. Rules of court, when legally adopted and promulgated, have the effect of positive laws, and they ought not only to be formally promulgated, but they

should be definitely stated. They should be published and made known in some permanent form so that they may be known to all. (Ind.) *McDonald v. State*, 383.

Stare Decisis.

2. **STARE DECISIS**—Application of Doctrine.—When a court of last resort has persistently declared approval of a rule of law, it should not lightly be ignored, especially when, in the presence of conflicting decisions in other jurisdictions, such declarations amount to the adoption of the views of those courts approving the rule. (Wis.) *Will of Hawkinson*, 1091.

See Judges.

CRIMINAL LAW.

In General.

1. **CRIMINAL LAW**—Judgment Barred by Statute—Remedy.—Where the statute has interposed a bar subsequent to conviction but prior to rendition of judgment, the remedy is by motion in arrest of judgment, or an appeal from the judgment if rendered. The writ of habeas corpus is not a proper remedy. (N. Y.) *People v. Frost*, 801.

2. **CRIMINAL LAW**—What Law Governs—Change from Territory to State.—Under an indictment for murder returned prior to statehood, the defendant should be tried and punished under the law as it existed at the time of the commission of the offense. (Okl. Cr.) *O'Barr v. United States*, 959.

3. **CRIMINAL TRIAL**—Conduct of Counsel in Argument.—The defendant being on trial for murder, it was improper for the prosecuting attorney, in his closing argument, to make use of the statement: "It is your duty to punish this defendant, who by the means of whisky given the poor girl, weakened her will and dulled her senses, and has been her ruin." (Okl. Cr.) *O'Barr v. United States*, 959.

Presence of Accused.

4. **CRIMINAL TRIAL**—Presence of Accused in Felony Case.—In a criminal prosecution for a felony, the defendant must be present, in person, during the trial, and the record must affirmatively show this fact. (Okl. Cr.) *Humphrey v. State*, 972.

Plea in Abatement.

5. **CRIMINAL LAW**—A Plea in Abatement must be supported by proof of the truth thereof by affidavit or other evidence. (Mo.) *State v. Martin*, 628.

6. **CRIMINAL LAW**—Plea in Abatement.—A pleading alleging that an indictment is violative of certain provisions of the constitution, and therefore should be quashed and the prosecution abated, not supported by affidavit or other proof, cannot be considered a plea in abatement. (Mo.) *State v. Martin*, 628.

Instructions.

7. **CRIMINAL LAW**—Instructions—Trial by Court.—Where the trial is by the court upon an agreed statement of facts, there is no necessity of instructions or of the court directing itself as to the law of the case. (Mo.) *State v. Martin*, 628.

8. **CRIMINAL TRIAL**—While an Instruction Relating to the Penalty for the crime charged, where the jury have nothing to do with imposing the penalty, may be technically erroneous, it is error without prejudice, and consequently no ground for reversing a judgment. (S. D.) *State v. Egland*, 1066.

9. CRIMINAL LAW—Instructions—Included Offense.—The trial court is not required, in the absence of a request, to instruct the jury that under Revised Code of Criminal Procedure of South Dakota, section 409, "the jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment or information, or of an attempt to commit the offense." (S. D.) *State v. Vierck*, 1040.

Verdict and Sentence.

10. CRIMINAL TRIAL—Prima Facie Case—Direction of Verdict. When the state has introduced evidence upon which, if believed by the jury, they may reasonably find the defendant guilty of the crime charged, the state has made out a prima facie case, and the court is not justified in directing a verdict in favor of the defendant. (S. D.) *State v. Egland*, 1066.

11. CRIMINAL LAW—General Finding on Two Counts.—Where it is apparent from the record that two counts of an indictment have reference to a single transaction, and the charge in the indictment has been treated by both parties as having reference to simply one offense, a general finding of guilty will not be reversed. (Mo.) *State v. Martin*, 628.

12. CRIMINAL LAW—Sentence.—The Time Fixed for Execution of a sentence, or for the commencement of its execution, is not one of its essential elements, and, strictly speaking, forms no part of the judgment and sentence, which is the penalty of the law as declared by the court; while the direction with respect to the time of carrying it into effect is in the nature of an award of execution, so that, where the penalty is imprisonment, the sentence may be satisfied only by the actual suffering of the imprisonment imposed, unless remitted by death or some legal authority. (Okl. Cr.) *Ex parte Eldridge*, 967.

13. CRIMINAL LAW—Sentence—Arrest of Convict at Large.—Where a convicted defendant is at liberty and has not served his sentence, and the same is not stayed as provided by law, he may be arrested as an escape and ordered into custody on the unexecuted judgment. (Okl. Cr.) *Ex parte Eldridge*, 967.

14. CRIMINAL LAW—Sentence.—Expiration of Time Without Imprisonment is in no sense an execution of the sentence. (Okl. Cr.) *Ex parte Eldridge*, 967.

See *Bail; Jurors*.

CURATIVE STATUTE.

See *Constitutional Law*, 9.

DAMAGES.

1. DAMAGES—Measure of for Excavating and Taking Sand.—Where one has excavated another's lot, mistaking it for his own, and has taken sand out and sold it, the measure of damages is not the cost of filling up the lot again, but the value of the sand. (Ky.) *Merriwether v. Bell*, 488.

2. DAMAGES.—The Grief, Anxiety, Worry, Mortification and humiliation which one suffers by reason of physical injuries are component parts of the "mental suffering" for which admittedly damages may be awarded. (Cal.) *Merrill v. Los Angeles Gas & Elec. Co.*, 134.

3. DAMAGES.—In Respect of the Physical Pain and mental anguish for which plaintiff asks compensation, it matters not whether the jury find that such were caused by or were because of the injuries received, both expressions being within the meaning of "by

reason of the injury" which has been held as the rule in that particular. (Cal.) *Merrill v. Los Angeles Gas & Elec. Co.*, 134.

DEATH.

See Parent and Child, 2.

DEATH OF JUDGE.

See New Trial, 1.

DEDICATION.

DEDICATION.—The Plat of School Section Addition to Chicago, not having been executed according to the statute then in force, amounted merely to a common-law dedication, and the abutting owners took the fee to the center of the streets marked thereon. (Ill.) *Sears v. Chicago*, 319.

DEED.

In General.

1. **DEED—Use of Word "Heirs."**—In Iowa the use of the term "heirs" or other technical words of inheritance is not necessary to create and convey an estate in fee simple. (Iowa) *Baker v. Kenney*, 456.

2. **DEEDS—Consideration, Parol to Deny or Explain.**—A consideration duly acknowledged in a deed cannot be contradicted by parol for the purpose of destroying the legal effect of the deed as a conveyance; but it is legitimate and proper to show the actual consideration for the purpose of determining whether there was fraud for which the deed should be set aside in equity. (Ill.) *Russell v. Robbins*, 342.

For Future Support—Relief in Equity.

3. **DEED FOR FUTURE SUPPORT.**—A Deed Made in Consideration of the grantor's future support belongs to a peculiar class, and is distinguishable from an ordinary deed of bargain and sale by the fact that the grantor gives up his property for the consideration of future support, which a court of equity cannot compel the grantee to furnish and a court of law cannot make good with damages. (Ill.) *Russell v. Robbins*, 342.

4. **DEED FOR FUTURE SUPPORT.**—Equity will Set Aside a deed made in consideration of the future support of the grantor, if satisfied that the contract was entered into with a fraudulent intent, or has been abandoned; but the failure to perform on the part of the grantee must be substantial and in relation to material matters; and, if the grantor prevents the grantee from carrying out the contract, there can be no presumption of fraud which will justify the setting aside of the deed. (Ill.) *Russell v. Robbins*, 342.

5. **DEED FOR FUTURE SUPPORT—Construction.**—If a deed is made upon the consideration that the grantee shall take the grantor to the former's home and support him during his natural life, the grantee is not bound to furnish support at any other place, nor to compensate other persons for taking care of the grantor during the time which he chooses to remain away from the grantee's home without any designated cause. (Ill.) *Russell v. Robbins*, 342.

6. **DEED FOR FUTURE SUPPORT.**—In Determining Whether Proper Support has been furnished by the grantee in a deed made in consideration of the future support of the grantor, the condition in life of the parties at the time the contract was made must be taken into consideration. (Ill.) *Russell v. Robbins*, 342.

See Husband and Wife; Timber; Vendor and Vendee.

DEFINITIONS.

See Words and Phrases.

DEPOTS.

See Carriers, 29-32.

DESCENT AND DISTRIBUTION.*In General.*

1. **DESCENT AND DISTRIBUTION**—Foundation of Right Statutory.—The statute of descents of Indiana covers the entire subject, and one claiming an interest in the estate of a deceased person must point to some provision of the statute giving it to him. (Ind.) Truelove v. Truelove, 404.

2. **DESCENT AND DISTRIBUTION**—Construction of Statute.—In construing the statute of descents and determining the meaning of the words and terms employed therein, we must look to the meaning attached to them by the common law. (Ind.) Truelove v. Truelove, 404.

Illegitimates.

3. **DESCENT AND DISTRIBUTION**—Illegitimate Child.—At common law an illegitimate child had no inheritable blood. (Ind.) Truelove v. Truelove, 404.

4. **DESCENT AND DISTRIBUTION**.—When the Word "Child" or "Children" or "brother" or "sister" is used in a statute of descent, it must be held to mean legitimate child, children, brother or sister, unless the language of the statute clearly shows it was used in a different sense. (Ind.) Truelove v. Truelove, 404.

5. **DESCENT AND DISTRIBUTION**.—An Illegitimate Brother is not entitled to share with a legitimate brother in the estate of a sister dying without other heirs. (Ind.) Truelove v. Truelove, 404.

6. **DESCENT AND DISTRIBUTION**.—The Statute Making an Illegitimate child an heir of its mother does not entitle it to inherit property after her death which she would have inherited if living. (Ind.) Truelove v. Truelove, 404.

Note.

Devisee. See Wills.

DISBARMENT.

See Attorney and Client, 5, 6.

DISTRICT ATTORNEY.

STATE'S ATTORNEY.—A Disbarred Attorney is not Eligible to the office of state's attorney, he being unable to fulfill the duties thereof. (S. D.) Danforth v. Egan, 1030.

DIVIDENDS.

See Corporations, 26-28.

DIVORCE.*In General.*

1. **DIVORCE**—Extreme Cruelty—Mental Suffering.—A showing that a wife interfered with and occasioned loss in her husband's business by fits of jealousy or temper; attempted to strike him with a chair; frequented cafés and places where liquor was sold with other men; remained out late at night and on one occasion all night; refused to prepare his breakfast; and applied to him such epithets as

"a dirty dog," "a street angel" and "a house devil," is sufficient to entitle the husband to a divorce on the ground of extreme cruelty. (Mich.) *Von Begrow v. Von Begrow*, 562.

2. **DIVORCE—Prosecution in Bad Faith.**—Where a wife in a petition for a divorce makes charges of matrimonial offenses against her husband so serious that, if true, would lead to his indictment and punishment by the criminal courts, and upon the hearing makes no attempt to substantiate them and dismisses her petition, and also refuses to make any defense to the charges of her husband in his cross-petition, it must be held she has acted in bad faith in the prosecution of the action. (N. J. Eq.) *Von Bernuth v. Von Bernuth*, 784.

3. **DIVORCE—Abandonment—Effect of Former Action.**—The time of the pendency of a prior action of divorce upon the ground of abandonment need not necessarily be deducted in computing the time of abandonment requisite to justify a divorce. (N. H.) *Easter v. Easter*, 688.

4. **DIVORCE—Separation During Pendency of Action.**—The pendency of an application for a divorce by either spouse against the other might, under some circumstances, compel the inference that the separation during such pendency was consented to, or was with sufficient cause. (N. H.) *Easter v. Easter*, 688.

5. **DIVORCE—Desertion—Time Action Pending Excluded.**—As a general rule, the time a divorce proceeding is pending must be excluded in computing the period of desertion necessary to constitute a suable cause of action, but an exception to this rule is made where the action is filed and prosecuted in bad faith. (N. J. Eq.) *Von Bernuth v. Von Bernuth*, 784.

Defense Arising After Commencement of Action.

6. **DIVORCE—Defense Arising After Commencement of Action.**—It is competent for a defendant in divorce to set up in bar of the suit a matrimonial offense committed by the complaining party which accrued after the filing of the original petition. (N. J. Eq.) *Von Bernuth v. Von Bernuth*, 784.

7. **DIVORCE—Defense Arising After Commencement of Suit.**—A defendant in a divorce proceeding may, by cross-petition, set up a cause of action for divorce which has accrued in his favor subsequent to the filing of the original bill and which was not at that time a completed or suable cause for divorce. (N. J. Eq.) *Von Bernuth v. Von Bernuth*, 784.

Cross-petition—Nonresident.

8. **DIVORCE—Cross-petition by Nonresident.**—Under the divorce act (section 6a), and chancery rule 206a, a nonresident defendant in a divorce proceeding may file a cross-petition alleging facts which would operate as a bar to the original petition if pleaded by way of answer, and constituting a ground for divorce in his favor, and obtain a decree thereon. (N. J. Eq.) *Von Bernuth v. Von Bernuth*, 784.

9. **DIVORCE—Cross-petition—Service of.**—Under chancery rule 206a, the defendant in a divorce proceeding "may set up in the answer matter which would be a proper subject of a bill of complaint or a petition, and may obtain such relief thereon as he or she would be entitled to upon a separate bill or petition against the complainant or petitioner"; and this dispenses with the actual service of process upon the cross-petition, and provides a short and simple method of reaching an issue. (N. J. Eq.) *Von Bernuth v. Von Bernuth*, 784.

10. **DIVORCE—Cross-petition—Consent of Parties.**—Where a cross-petition is filed by stipulation of the parties, such stipulation cannot be considered as a consent to a divorce decree, nor a consent

to confer jurisdiction; it is but an agreement of counsel which merely avoids the necessity of the more formal application to the court for leave to file the pleading. (N. J. Eq.) *Von Bernuth v. Von Bernuth*, 784.

Injunction Against Action in Foreign Jurisdiction.

11. **DIVORCE**—*Injunction Against in Foreign Jurisdiction.*—Where a wife has commenced an action for divorce in the courts of New Jersey, in which jurisdiction of the defendant has been obtained, the prosecution of an action for divorce by the husband in a foreign jurisdiction will be enjoined, where all the relief sought thereby can be granted and is sought by cross-bill in the New Jersey action, and where such injunction will not impugn the policy of the other state. (N. J. Eq.) *Von Bernuth v. Von Bernuth*, 752.

See Wills, 12.

EASEMENTS.

EASEMENTS—"Profit à Prendre"—*Appurtenant and in Gross.* An easement giving the right to appropriate part of the land itself, generally described as "profit à prendre," is usually granted or reserved as appurtenant to other real property, and then passes only as an incident to the ownership of that property, but many rights of profit à prendre may be acquired and exercised in gross, and not merely as appurtenant. (Iowa) *Baker v. Kenney*, 456.

ELECTIONS.

1. **ELECTORS**—*Nature of Right to Vote.*—The right of a qualified elector to vote is neither a property right nor right of person, nor an asset of commercial value. It is a political privilege as distinguished from a property or personal right. (Colo.) *Morris v. Colorado Midland R. R. Co.*, 268.

2. **ELECTORS**—*Damages for Loss of Vote.*—The weight of authority is to the effect that where a qualified voter is prevented from exercising his right to vote, there is no cause of action, unless the act of the party so preventing was sinister. (Colo.) *Morris v. Colorado Midland R. R. Co.*, 268.

3. **ELECTORS**—*Damages for Loss of Vote.*—It is only where the right to vote has itself been assailed and denied, with a pernicious purpose, that a cause of action arises. The wrong then is primarily against the public and not against the individual, and the damages awarded are punitive and to deter others from the commission of like offenses. (Colo.) *Morris v. Colorado Midland R. R. Co.*, 268.

4. **ELECTORS**—*Damages for Loss of Vote.*—Malice is the gist of an action for damages for being deprived of the right to vote. (Colo.) *Morris v. Colorado Midland R. R. Co.*, 268.

5. **ELECTORS**—*Damages for Loss of Vote.*—The mere fact that one has been unable to enjoy a political right, as the unintentional result of the negligent conduct of another, gives no right of action, although the loss may be a natural consequence of such conduct. (Colo.) *Morris v. Colorado Midland R. R. Co.*, 268.

ELECTRIC COMPANY.

Liability for Injuries from Wires.

1. **ELECTRIC COMPANY**—*Injury from Wires to Persons in Street.*—The right enjoyed by an electric light and power company, through permission of a municipality, to use the streets in the prosecution of an enterprise for its own gain, does not, apart from any other fact, require it to insure all other persons on or near by the streets

against possible injury from its wires. (Cal.) Pennebaker v. San Joaquin Light etc. Co., 202.

2. ELECTRIC COMPANY—Disconnected Wire—Knowledge.—Though dereliction of duty may be imputed to an electric light and power company which, with knowledge that a certain disconnected wire is a menace to life, makes no effort to correct the circumstance, none can be when it has no such knowledge, and besides is in preparation always to act at once upon such knowledge being furnished. (Cal.) Pennebaker v. San Joaquin Light etc. Co., 202.

3. ELECTRIC COMPANY—Voltage not Regarded Dangerous.—A defendant's conduct is to be judged by the ordinary knowledge of mankind. Hence an electric light and power company cannot be charged with the maintenance of a deadly wire when the current, notwithstanding it caused the death of plaintiff's intestate, had a voltage that is regarded as not dangerous to human life. (Cal.) Pennebaker v. San Joaquin Light etc. Co., 202.

4. ELECTRIC COMPANY—Liability for Casualty—Evidence.—A report of the city electrician, on file with the municipality, reciting arrangements made with him by an electric light and power company for the immediate cutting off of the current from any district desired on instructions telephoned to the power-house by the fire chief or city electrician is competent evidence for the company in a case where a casualty occurred in default of the company being advised of the danger. (Cal.) Pennebaker v. San Joaquin Light etc. Co., 202.

Fire—Shutting Off Current.

5. ELECTRIC COMPANY—Duty to Shut Off Current in Case of Fire.—A public service corporation furnishing electric light and power to a municipality and its residents is not charged with a duty to cut off, at its own instance, the current from some certain district merely upon knowledge being brought to it that a building within that district is on fire. (Cal.) Pennebaker v. San Joaquin Light etc. Co., 202.

6. ELECTRIC COMPANY—Duty to Shut Off Current in Case of Fire.—In the event of a fire occurring within a municipality, no duty, in the absence of an ordinance to that effect, rests upon a local electric light and power company to have an agent present to disconnect from the main feed any wire possibly in or about the burning structure, or signal to the power-house to have the current cut off. (Cal.) Pennebaker v. San Joaquin Light etc. Co., 202.

7. ELECTRIC COMPANY—Burning Building.—No Imputation of Negligence on the part of an electric light and power company arises from the fact that one of its employees, at the time off duty, was present when a house was afire during the night and, seeing one of the company's wires disconnected from the building and sputtering on the ground, "did nothing." (Cal.) Pennebaker v. San Joaquin Light etc. Co., 202.

EMINENT DOMAIN.

1. EMINENT DOMAIN—Basis of Proceeding.—All proceedings prosecuted under the right of eminent domain are based upon two fundamental facts: That the owner's land is taken from him, theoretically against his will, and that the owner is not permitted to fix his own price, but must be content with just compensation. (N. Y.) In re City of New York, 791.

2. EMINENT DOMAIN—Failure to Object to Appropriation.—If an owner of land fails to object in due time to an appropriation of part of it by a railroad, he is concluded from reclaiming the land free of the servitude imposed thereon and is relegated to the

right of claiming damages: *St. Julien v. Morgan's R. R. Co.*, 35 La. Ann. 924. (La.) *Taylor v. New Orleans Terminal Co.*, 537.

3. **EMINENT DOMAIN—Library Site.**—Under Public Statutes, chapter 40, section 6, a town may acquire land for a library lot. (N. H.) *Lyford v. Laconia*, 680.

4. **EMINENT DOMAIN—Who Entitled to Damages.**—To be entitled to damages for the land taken one must be an owner thereof within the provisions of the statute; that is, an owner of the fee, remainder, or reversion, or tenant for life or years. (N. H.) *Lyford v. Laconia*, 680.

5. **EMINENT DOMAIN—Ownership—Damages.**—One having a mere possibility of reverter upon a determinable fee or right of entry upon breach of conditions subsequent is not an owner of the land within the provisions of the statute, and not entitled to damages for its taking under the power of eminent domain. (N. H.) *Lyford v. Laconia*, 680.

6. **EMINENT DOMAIN—Value of Improvements.**—Where the character of structures is well adapted to the kind of land upon which they are erected, the value of the buildings enhances the value of the land, and such enhanced value of the land is the measure of the owner's just compensation when his property is condemned for public use. (N. Y.) *In re City of New York*, 791.

7. **EMINENT DOMAIN—Structural Value of Buildings.**—Where the buildings are suitable to the land sought to be condemned, evidence of their structural value—i. e., the cost of reproduction after making proper deductions for wear and tear—is competent to show the market value of the property: *Village of St. Johnsville v. Smith*, 184 N. Y. 341, distinguished. (N. Y.) *In re City of New York*, 791.

8. **EMINENT DOMAIN—Evidence of Market Value.**—When the state compels a man to give up his land for public use, and permits him to recover, not what he thinks it is worth, but only its fair market value, he should at least have the right to prove every element that can fairly enter into the question of market value. (N. Y.) *In re City of New York*, 791.

9. **EMINENT DOMAIN—Right to Damages is Personal.**—The right to claim these damages is personal to the owner of the land and does not pass to successive owners, unless they have been specially subrogated to it, for it does not pass with the title: *McCutchen v. Railroad*, 118 La. 438, 43 South. 42. (La.) *Taylor v. New Orleans Terminal Co.*, 537.

10. **EMINENT DOMAIN—Courts of Review will not Disturb the determination of commissioners in condemnation proceedings for mere errors in the admission or exclusion of evidence, unless the commissioners have proceeded upon a wrong theory, to the prejudice of one of the parties.** (N. Y.) *In re City of New York*, 791.

11. **EMINENT DOMAIN—Determination of Commissioners—How Made.**—The commissioners view the premises, and in coming to a conclusion as to the value, they may take into consideration the knowledge thus acquired in connection with the oral evidence produced before them. (N. Y.) *In re City of New York*, 791.

EMPLOYER'S LIABILITY.

See Master and Servant.

EQUITY.

In General.

1. **EQUITY—Interference With Judgment at Law.**—The court of chancery has no jurisdiction to interfere with a judgment of a court

of law except where some well-defined independent equitable ground exists for restraining the enforcement thereof. (N. J. Eq.) *Clark v. Board of Education of Bayonne*, 763.

2. EQUITY—Preservation of Status Pending Appeal at Law.—That an unsuccessful litigant in a court of law has appealed therefrom and is meanwhile unable to secure from any law court a restraint against further proceedings under the judgment below, is not an independent equity which gives the court of chancery jurisdiction to interfere, although such proceedings under the judgment may result in such a change in the status of the subject matter of the controversy as may make nugatory a judgment of the court of review when pronounced. *Overruling People's Traction Co. v. Central Passenger Ry. Co.*, 67 N. J. Eq. 370. (N. J. Eq.) *Clark v. Board of Education of Bayonne*, 763.

3. EQUITY—Granting of Stay of Proceedings in Law Action.—An application for a stay is a mere step in procedure to be applied in the exercise of an equitable discretion by the court having control of the law action and by that court only. (N. J. Eq.) *Clark v. Board of Education of Bayonne*, 763.

4. EQUITABLE ACTIONS—Possession of Real Property.—Courts of equity are extremely reluctant to deal with questions affecting the possession of real estate, and will not, as a general rule, interfere to change the possession from one to another or to transfer it to one whose rights have not been established at law. (Iowa) *Hall v. Henninger*, 412.

5. EQUITY—Vexatious Litigation, What Constitutes.—The bringing of an action in another jurisdiction, after the commencement of an action in this jurisdiction in which the same relief as is prayed in the second action may be had and is sought by cross-bill, will be considered vexatious, although there is no actual intent to vex or embarrass the plaintiff in the first suit. (N. J. Eq.) *Von Bernuth v. Von Bernuth*, 752.

6. EQUITY—Creditors—Exhaustion of Legal Remedy.—The rule, which demands the exhaustion by the creditor of his legal remedies is one adopted in regulation of the exercise of the equitable jurisdiction of the court, and should not be departed from unless the facts justify through the obvious necessity of the case. (N. Y.) *De Coppet v. Cone*, 844.

7. EQUITY—Demurrer.—A Bill Without Equity is subject to demurrer testing its equity. (Ala.) *City of Huntsville v. Madison County*, 45.

8. EQUITY.—A Motion to Dismiss a Bill in equity under rule 213 is equivalent to a demurrer, and admits the facts well pleaded in the bill. (N. J. Eq.) *Allen v. Allen*, 758.

9. EQUITY—Amendment of Bill.—In an Equitable Action the complainant will be permitted, after issue joined and after witnesses have been examined, to amend his bill by adding proper parties, or on final hearing will be allowed to amend, if thereby no right of defense is abridged. (N. J. Eq.) *Allen v. Allen*, 758.

Limitation of Action.

10. EQUITY—Statute of Limitations.—Where the jurisdiction of equity is exclusive, the court is not bound by the limitations applicable to actions at law, but may restrict or enlarge them according to the peculiar circumstances of the particular case. (Ill.) *Evans v. Moore*, 302.

See *Actions; Executors and Administrators*, 5-9; *Judgments*, 8, 9.

ESCAPE OF PRISONER.

See Appeal and Error, 13, 14.

Note.

Estates. See Wills.

ESTATES OF DECEDENTS.

See Executors and Administrators.

EVIDENCE.*In General.*

1. **EVIDENCE—Burden of Proving Negative.**—As a general rule, the burden of proving a negative averment is not upon the plaintiff, but this rule does not seem to prevail in actions upon an open account, as distinguished from a stated or uncontroverted one. (Ala.) Pollak v. Winter, 33.

2. **EVIDENCE—Uncommunicated Thoughts and Suppositions** cannot be testified to. (Ala.) Broyles v. Central of Georgia Ry. Co., 50.

3. **EVIDENCE—Uncommunicated Motive or Intention.**—A witness cannot testify to his uncommunicated motive or purpose. Uncommunicated intention or purpose is an inferential fact not capable of direct proof, but must be inferred from the facts proved. (Ala.) Broyles v. Central of Georgia Ry. Co., 50.

4. **EVIDENCE Admitted for Particular Purpose.**—Caution to the Jury should be given where evidence is admitted for a particular purpose only, even though not requested. (Colo.) Melcher v. Beeler, 273.

5. **EVIDENCE—Act of Third Party.**—Evidence that one in whose favor a public officer attempted to resign has offered to relinquish his rights to the office for a consideration, is not admissible against the officer in a proceeding where the validity of the resignation is in issue. (Ind.) State v. Huff, 355.

Copies of Letters—Proof of Mailing.

6. **EVIDENCE.—To Render Copies of Letters Admissible** as secondary evidence there must be shown an actual deposit of the originals in the postoffice, or a course of office practice, or business, from which a presumption might be legally indulged that the letters had been carried to the postoffice and that they therefore had been received by the addressee in due course of the mails. (N. Y.) Gardam v. Batterson, 806.

7. **EVIDENCE—Proof of Mailing Letters.**—Testimony that certain papers offered in evidence were copies of letters; that the originals were addressed, sealed, stamped and put in a box, or tray, "on my desk to be mailed in the postoffice, the same as I always do with every letter going from my office; . . . they were put there for the purpose of being mailed by somebody in my employ. I am head of a big insurance company down there. The letters are taken from that tray periodically through the day . . . by the clerk whose duty it was to gather up the mail and post it. That was the way that all mail that emanated from my office always went through the post. That was the regular course of business in my office every day"—is not sufficient to show a mailing, or to raise a presumption of mailing of the original letters, so as to raise the presumption that they were received in the due course of the mail, and entitle the copies to be read in evidence. (N. Y.) Gardam v. Batterson, 806.

Conflicting Testimony—Preponderance of Witnesses.

8. **EVIDENCE—Preponderance of Witnesses—Inference.**—Where the testimony of eight credible witnesses is in direct contradiction of that of a single witness, the probabilities favor the evidence of the larger number. (Pa.) *Davies v. Philadelphia Rapid Transit Co.*, 1001.

9. **EVIDENCE—Personal Injuries—Plaintiff's Testimony as Against Onlookers.**—The weight of the evidence is not to be judged alone by the number of witnesses on either side; yet where it is one witness against many, and that one a plaintiff seeking damages for personal injuries, the court should have the jury consider the probability that the plaintiff, by reason of the fact and character of the accident, was not so favorably placed as onlookers to note and remember just what occurred. (Pa.) *Davies v. Philadelphia Rapid Transit Co.*, 1001.

10. **EVIDENCE—Personal Injuries—Conflicting Testimony—Instructions.**—In an action for damages for personal injuries the court should instruct the jury as to the difference between interested and disinterested testimony and caution them to have regard thereto in weighing conflicting testimony. (Pa.) *Davies v. Philadelphia Rapid Transit Co.*, 1001.

See Contracts, 8-10; Homicide, 7; Trial, 1-3.

EXECUTIONS.**SUPPLEMENTARY PROCEEDINGS—Statute not Exclusive.**

Section 1871 of the Code of Civil Procedure, authorizing an action against a judgment debtor to compel a discovery of his property, etc., is not exclusive. It does not operate to repeal or curtail the common-law equity powers of the court to investigate the conduct of debtors and grant relief. (N. Y.) *De Coppet v. Cone*, 844.

See Judicial Sales; Judgments, 6-9.

EXECUTORS AND ADMINISTRATORS.**In General.**

1. **ESTATE OF DECEDENT—Jurisdictional Facts.**—The county court has jurisdiction to act in the probate of wills and the granting of letters testamentary and of administration, (1) when it is shown that an inhabitant of or resident in the county has died; (2) when it is shown that a person has died without the state having any estate within such county to be administered. The jurisdictional facts are, in the first case, domicile and death; in the second, the existence of an estate within the county to be administered, and death without the state, and these facts must be established before the court acquires jurisdiction to act. (Wis.) *Estate of Barlass*, 1111.

2. **ESTATE OF DECEDENT—Administration—Existence of Property.**—A prima facie showing that there is an estate, or a bona fide claim that the deceased left property to be administered, or the prima facie showing of any other statutory ground, is all that is necessary to authorize the granting of letters of administration in the case of the death of a resident of the county. (Wis.) *Estate of Barlass*, 1111.

3. **ESTATE OF DECEDENT—Administration—Claim to Property.** On an application for letters of administration the court will not inquire into the validity of a claim that the deceased owned certain property. (Wis.) *Estate of Barlass*, 1111.

4. **ESTATE OF DECEDENT.**—The Mere Existence of Local Assets, irrespective of amount or value, will support a grant of administration. (Wis.) Estate of Barlass, 1111.

Equitable Action for Administration.

5. **ESTATES OF DECEDENTS**—Equitable Action for Administration.—Where a nonresident decedent leaves property in the state and it is impossible to prove his will or have letters testamentary or of administration issued here, leaving citizens, who are creditors, no means of obtaining their demands, equity will entertain a suit for the administration of the property situated in the state and apply it to the payment of creditors. (N. Y.) De Coppet v. Cone, 844.

6. **ESTATES OF DECEDENTS**—Equitable Action for Administration.—The rule which obtains with so much strictness in actions to set aside fraudulent conveyances and in creditors' bills, that the plaintiff must have exhausted his remedy at law by the recovery of a judgment and the issue of an execution thereon, does not apply to an equitable action for the administration of the estate of a decedent. (N. Y.) De Coppet v. Cone, 844.

7. **ESTATES OF DECEDENTS.**—An Equitable Action for the Administration of the estate of a decedent must be brought on behalf of all the creditors for a ratable distribution of the estate in satisfaction of their respective claims. (N. Y.) De Coppet v. Cone, 844.

8. **ESTATES OF DECEDENTS.**—In an Equitable Action for the Administration of the estate of a nonresident decedent, the foreign executors of his will or the persons beneficially interested in the estate, either as legatces or next of kin, are necessary parties. (N. Y.) De Coppet v. Cone, 844.

9. **ESTATES OF DECEDENTS**—Equitable Action for Administration.—Where the property of a nonresident decedent in this state consists of an interest in the estate of another decedent, an action to subject such interest to the claims of contract creditors will not lie against the executors of the latter estate, neither the foreign executors nor those beneficially interested in the estate of the nonresident being made parties. (N. Y.) De Coppet v. Cone, 844.

Embezzlement of Funds.

10. **EXECUTORS**—Embezzlement—Liability of Residuary Legatees.—Where an executor makes payment of a fund to a legatee or to a trustee for him, or makes such appropriation as is equivalent to payment, the persons entitled under the will to the residuary estate will not be called upon to make contribution for any loss to such fund by embezzlement of the executor or trustee, or otherwise. (N. J. Eq.) Lister v. Hardin, 767.

See Stolen Property.

EXEMPTIONS.

See Insurance, 12.

EXPERT TESTIMONY.

See Homicide, 7.

EXPLOSION.

See Gas Explosion.

FELLOW-SERVANTS.

See Master and Servant, 15-21.

FERRY.

1. **FERRY—Negligence of Passenger Boarding Boat.**—The plaintiffs' mother, in attempting to board a ferry-boat, fell into the Mississippi river and was drowned. They sue the ferry company for damages as having caused her death by leaving open a gate at the end of a gangway leading to the boat, thereby misleading her into the belief that she (the boat) was safely moored to the wharf, and impliedly inviting plaintiffs' mother to go on, when in fact the ferry had swung out into the stream. The jury before which the case came rendered a verdict in favor of defendant, and plaintiffs have appealed. The judgment appealed from is affirmed. The death of the woman was due to her own rashness and negligence. (La.) *Williams v. Union Ferry Co.*, 542.

2. **FERRY—Boarding Boat After Starting.**—One who attempts to board a ferry-boat after it has commenced to leave its dock and who, in attempting to jump upon it, falls into the water and is drowned, must be held to have assumed the risk of so doing and to have been killed by her own negligence. (La.) *Williams v. Union Ferry Co.*, 542.

3. **FERRY—Negligence.**—The Leaving Open of a Gate at the end of a gangway down which passengers have to pass to enter a boat, where the attendant circumstances are such as to lull the approaching passengers into false security and mislead them by the reasonable belief that the boat is still tied to her usual landing place, constitutes negligence on the part of the ferry company operating the boat. (La.) *Williams v. Union Ferry Co.*, 542.

FIRE.

See *Electric Companies*, 5-7; *Negligence*, 7, 8.

FIREMEN.

See *Negligence*, 7, 8.

FORNICATION.

1. **FORNICATION—What Constitutes at Common Law.**—Fornication, as understood by the common law, was unlawful sexual intercourse between a man, either married or single, and an unmarried woman. It was not punishable as a common-law offense unless accompanied by such circumstances as per se constituted it a misdemeanor. (Ind.) *Richey v. State*, 362.

2. **FORNICATION—Common Law Adopted by Statute.**—The criminal statutes of Indiana have adopted substantially the common-law doctrine upon the subject of fornication. (Ind.) *Richey v. State*, 362.

3. **FORNICATION.—To Constitute the Statutory Offense of fornication**, it must be shown that the parties cohabited or lived together in the manner of husband and wife. The statute does not deal with private acts of incontinence and unchastity, but reaches those only who as paramour and mistress contemn and scandalize the institution of marriage. (Ind.) *Richey v. State*, 362.

4. **FORNICATION—Occasional Acts not an Offense.**—Evidence that the defendant, a married man, living with his wife, indulged in occasional acts of illicit intercourse with a servant girl in his own house will not sustain a conviction of fornication. (Ind.) *Richey v. State*, 362.

Note.

Fornication, canon-law definition, 366.
 circumstantial evidence, 375.
 common-law definition, 366.
 confessions and declarations as evidence, 373.
 definition of the crime, 365.
 evidence, admissibility of, 373-375.
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 what constitutes the offense, 365-369.

FRANCHISE.

FRANCHISE—Construed Strictly Against Grantee.—The terms of a franchise granted by a municipal corporation must be construed strictly against the grantee. (Mich.) *People v. Detroit United Ry.*, 582.

See *Street Railways; Taxation*, 10-14.

FRAUD.

1. **FRAUD—Suppression of Knowledge.**—Between Parties dealing with each other at arm's-length, one having valuable knowledge pertinent to the subject matter not had by the other may validly proceed with the negotiation without volunteering a disclosure. (Ky.) *Hays v. Meyers*, 493.

2. **FRAUD—Suppression of Knowledge.**—The Right One has to use the knowledge he has, superior to that of the party he deals with, as to the matter in negotiation between them, for his own sole advantage, does not excuse a resort by him to fraud or deceit. (Ky.) *Hays v. Meyers*, 493.

3. **FRAUD—Promise to Do Something in the Future.**—Ordinarily a promise to do something in the future does not constitute a fraud, and a violation or disregard of such a promise does not amount to a fraud. (Ill.) *Russell v. Robbins*, 342.

4. **FRAUD—Motive.**—A Less Amount of Evidence of the participation in a fraud of a sole beneficiary thereof is sufficient to support a finding that he was a party thereto than in a case where the party sought to be charged was not interested in the subject matter, or where the visible actor had himself some end of his own to serve. (N. H.) *Blaisdell v. Davis Paper Co.*, 735.

FRAUDS, STATUTE OF.

See *Timber*.

GARNISHMENT.

1. **GARNISHMENT—When Subordinate to Equitable Assignment.** A garnishment is subordinate to a good, pre-existing equitable assignment, though it is not perfect at law. (Ala.) *Canterbury & Gilder v. Marengo Abstract Co.*, 30.

2. **GARNISHMENT—When Subordinate to Assignment of Judgment.**—The lien of a garnishment is subordinate to the assignment of a judgment, based on a valuable consideration, and made seventeen days prior to the levy of execution by the sheriff under the judgment and a like period before the service of the garnishment on the sheriff. (Ala.) *Canterbury & Gilder v. Marengo Abstract Co.*, 30.

GAS EXPLOSION.

GAS EXPLOSION Through Joint Negligence.—Where an explosion happens through the joint negligence of a gas company in discovering and repairing a leak in its pipe, and the proprietor of the locus bringing a light in contact with the gas, a person present as a patron of the place, who is injured by the explosion, may recover from either or both at his election. Each is and both are the proximate cause of the injury. (Cal.) *Merrill v. Los Angeles Gas & Electric Co.*, 134.

Note.

Gift Inter Vivos, right of life tenant under will to make, 117.

GUARDIANSHIP.

1. GUARDIANSHIP — Nonresident Incompetent — Determination of Incompetency.—The fact of the incompetency of a nonresident, for the protection of whose property the appointment of a guardian is sought, must be judicially determined, but this may be done on the hearing of the application for the appointment of the guardian. It need not be determined in an independent proceeding. (Iowa) *Wallace v. Tinney*, 448.

2. GUARDIANSHIP — Nonresident Incompetent.—Notice of an application for the appointment of a guardian of the estate of a nonresident incompetent is not required, either by statute or general principles of law, to be given to the incompetent. (Iowa) *Wallace v. Tinney*, 448.

3. GUARDIANSHIP—Nonresident Incompetent — Collateral Attack.—Proceedings for the appointment of a guardian for a nonresident incompetent, in a court having jurisdiction thereof, are not subject to collateral attack. (Iowa) *Wallace v. Tinney*, 448.

4. GUARDIANSHIP — Nonresident Incompetent — Collateral Attack.—The finding of incompetency in a proceeding for the appointment of a guardian of a nonresident incompetent is not subject to collateral attack. (Iowa) *Wallace v. Tinney*, 448.

HABEAS CORPUS.

See Bail.

HAWKERS.

See Peddlers.

HOMESTEAD.

See Public Lands.

HOMICIDE.

In General.

1. HOMICIDE—Reduction to Manslaughter—Cooling Time.—In determining whether a homicide is reduced from murder to manslaughter, the question is not only, Did the defendant's passion engendered by a sufficient provocation in fact cool? But also, Was the time intervening between the giving of the provocation and the killing sufficient for the passion of a reasonable man to cool? An affirmative answer to either question precludes a reduction of the homicide to manslaughter. (Okl. Cr.) *In re Fraley*, 988.

2. HOMICIDE—Reduction to Manslaughter—Cooling Time.—If a fatal wound be inflicted immediately following a sufficient provocation given, then the question as to whether the defendant's passion thereby aroused had in fact cooled, or as to whether a sufficient time had elapsed in which the passion of a reasonable man would have cooled, is a question of fact to be determined upon a consideration

of all the facts and circumstances in evidence; but when an unreasonable period of time has elapsed between the provocation and the killing, the court is authorized to say as a matter of law that the cooling time was sufficient. (Okl. Cr.) *In re Fraley*, 988.

3. **HOMICIDE—Revenge.**—A Deliberate Killing Committed in revenge for an injury inflicted in the past, either near or remote, is murder. (Okl. Cr.) *In re Fraley*, 988.

4. **HOMICIDE—Willfully.**—An Instruction Defining Manslaughter under the United States statute (U. S. Rev. Stats., sec. 5341 [U. S. Comp. Stats. 1904, p. 3628]), in force in the Indian Territory prior to statehood which omits the word "willfully," is improper. (Okl. Cr.) *O'Barr v. United States*, 959.

5. **HOMICIDE—Negligence in Handling Weapons.**—The court in this case instructed the jury: "The law imposes upon people controlling or handling dangerous instruments or agencies the duty of exercising some care or caution in the manner of using the dangerous agency, and in case of gross or culpable neglect of this duty the law imposes criminal as well as civil liability." Held, error for the reason that it does not define the degree of care or caution to be used, or gross neglect, such as would render the defendant guilty of criminal negligence. (Okl. Cr.) *O'Barr v. United States*, 959.

6. **HOMICIDE.**—The Word "Willfully," as Used in the United States statute defining manslaughter, is synonymous with "intentionally" or "designedly." (Okl. Cr.) *O'Barr v. United States*, 959.

Expert Evidence as to Manner of Receiving Wound.

7. **HOMICIDE—Expert Evidence as to Manner of Receiving Wound.**—It is error to allow physicians to testify to their opinions, as experts, as to the position of the arm of the deceased at the time that he received the fatal wound, which opinions are based upon the range of the bullet after it entered the body of the deceased. (Okl. Cr.) *Price v. United States*, 930.

Note.

Hospitals, charitable, liability for torts of physicians and nurses, 902.
railway, liability for torts of surgeons and nurses, 904.

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE—Deed from One to the Other.**—There is no statute in Pennsylvania which authorizes or permits a direct conveyance of the wife's real estate to her husband. (Pa.) *Alexander v. Shalala*, 1004.

2. **HUSBAND AND WIFE—Deed from One to the Other.**—The fact that the husband joins with the wife in a deed from her to him does not cure the invalidity of the transfer. (Pa.) *Alexander v. Shalala*, 1004.

3. **HUSBAND AND WIFE—Deed from One to the Other.**—In an action of ejectment, defendants who rely upon an attempted conveyance from a wife direct to her husband are not entitled to have a conditional verdict rendered to cover the amount of their improvements. (Pa.) *Alexander v. Shalala*, 1004.

INDICTMENT AND INFORMATION.

In General.

1. **INDICTMENT—Sufficiency—Certainty and Particularity.**—An information which informs the accused of the offense with which he is charged with such particularity as will enable him to prepare for his trial, and so defines and identifies the offense that the accused, if convicted or acquitted, will be able to defend himself in case he be indicted again for the same offense by pleading the record of such

former conviction or acquittal, is sufficient as against demurrer. (Okl. Cr.) Smythe v. State, 918.

2. **INFORMATION.—A Felony may be Prosecuted by information.** For opinion of this court see *In re McNaught*, 1 Okl. Cr. 528, 99 Pac. 241, which is here approved. (Okl. Cr.) Canard v. State, 949.

3. **INFORMATION—Presumption in Favor of.**—When the information is filed in court by the county attorney, the presumption of law is that it is legal; that the examination of the defendant has been had or waived. (Okl. Cr.) Canard v. State, 949.

Verification to Information.

4. **INFORMATION—Verification on Information and Belief.**—The constitution of the state of Oklahoma, being section 30 (Bunn's edition, section 39) of the Bill of Rights, provides that: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized." Therefore, a statute of Oklahoma territory, which provides that in misdemeanor cases a warrant may issue upon information, which has been verified only on information and belief, and without any other evidence, is repugnant to the foregoing provision of the constitution, and is null and void. (Okl. Cr.) Salter v. State, 935.

5. **INFORMATION—Verification on Information and Belief.**—A verification to an information, charging a misdemeanor and stating that affiant "declares that the statements set forth in the above information are true, as he is informed and verily believes," is nothing more than the expression of an opinion, and is not sufficient to justify the issuance of a warrant of arrest; and an information so verified is insufficient to support a judgment of conviction. (Okl. Cr.) Salter v. State, 935.

6. **INFORMATION—Necessity of Verification.**—In Oklahoma an information charging a misdemeanor must be verified by oath of the prosecuting attorney, or by the oath or affirmation of some person competent to testify, presenting the facts to the magistrate, before a warrant for the party charged may issue. (Okl. Cr.) Salter v. State, 935.

Negating Exceptions.

7. **INDICTMENT—Negating Exceptions, When Necessary.**—It is only when the exception in a penal statute is so incorporated in or with the enacting clause of such statute as to constitute a material part of the definition or description of the offense that it need be negated in the information; otherwise it will be a matter of defense. (Okl. Cr.) Smythe v. State, 918.

8. **INDICTMENT—Negating Exceptions, When Necessary.**—A negative averment to the matter of an exception or proviso in a penal statute is not requisite in an information, unless the matter of such exception or proviso enters into, and becomes a material part of, the description of the offense. (Okl. Cr.) Smythe v. State, 918.

Preliminary Hearing.

9. **INFORMATION—Allegation of Preliminary Hearing.**—In the prosecution of a defendant by information for a felony, it is not necessary that the information should allege that there was a preliminary hearing before a committing magistrate, or a waiver of the same, although such facts must exist in order to authorize the filing of such information. (Okl. Cr.) Canard v. State, 949.

10. INFORMATION—Preliminary Examination.—Whether an examination has or has not been had is not a question of pleading, but a question of fact, to be raised by the defendant or not at his option, by a motion to quash, supported by affidavits. (Okl. Cr.) Canard v. State, 949.

INFANTS.

See Constitutional Law, 19-23; Master and Servant.

INFORMATION.

See Indictment and Information.

INHERITANCE TAXES.

See Taxation, 20-32.

INITIATIVE AND REFERENDUM.

1. INITIATIVE AND REFERENDUM.—A Petition for the Submission of a constitutional amendment under the initiative and referendum amendment must contain the full text of the amendment. (Mo.) State v. Roach, 639.

2. INITIATIVE AND REFERENDUM—Constitutional Amendment.—The rules and principles applicable to the submission of constitutional amendments to the voters are applicable alike to amendments proposed to the constitution under the initiative and referendum amendment and those proposed by the General Assembly of the state. (Mo.) State v. Roach, 639.

3. INITIATIVE AND REFERENDUM—Constitutional Amendment.—The terms "laws" and "amendments to the constitution" are used in the initiative and referendum amendment to the constitution in their plain and ordinary sense, and there cannot be put into the constitution, by way of amendment, mere legislative acts providing for the exercise of certain powers. (Mo.) State v. Roach, 639.

4. INITIATIVE AND REFERENDUM—Petitions.—The Secretary of State has the Authority to refuse to file a petition for the submission of a so-called constitutional amendment under the provisions of the initiative and referendum amendment to the constitution which is legally insufficient, or where the measure proposed is not in fact a constitutional amendment, and other provisions of the law are not complied with. If his action be wrong, a remedy is provided by an appeal to the courts. (Mo.) State v. Roach, 639.

5. INITIATIVE AND REFERENDUM—Action of Secretary of State Ministerial.—In the matter of the filing of petitions under the provisions of the initiative and referendum amendment to the constitution, the Secretary of State acts as a ministerial administrative officer, and his acts may be controlled by the courts through mandamus proceedings. He does not act as a part of the legislative branch of the government. (Mo.) State v. Roach, 639.

6. INITIATIVE AND REFERENDUM—Discretion of Secretary of State.—Although the Secretary of State, in performing the duties cast upon him by the initiative and referendum amendment to the constitution, acts as a ministerial administrative officer, he is vested with power to examine the petitions presented to him to determine their sufficiency, and a discretion, subject to review by the courts, to refuse to accept or file such as are legally insufficient. (Mo.) State v. Roach, 639.

7. INITIATIVE AND REFERENDUM.—The Distinction Between Constitutional provisions and legislative acts is clearly and distinctly recognized by the initiative and referendum amendment to the constitution, by express separate provisions for the adoption of each. (Mo.) State v. Roach, 639.

8. INITIATIVE AND REFERENDUM—Mandamus to File Petition.—Any citizen and voter has the right to maintain a proceeding in mandamus to compel the filing by the Secretary of State of a petition for submitting an amendment to the constitution under the initiative and referendum law, notwithstanding he has not signed the petition. (Mo.) State v. Roach, 639.

9. INITIATIVE AND REFERENDUM—Mandamus to File Petition.—The question as to the duty of the Secretary of State to file a petition for submitting an amendment to the constitution under the initiative and referendum law, raised in a mandamus proceeding, being of vital importance to the people of the state, cannot be said to be a moot question. (Mo.) State v. Roach, 639.

10. INITIATIVE AND REFERENDUM—Mandamus—Jurisdiction of Supreme Court.—Under article 6, section 3 of the constitution, the supreme court has original jurisdiction in mandamus proceedings to compel administrative state officials to perform administrative and ministerial acts, and the mere fact that the initiative and referendum law provides for an application for such writ to the Cole county circuit court does not deprive the supreme court of jurisdiction. (Mo.) State v. Roach, 639.

11. INITIATIVE AND REFERENDUM—Repeal of Laws Adopted by.—The adoption of a law by the people under the initiative provision of the constitution does not prevent the repeal thereof by the legislature and the enactment of other measures in substitution for those repealed. (Mo.) State v. Roach, 639.

12. INITIATIVE AND REFERENDUM.—The Character of a Petition under the initiative and referendum laws, i. e., whether it provides for a constitutional amendment or the enactment of a statute, must be determined from its nature and contents, irrespective of what it is entitled by the petitioners. (Mo.) State v. Roach, 639.

13. INITIATIVE AND REFERENDUM—Division into Senatorial Districts.—A petition under the initiative and referendum laws suggesting what is termed an amendment to the constitution by striking out section 11 of article 4 thereof, providing for the division of the state into senatorial districts prior to the census of 1880, and substituting a provision for such division to exist until 1920, does not in fact call for an amendment to the constitution, but merely for the enactment of a statute. (Mo.) State v. Roach, 639.

INJUNCTIONS.

1. INJUNCTIONS—Remedy at Law.—It is a Rule in equity, peculiarly applicable to actions in which an injunction is sought, that relief will not be granted where there is a plain, speedy and adequate remedy at law. (Iowa) Hall v. Henninger, 412.

2. INJUNCTIONS—Trespass on Real Property.—Courts of equity will, under certain circumstances, interfere by injunction to prevent trespasses upon real estate, but to authorize such interference there must exist some distinct ground of equitable jurisdiction. (Iowa) Hall v. Henninger, 412.

3. INJUNCTION—Recovery or Change of Possession of Realty.—Injunction is not a proper remedy to recover the possession of real property held by a tenant after the expiration of his lease under a claim of right to so hold. (Iowa) Hall v. Henninger, 412.

See Divorce, 11; Mortgages, 1, 2; Quo Warranto, 3.

INNKEEPERS.

1. INNKEEPER—Liability for Baggage Represented by Check.—One who becomes the guest of a hotel, by giving his baggage checks into its possession, places the goods they represent into its custody,

so far as to make the innkeeper responsible for goods which, by means of the possession of such checks, his representative or agent receives, although the baggage is never brought within the walls of the hotel. (Colo.) Keith v. Atkinson, 284.

2. **INNKEEPER—Authority of Servant—Presumptions.**—A guest at a hotel has a right to assume that the authority of its manager, bookkeeper, cashier, porter and bellboys is the same as that prevailing generally in all other hotels of the same class and character. (Colo.) Keith v. Atkinson, 284.

3. **INNKEEPER—Custom and Usage—Loss of Baggage.**—A guest of a hotel has a right to rely upon prevailing customs, and where a custom for guests to deliver their baggage checks to bellboys for delivery to the clerk is shown, the hotel is constructively in possession of the baggage by such delivery to the bellboy and responsible therefor. (Colo.) Keith v. Atkinson, 284.

INSTRUCTIONS.

See Trial, 4-6.

INSURANCE.

Of Property.

1. **FIRE INSURANCE—Ownership of Property—Waiver of Condition.**—Where at the time a policy was written the secretary of the insurer knew that the title to property insured in the name of a widow stood in her children, subject to her rights of dower and homestead, a provision that all property must be insured in the names of all the owners will be deemed to have been waived. (Wis.) Siemers v. Meeme Mut. Home Protection Ins. Co., 1083.

2. **INSURANCE.—The Purchaser at a Judicial Sale** has, prior to obtaining the officer's deed or possession, an insurable interest in the property. (N. J. Eq.) Cropper v. Brown, 770.

3. **FIRE INSURANCE—Clause Against Falling Building.**—Where a policy provides that all insurance under it shall cease immediately in the event that the building in which the insured goods are, or any part of the building, falls, except as a result of fire, the test properly is not whether the effect or extent of collapse is such as to increase the fire risk but the event itself, provided what falls is a material or important part of the structure. (Cal.) Fountain v. Connecticut Fire Ins. Co., 214.

4. **FIRE INSURANCE.—A Clause in an Insurance Policy** whose substance is within the law of California, "a policy may declare that a violation of specific provisions thereof shall avoid it," must be enforced by the courts of that state, whether it accords with justice or not. (Cal.) Fountain v. Connecticut Fire Ins. Co., 214.

5. **FIRE INSURANCE—Clause Against Falling Building.**—Where a material part of the walls of a building tumble down by reason of an earthquake, and destruction is completed by a fire following thereupon but caught from a burning structure near by, recovery of insurance on the contents of the building cannot be had under a policy containing the clause: "If a building, or any part thereof fall, except as a result of fire, all insurance by this policy on such building or its contents shall immediately cease." (Cal.) Fountain v. Connecticut Fire Ins. Co., 214.

6. **FIRE INSURANCE—Increased Risk—Proximate Cause of Loss.**—A finding of the jury that the running of a steam engine without a spark-arrester did not increase the risk will be sustained, where there was no evidence to show that the removal of the spark-arrester was the proximate cause of the fire. (Wis.) Siemers v. Meeme Mut. Home Protection Ins. Co., 1083.

7. FIRE INSURANCE—Ordinary Risks Covered by Policy.—People insure against their own negligence as well as that of their neighbors, and against those untoward events which human foresight is unable to prevent; against accidents which cannot be avoided and from acts of omission or commission on their part which might have been guarded against, and the dangers of carrying on of business operations in the ordinary way, and such must, in general, be considered a necessary part or incident of the risk which the insurer has undertaken to bear. (Wis.) *Siemers v. Meeme Mut. Home Protection Ins. Co.*, 1083.

8. FIRE INSURANCE—Extraordinary or Increased Risk.—A provision or condition avoiding a policy if the risk is increased means that the insured shall not allow or permit a change to be made in the structure, nature, or habitual use of the insured property materially different from that which the insurer has agreed to undertake. But trivial or temporary variations in the risk, incident to the ordinary use of the property, are presupposed by the contracting parties to be likely to occur. (Wis.) *Siemers v. Meeme Mut. Home Protection Ins. Co.*, 1083.

9. FIRE INSURANCE—Increased Risk—Use of Steam Engine.—Insurance must be presumed to be made with reference to the character of the property insured and to the owner's use of it in the ordinary way and for the purpose for which the property is ordinarily held and used, and therefore, the use of a steam engine for the cutting of ensilage, such being ordinary and usual in running a farm, cannot be considered to have increased the risk contemplated by a policy of insurance on farm buildings, within the meaning of a provision that an increase of risk shall avoid the policy. (Wis.) *Siemers v. Meeme Mut. Home Protection Ins. Co.*, 1083.

10. FIRE INSURANCE—Use of Steam Engine.—A Clause in a fire insurance policy prohibiting the use of "steam-threshing machines" without certain precautions does not prohibit the use of steam-threshing machine engines for purposes other than threshing, but does prohibit the use of such engines for such other purposes without the required precautions. (Wis.) *Siemers v. Meeme Mut. Home Protection Ins. Co.*, 1083.

11. FIRE INSURANCE—Saving and Preservation of Property.—A provision in a fire insurance policy that "it shall be the duty of the insured to use their best endeavors for saving and preserving the property" defines the duty of the insured when the property covered by the policy is on fire, or when it is so menaced by fire in its vicinity that damage is likely to result, and does not apply to some action by which the risk of the property taking fire might be increased. (Wis.) *Siemers v. Meeme Mut. Home Protection Ins. Co.*, 1083.

Life Insurance.

12. LIFE INSURANCE—Character of Policy—Exemption from Execution.—By the withdrawal of the surplus at the end of the tontine period, and the continuance of the policy as fully paid up, with the wife of the assured named as beneficiary, a tontine policy becomes strictly a life insurance policy, and as such exempt from the claims of creditors. (Wis.) *Allen v. Central Wisconsin Trust Co.*, 1107.

13. LIFE INSURANCE—Effect of Dividends on Character of Policy.—The sharing in annual dividends, varying from year to year, does not destroy the essential character of a policy as a purely life insurance contract, the dividends being but a mere incident of the policy, the right to receive which is in the beneficiary. (Wis.) *Allen v. Central Wisconsin Trust Co.*, 1107.

Fraternal Insurance.

14. **FRATERNAL INSURANCE**—Prohibiting Certain Occupations. A fraternal insurance society has a right, in a proper manner, to adopt a by-law applicable to certificates thereafter issued which, as broadly as may be thought wise, will prohibit beneficial members directly or even indirectly to engage in the business of manufacturing or selling liquors. (N. Y.) *Graves v. Knights of Maccabees*, 912.

15. **FRATERNAL INSURANCE**—Engaging in Liquor Business—Forfeiture.—A by-law of a fraternal insurance society providing that the certificate of a member shall become null and void upon his engaging in the manufacture or sale of liquor is violated by a member who forms a partnership with his son for the carrying on of a saloon business and personally applies for and takes out a license in the firm name, the saloon being operated in the usual manner, the member, while living in the same house, taking no active part in the business, and such violation has the effect of rendering the certificate void. (N. Y.) *Graves v. Knights of Maccabees*, 912.

16. **FRATERNAL INSURANCE**—Forfeiture.—The Issuance of a New Certificate after a forfeiture, for the sole purpose of changing the beneficiary at the request of the member, does not waive the forfeiture, the new certificate being considered but a continuance of the former one. (N. Y.) *Graves v. Knights of Maccabees*, 912.

Accident Insurance.

17. **ACCIDENT INSURANCE**—"Voluntary Exposure to unnecessary danger or obvious risk," as used in a policy of accident insurance, means a conscious or intentional exposure to a known risk, and not a merely inadvertent or accidental one. (N. H.) *Whalen v. Peerless Casualty Co.*, 695.

18. **ACCIDENT INSURANCE**—Exposure to Danger.—One Who Crosses Railroad tracks by a path generally used, and looks and listens, but sees or hears nothing, before crossing, cannot be said, as matter of law, to voluntarily expose himself to unnecessary danger. (N. H.) *Whalen v. Peerless Casualty Co.*, 695.

19. **ACCIDENT INSURANCE**—Violation of Law or Rules of Carrier.—One who crosses railroad tracks by a path generally used cannot be said to be guilty of a violation of law or the rules of a public carrier, in the absence of a showing of the posting of notices as required by the statute. (N. H.) *Whalen v. Peerless Casualty Co.*, 695.

See Bankruptcy.

Note.

Accident Insurance, Voluntary Exposure to Danger, attempting to rescue persons in danger, 716.

boarding train in motion, 710.
boarding freight-cars by means of ladder, 712.
cattle dealer boarding train, 713.
cleaning loaded gun, 708.
climbing on stationary railway cars, 710.
crossing on railway trestle at night, 709.
crossing railway track between cars, 710.
distinguished from voluntary act, 706.
falling asleep on railroad track, 709.
falling from scaffold, 717.
fishing on dark nights, 707.
getting pigeons from barn, 717.
hunting for game, 707.
knowledge of danger, 705.
leaving or alighting from train, 714.
negligence of insured, 701.

Accident Insurance, Voluntary Exposure to Danger, obviousness of danger, 705.

placing arm over muzzle of gun, 707.

playing indoor baseball, 707.

provoking fight, 717.

riding steeple-chase, 707.

riding or standing on platform of railway car, 715.

sitting on railroad track, 708.

sleeping on top of steamboat boilers, 717.

walking on railroad track, 709.

wanton or reckless exposure, 704.

what constitutes in general, 699.

Insurance Patrol, liability for torts of agents, 907.

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUORS.

1. INTOXICATING LIQUORS—Statutory Definition Controlling. Where the statute has provided that any beverage containing alcohol in any quantity whatever is an intoxicating liquor, it is not permissible to inquire into the actual intoxicating properties of any composition containing any alcohol whatever, nor is the percentage of alcohol contained in such composition at all material. (Mo.) *State v. Martin*, 628.

2. INTOXICATING LIQUORS—Constitutionality of Statute.—Senate Bill No. 61 (Sess. Laws 1907-08, c. 69, p. 594), known as the "Billups Prohibition Enforcement Act," is not violative of section 57, article 5, of Bunn's Constitution of Oklahoma. (Okl. Cr.) *Smythe v. State*, 918.

3. INTOXICATING LIQUORS—Local Option Law—Construed With Existing Statutes.—The object of the legislature in the passage of the local option act was to afford the people in their respective counties and cities an opportunity to say whether or not intoxicating liquors should longer be sold under the provisions of the law in existence at the time of the submission of the question to the voters, and the local option act must be read in connection with the general dramshop law. (Mo.) *State v. Martin*, 628.

4. INTOXICATING LIQUORS—Meaning of Local Option Law.—The local option law is supplemental to the general dramshop law, and is in *pari materia* with it, and therefore they should be considered together in construing the local option law. When so construed the definition of intoxicating liquor contained in the dramshop law must be read into the local option law, and thus, any beverage containing alcohol in any quantity whatever is an intoxicating liquor under the provisions of the latter law. (Mo.) *State v. Martin*, 628.

5. INTOXICATING LIQUORS—In an Indictment for Selling intoxicating liquor it is not necessary to use the terms, "sold intoxicating liquor," or "that the liquor or beverage sold was intoxicating liquor," but if the ingredients of the composition sold as a beverage are designated and charged, and the component parts make it an intoxicating liquor, this is sufficient. (Mo.) *State v. Martin*, 628.

6. INTOXICATING LIQUORS—Trial—Agreed Statement of Facts.—A statement in an agreed statement of facts that a nonintoxicating liquor was sold is not binding on the court where the agreed statement also shows the beverage sold was such as the law declares to be an intoxicating liquor. (Mo.) *State v. Martin*, 628.

JUDGES.

1. **CHANGE OF JUDGES**—Motion for on Account of Bias or Prejudice.—Under section 6647, Snyder's Compiled Laws of 1909, and section 15, Bunn's Constitution, a motion for a change of judge on account of the bias or prejudice of a county judge is in time if presented before the trial begins. (Okl. Cr.) *Rea v. State*, 954.

2. **CHANGE OF JUDGES**—Constitutional Right in Case of Bias.—Section 15, Bunn's Constitution, provides that right and justice shall be administered without prejudice. Under this provision, when a motion, properly verified, is made before the trial begins for a change of judge upon the ground of the bias or prejudice of the trial judge, it is the constitutional right of the party making it that it shall be granted. (Okl. Cr.) *Rea v. State*, 954.

See New Trial, 1.

JUDGMENT.

Res Judicata.

1. **JUDGMENTS**—*Res Judicata*.—When a Matter has Once properly passed to final judgment, it has become *res adjudicata* and, as between the same parties, cannot be reopened or subsequently considered save by direct appeal for reconsideration to the tribunal that gave the first judgment, or by proceedings for reversal in an appellate court. (Pa.) *Stradley v. Bath Portland Cement Co.*, 993.

2. **JUDGMENTS**—*Res Judicata*—Judgment by Default.—So long as a judgment stands unreversed and unappealed from, it may not be questioned in any other case, and the circumstance that the defendant let the matter go uncontested to judgment does not impair the effect. A judgment by consent or default raises an estoppel. (Pa.) *Stradley v. Bath Portland Cement Co.*, 993.

3. **JUDGMENTS**—*Res Judicata*—Matters That Might have been Considered.—A judgment is conclusive not only of the matters that were actually considered, but of those that might have been considered if the defendant had exercised the vigilance that the law requires. (Pa.) *Stradley v. Bath Portland Cement Co.*, 993.

4. **JUDGMENTS**—*Res Judicata*.—An Action on a Contract having gone to judgment, affects an action between the same parties subsequently for damages arising from a breach of that contract. The legal theory underlying the two actions may not be the same, but the doctrine of *res adjudicata* applies to the material issuable facts common to both. (Pa.) *Stradley v. Bath Portland Cement Co.*, 993.

Recorded Judgment as Lien on Another Judgment.

5. **RECORDED JUDGMENT as Lien upon Another Judgment**.—One holding a recorded judgment acquires no lien thereby upon another judgment obtained by the judgment debtor, as the latter judgment is merely in the nature of a chose in action, and not property subject for levy and sale under execution, which is the only property subject to the statutory lien created by recordation. (Ark.) *Turner & Co. Inc. v. Marine Abstract Co.*, 31.

Enforcement of Judgment.

6. **JUDGMENT**—Suit on Judgment—*Scire Facias*.—The judgment at the end of a suit or a judgment is for the debt and damages; but as a *scire facias* it is that the plaintiff have execution. (Ark.) *Turner & Co. Inc.*, 31.

7. **JUDGMENT**—Proceedings After Completed Execution.—The holder of a judgment before proceedings against jointly with him in a suit against the judgment debtor, after the issue of execution and the return of the property found therein, is a defendant in the

action and may have the latter transferred to the ordinary docket so as to avail himself of a jury trial. (Ky.) *Merriwether v. Bell*, 488.

8. JUDGMENT—Enforcement—Equitable Proceedings.—The rule whereby only a liquidated claim of a debtor against a third person may be subjected to the satisfaction of that for which the creditor sues such debtor gives way when, under an appropriate statute, such third person is made codefendant with the debtor in an equitable proceeding after judgment, issue of execution and the return "no property found." (Ky.) *Merriwether v. Bell*, 488.

9. JUDGMENT—Enforcement—Equitable Proceedings.—Under the Kentucky statute which authorizes a proceeding in equity, on the return "no property found," against the judgment debtor jointly with a debtor of his, a chose in action of the former as against the latter may be subjected to the payment of the debt for which the judgment was recovered. (Ky.) *Merriwether v. Bell*, 488.

Reversal of Judgment.

10. REVERSAL OF JUDGMENT—Restitution of Land—Rents and Interest.—If a party has been deprived of land by a decree which is subsequently reversed, and he is entitled to a judgment for the restoration of the land, he is also entitled to the rents received with the interest thereon during the time they were wrongfully withheld, and is not answerable for compensation for services by the wrongdoer in his assumption of control and management of the land. (Ala.) *Lehman-Durr Co. v. Folmar*, 37.

11. REVERSAL OF JUDGMENT—Restitution of Property—Nature of Remedy.—The restitution of property of which a person has been deprived by an erroneous judgment that has subsequently been reversed is a remedy to make such person whole. The decree of restitution is intended to restore to the aggrieved party that which he lost in consequence of the erroneous judgment reversed; and it may be a part of the reversed judgment, or it may be a separate judgment based on the one of reversal. (Ala.) *Lehman-Durr Co. v. Folmar*, 37.

12. REVERSAL OF JUDGMENT OF RESTITUTION.—A Judgment of Restitution of land, of which a party has been deprived by a judgment subsequently reversed, does not necessarily finally determine the rights of the parties to the property restored. (Ala.) *Lehman-Durr Co. v. Folmar*, 37.

See Equity, 1-3; *Scire Facias*.

JUDICIAL SALES.

In General.

1. JUDICIAL SALES—Confirmation—Written Objections.—The only office of a written objection to the confirmation of a sheriff's sale in foreclosure, under the act of March 12, 1880, and rule of court 205, is to urge the overthrow of the sale upon the sole ground that the property did not bring the highest and best price that could be obtained for it in cash, and an attack upon the sale on any other ground must be made the basis of an independent action either by bill or petition. (N. J. Eq.) *Cropper v. Brown*, 770.

2. JUDICIAL SALES—Contract Subject to Rules of Private Sale. When the judicial officer, observing proper legal formalities, at a public sale strikes off the property to a purchaser, who thereupon signs the conditions of sale, thereby entering into a contract to purchase the premises named, at the price named, the situation is exactly the same as if the contract were between private parties, and the same principles will control as would control private parties entering into a similar contract. (N. J. Eq.) *Cropper v. Brown*, 770.

3. JUDICIAL SALES—Deed Relates Back to Sale.—The giving of the officer's deed upon a judicial sale is a mere ministerial act, and not a substantial part of the sale. When given it relates back to the sale and the contract there made. (N. J. Eq.) *Cropper v. Brown*, 770.

Rights and Title of Purchaser.

4. JUDICIAL SALES—Rights of Purchaser.—A purchaser at a judicial sale becomes invested with a fixed and definite legal right, which is recognized and enforced by the law, and of which he cannot be deprived except upon some legal or equitable ground; and, although in those cases where confirmation is required the right is subject to be defeated, the right of the purchaser and the correlative rights of the judicial officer are established at the time of the sale and by the contract then made. (N. J. Eq.) *Cropper v. Brown*, 770.

5. JUDICIAL SALES—Title of Purchaser.—The legal title does not vest in the purchaser at a judicial sale until the delivery of the deed, but in the meantime it is held in trust for him. Since he has stipulated that he is not to receive possession until a future date, namely, the time the deed is to be delivered to him, he is not entitled to the fruits of possession, which are the current avails of the land, but he is vested with the beneficial ownership of the property, and any increase of value or decrease therein inures to him, and the loss or destruction of the property falls upon him and not upon the vendor. (N. J. Eq.) *Cropper v. Brown*, 770.

Relief of Purchaser.

6. JUDICIAL SALES—Relief of Purchaser.—In those cases in which the court itself is requested by the purchaser to relieve him of his purchase, the matter is dealt with as if it were an action of specific performance, and the same principles are applied. (N. J. Eq.) *Cropper v. Brown*, 770.

7. JUDICIAL SALES—Relief of Purchaser, How Obtained.—Any effort on behalf of the purchaser at a judicial sale to be relieved of his purchase must be by some independent proceeding, and not by mere objections to confirmation. It may be by petition to the court. (N. J. Eq.) *Cropper v. Brown*, 770.

8. JUDICIAL SALES—Petition by Purchaser for Release.—In the absence of a showing that the property did not bring the best price or that the sale was not properly conducted, a petition by a purchaser at a judicial sale to be released from his purchase, heard before confirmation of the sale, will be treated the same as if the sale had been, or was about to be, confirmed. (N. J. Eq.) *Cropper v. Brown*, 770.

Destruction of Property.

9. JUDICIAL SALE—Destruction of Property Pending Confirmation.—Where, subsequent to a judicial sale and the signing of the conditions of sale by the purchaser, but prior to confirmation, the property is destroyed, the purchaser must sustain the loss, and will not be relieved from his contract because of such destruction. (N. J. Eq.) *Cropper v. Brown*, 770.

JURISDICTION.

See Venue.

JURORS.

Challenges.

1. JURORS.—The Right of Peremptory Challenge is not denied where it is restricted to a defined number of opportunities. There need not be a definite rule fixing the time when, or the manner in which, the right must be exercised; it may be controlled either by a

fixed rule, or by any reasonable limitation imposed in any specific case, so long as the right of peremptory challenge is not taken away. (Ind.) *McDonald v. State*, 383.

2. JURORS—Challenge to Array or Panel.—At common law no challenge to the array or panel could be made until the full jury was present, and the statute of this state upon the subject was evidently adopted with this practice in mind. (Ind.) *McDonald v. State*, 383.

Instructions as to Manner of Deliberations.

3. CRIMINAL TRIAL—Instructing Jury as to Manner of Deliberation.—An instruction that the jury should examine the questions submitted to them with candor, and with a proper regard and deference to the opinions of each other; that it is their duty to decide the case if they can conscientiously do so; that in conferring together they ought to pay a proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments; that a juror, dissenting from the majority, should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath; that a minority should seriously ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows, is not erroneous as invading the province of the jury, or attempting to dictate to them the manner in which they should conduct their deliberations. (S. D.) *State v. Egland*, 1066.

LANDLORD AND TENANT.

Fitness of Premises—Fraud—Damages.

1. LANDLORD AND TENANT—Fraud of Landlord—Damages.—A tenant, by remaining in possession, waives the right to rescind the lease for fraud or deceit of the landlord, whereby he was induced to enter into the lease, but he does not thereby waive his claim for damages occasioned by the fraud. (Mich.) *Morton v. Hanes*, 566.

2. LANDLORD AND TENANT—Fraud—Recoupment of Damages.—In an action for rent under a lease the tenant may show fraud and deceit of the landlord, whereby he was induced to enter into the lease, and recoup damages occasioned thereby. (Mich.) *Morton v. Hanes*, 566.

3. LANDLORD AND TENANT—Fitness of Premises—Covenants. In the absence of fraud, there is no implied covenant that premises are fit for the purpose for which they are leased. (Mich.) *Morton v. Hanes*, 566.

4. LANDLORD AND TENANT—Fitness of Premises—Damages.—Where a landlord makes false or fraudulent representations as to material facts not obvious to the lessee, or, knowing such facts, of which the lessee is excusably ignorant, conceals them, he may be held liable to the lessee for damages incurred in consequence thereof in an action for fraud and deceit, or the lessee may recoup such damages in the landlord's suit for rent. (Mich.) *Morton v. Hanes*, 566.

Holding Over.

5. LANDLORD AND TENANT.—A Tenant Holding Over more than thirty days after the expiration of his lease becomes a tenant at will, and thirty days' notice in writing is necessary to terminate the tenancy. (Iowa) *Hall v. Henninger*, 412.

6. LANDLORD AND TENANT—Holding Over by Tenant.—After the death of a lessor, owning a life estate, the tenant, if he continues in possession, is one holding over after the expiration of his term, and may be dispossessed by an action for the recovery of real property or by an action of forcible entry under the code. (*Iowa*) *Hall v. Henninger*, 412.

7. LANDLORD AND TENANT—Holding Over by Tenant.—After the death of a lessor owning a life estate, the remainderman may elect to allow a tenant holding over to remain subject to the obligation to pay rent, or by proper steps to oust him from possession. If he elects to allow the tenant to remain for thirty days, he is not entitled to either remedy until after service of thirty days' notice to quit as provided by statute. (*Iowa*) *Hall v. Henninger*, 412.

Note.

Legacies. See *Wills*.

LETTERS.

See *Evidence*, 6, 7.

LIBEL AND SLANDER.

In General.

1. LIBEL—Injury to Business.—An Allegation of Special Damage is not necessary in a complaint in libel when the charges complained of have a tendency to injure the plaintiff in his trade or business. Such charges are actionable per se. (*Ky.*) *Pennsylvania Iron Works Co. v. Vogt Machine Co.*, 504.

2. LIBEL—Malicious Intent Presumed—Punitive Damages.—When a letter is libelous per se, malicious intent in the publication is presumed, and the jury have a right to find punitive damages, in their discretion. (*Ky.*) *Pennsylvania Iron Works Co. v. Vogt Machine Co.*, 504.

3. LIBEL—Damage Presumed.—Where the Words Charged as libelous are actionable per se, the law presumes damages. No special evidence concerning them is required. It is for the jury to determine what amount by way of compensation shall be allowed for the injury. (*Colo.*) *Melcher v. Beeler*, 273.

4. LIBEL—Communication Invited by Plaintiff.—Alleged defamatory statements invited or procured by a plaintiff or person acting for him will not support an action for libel. (*Colo.*) *Melcher v. Beeler*, 273.

5. LIBEL—Prior and Contemporaneous Publications of similar import to those for which damages are claimed in an action for libel are competent to show malice. (*Colo.*) *Melcher v. Beeler*, 273.

6. LIBEL—Where Prior Publications of Similar import are admitted in evidence for the purpose of showing malice, and the jury is not cautioned to consider them for that purpose only, an instruction to the effect that the jury may award such damages as in the exercise of its reasonable judgment, "under all the evidence in the case," it may think the plaintiffs should have by way of compensation, etc., is erroneous. (*Colo.*) *Melcher v. Beeler*, 273.

Liability of Corporation.

7. LIBEL.—A Corporation is Responsible for a Libel, provided the publication can be shown to have been made by one of its servants or agents in the scope of his employment and in the course of the business in which he was employed. (*Ky.*) *Pennsylvania Iron Works Co. v. Vogt Machine Co.*, 504.

8. LIBEL.—The Facts That a Corporation Gave No Authority to its agent to insert libelous statements written by him as such agent,

and that such were written without its knowledge and consent, do not relieve it from liability, if the wrong was done in an effort to obtain business for it. (Ky.) *Pennsylvania Iron Works Co. v. Vogt Machine Co.*, 504.

9. **LIBEL**.—Words Written of a Corporation by the Agent of Another Corporation in a letter to a third, to which the first two had submitted competing bids for furnishing an ice machine, which words characterized the company written about as a second-hand dealer, ignorant of how to construct the needed article, foretold failure if it tried to do so, charged it with using inferior material and employing only "scab" labor, and denied its having "a mechanic in their whole establishment," are libelous. (Ky.) *Pennsylvania Iron Works Co. v. Vogt Machine Co.*, 504.

10. **LIBEL**.—Failure by a Corporation to Repudiate the libelous letter of its agent immediately upon obtaining knowledge of its publication amounts to a ratification. (Ky.) *Pennsylvania Iron Works Co. v. Vogt Machine Co.*, 504.

Privileged Communications.

11. **LIBEL**.—Privileged Communications—Social or Moral Duty.—A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains incriminatory matter which, without this privilege, would be actionable; and this though the duty is only a moral or social duty of imperfect application. (Colo.) *Melcher v. Beeler*, 273.

12. **LIBEL**.—Privileged Communications.—The Falsity of Statements of a privileged communication is not sufficient of itself to raise the inference that they were maliciously inspired. (Colo.) *Melcher v. Beeler*, 273.

13. **LIBEL**.—Privileged Communications—Questions for Jury.—The questions of the good faith of the defendant in making privileged communications, his belief in the truth of his statements and whether or not they were inspired by malice, are for the jury. (Colo.) *Melcher v. Beeler*, 273.

14. **LIBEL**.—Privileged Communications—Establishing Malice.—That a person was actuated by malice in making a defamatory communication which is privileged cannot be established alone by introducing other privileged communications, nor is the latter admissible for this purpose until there has been some other testimony tending to prove the malice of the person making the privileged communication. (Colo.) *Melcher v. Beeler*, 273.

See Partnership, 2.

LICENSE.

1. **LICENSE**.—The Wheel Tax Ordinance of Chicago is not unconstitutional for the reason that it is a revenue ordinance and imposes a penalty for its violation which may be enforced by arrest and imprisonment. (Ill.) *City of Chicago v. Morell*, 340.

2. **LICENSE TO RUN AUTOMOBILE**.—Enforcement by Fine.—The city of Chicago has a right to enforce, by fine and imprisonment, the wheel tax ordinance of that city, which requires the taking out of a license as a prerequisite to the running of an automobile upon the streets of that city. Such prosecution is not a proceeding to collect the wheel tax upon automobiles, but to collect the penalty imposed by the ordinance for using an automobile without having complied with the ordinance. (Ill.) *City of Chicago v. Morell*, 340.

LIEN.

See Judgments, 5.

Note.

Life Estates. See Wills.

right of life tenant to convey or mortgage fee, 114-117.

right and obligation of life tenant as to use of property, 118-120.

LIMITATION OF ACTIONS.

1. **LIMITATIONS**—Interruption by Service of Citation.—Prescription is not interrupted by the service of citation on a day of public rest other than Sunday. (La.) *Rady v. Fire Ins. Patrol*, 511.

2. **LIMITATIONS**—Computation of Time—Action for Death.—An action for damages for the death of a person is prescribed by one year from the day of the death. In the computation of time, the day a quo is excluded, and the day ad quem must have elapsed. Thus, where death occurred on June 25, 1905, citation served on June 25, 1906, before midnight, will interrupt prescription. (La.) *Rady v. Fire Ins. Patrol*, 511.

3. **STATUTE OF LIMITATIONS**—Fraud.—Under section 382, subdivision 5 of the code, an action in equity based on fraud, even where the jurisdiction in equity is only concurrent with that of law, may be brought at any time within six years after the discovery of the fraud. Nor does the fact that the ultimate relief sought is a money judgment take the case without the statutory provision. (N. Y.) *Lightfoot v. Davis*, 817.

4. **STATUTE OF LIMITATIONS**—Debt not Discharged.—While the statute of limitations may bar the remedy, it does not cancel or discharge the debt. It may operate to transfer title to property, as in case of adverse possession of real property. (N. Y.) *Lightfoot v. Davis*, 817.

See Adverse Possession; Equity, 10.

LOCAL OPTION.

See Intoxicating Liquors.

LOGS AND LOGGING.

See Timber.

MAILING LETTERS.

See Evidence, 6, 7.

MANSLAUGHTER.

See Homicide.

MARRIAGE.

MARRIAGE—Cohabitation After Removal of Impediment.—A woman will be regarded as the legal wife of a man at the time of his death where, in good faith and in ignorance of his prior undissolved marriage to another, she married him and cohabited with him during the lifetime of the former wife and after her death. (Brooke, Ostrander, Hooker and McAlvay, JJ., dissenting. (Mich.) *In re Fitzgibbons' Estate*, 570.

See Husband and Wife.

MASTER AND SERVANT.

Duty and Liability to Servant in General.

1. **MASTER AND SERVANT**—Safe Place—Assumption of Risk. At common law the master owed the servant the duty to provide a

reasonably safe place to work and reasonably safe appliances to work with, and the employee assumed the ordinary risks of the business which he knew, or as an ordinary, careful and intelligent man ought to have anticipated; among them, the likelihood of human infirmity in his fellow-workmen, so that they may be careless. (Wis.) *Massy v. Milwaukee Elec. Ry. & L. Co.*, 1096.

2. MASTER AND SERVANT—Safe Place.—A Promise Made by the chief engineer to the oiler of a private steam yacht to "fix" a dangerous place does not render the owner liable for injuries to the oiler subsequently by reason of the place not being made safe. (Pa.) *Hollis v. Widener*, 1010.

3. MASTER AND SERVANT—Warning of Danger.—In addition to using precaution to furnish servants a safe place to work, the master must warn them of secret dangers, and it does not absolve him to show that they could not have avoided the danger had they known of it. (N. H.) *Blaisdell v. Davis Paper Co.*, 735.

4. MASTER AND SERVANT—Unexploded Blast.—Where a servant is injured by the explosion of dynamite, which had failed to explode in a blast, while removing dirt loosened by the blast, the question of the negligence of the master should be left to the jury in the absence of evidence of careful inspection and the use of every precaution human ingenuity could suggest, and of warning to the workmen. (N. H.) *Blaisdell v. Davis Paper Co.*, 735.

5. MASTER AND SERVANT—Right to Rely on Customary Methods.—An employee has a right to rely upon the continued observance of proper and customary methods of conducting a particular business. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

6. MASTER AND SERVANT—Assumed Risk—Violation of Statute.—A master may not rightfully invoke the principle of assumed risk to defeat an action for injuries caused by his violation of a specific statutory mandate or prohibition. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

Minor Employees—Statutes.

7. MASTER AND SERVANT—Misrepresentation of Age by an Infant when seeking employment is no defense to the master who employs him under the age fixed by a statute and in violation of its provisions. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

8. MASTER AND SERVANT—Minor—Violation of Statute—Contributory Negligence.—A complaint by a boy thirteen years old, employed in a factory in violation of law, showing that by reason of exhaustion occasioned by excessive labor he fell asleep in a position, not ordinarily dangerous, where he was injured by the defendant moving cars contrary to its usual custom, does not show a case of contributory negligence. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

9. MASTER AND SERVANT—Minor—Violation of Statute.—The employment of a child of tender years and subjecting him to excessive hours of labor in violation of a statute, and the running of cars at unusual times whereby he is injured, constitute a violation of the master's duty not only to the servant but to the state as well. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

10. MASTER AND SERVANT—Minor.—The Violation of Statutes prohibiting the employment of children and fixing hours of labor constitutes negligence per se, but to make such negligence actionable it must be a proximate cause of the injury for which the action is brought. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

11. MASTER AND SERVANT—Minor—Duty to Instruct and Caution.—A master must give to a young and inexperienced servant such instruction and caution regarding the dangers of his employment as

are reasonably calculated to enable him to avoid injury. This duty becomes imperative and inflexible when the servant is forbidden by law to assume the hazard to which he is exposed. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

12. MASTER AND SERVANT—Minors—Violation of Statute.—*Allegations Showing* a violation of the terms of a statute prohibiting the employment of a minor in a certain business, and requiring him to work a number of hours in excess of the maximum fixed by law, are sufficient to show negligence per se, in an action for personal injuries received during such employment. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

13. MASTER AND SERVANT—Minor—Violation of Statute.—A master who, in violation of a statute, employs an infant for an excessive number of hours has an exceptional responsibility for the care of the infant cast upon him, and must anticipate the happening of accidents and give warning and take precautions commensurate with the danger to be apprehended. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

14. MASTER AND SERVANT—Minor—Violation of Statute.—The employer of a child in violation of a specific statute cannot screen himself from liability for an injury sustained by the child in the service, because the injury was occasioned through such negligence, imprudence or childish traits as gave rise to the statute. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

Fellow-servants.

15. FELLOW-SERVANTS—Chief Engineer and Oiler on Yacht.—The higher order of employment of the chief engineer of a private yacht over that of the oiler does not of itself make the holders of the two positions other than fellow-servants of the owner. (Pa.) *Hollis v. Widener*, 1010.

16. FELLOW-SERVANTS—Association Theory.—In applying the fellow-servant rule the Kentucky courts adopt the "association theory," by which the master is excused in cases only where the servants were so engaged and situated at the time of the injury that each by carefulness and attention to the performance of his duties might have protected himself from the effects of other's negligence. (Ky.) *Louisville Ry. Co. v. Hibbitt*, 464.

17. FELLOW-SERVANTS.—A Servant Assumes the Risk of being injured by a fellow-servant only when the two labor together in a common employment, each being so situated that he can observe the acts and conduct of the other. (Ky.) *Louisville Ry. Co. v. Hibbitt*, 464.

18. FELLOW-SERVANTS—Unreasonableness of Doctrine.—Nearly all of the courts seem to recognize that the fellow-servant doctrine is a harsh and unreasonable rule, and yet one that is so firmly fixed in the jurisprudence of the country that it cannot well be gotten rid of except by legislation. (Ky.) *Louisville Ry. Co. v. Hibbitt*, 464.

19. FELLOW-SERVANTS.—The Motormen of Two Trolley Cars, one of which collides with the other, are not fellow-servants so as to exempt from liability the master in an action by one of the motormen for injuries caused by the collision. (Ky.) *Louisville Ry. Co. v. Hibbitt*, 464.

20. MASTER AND SERVANT—Fellow-servants—Electrical Industries.—In such employments as the electrical industries, where constantly employees must work in places which are rendered safe or unsafe by other agents or employees hired to do the determining act for the very purpose of creating the safety, with whom the exposed

workmen have no contact or community save being employed to carry on the general business of the master, the two employees cannot be considered fellow-servants. (Wis.) *Massy v. Milwaukee Elec. Ry. & L. Co.*, 1096.

21. MASTER AND SERVANT—Switch Attendant and Lineman not Fellow-servants.—A distinct and independent employee to whom is delegated the duty to disconnect and make safe the wires of an electrical industry on which others must work is ordinarily a vice-principal, not a fellow-servant with the linemen and other like workmen. (Wis.) *Massy v. Milwaukee Elec. Ry. & L. Co.*, 1096.

Wages—Discharge of Servant.

See Commerce, 5; Constitutional Law, 15-26.

22. MASTER AND SERVANT—Action for Compensation—Installments.—A Discharged Servant who would recover of his employer upon a contract under which his services were to be paid for in periodical installments must bring his action for all the installments due at the time; otherwise he waives those due and unsued for. (Pa.) *Stradley v. Bath Portland Cement Co.*, 993.

23. MASTER AND SERVANT—Statute Regulating Payment of Wages.—A statute providing that the employees of a steam surface railroad company shall be paid semi-monthly and in cash, and inflicting a penalty for a violation thereof, operates as a restraint upon the freedom of such corporations to make any contract to pay the wages of their employees otherwise than semi-monthly and in cash. (N. Y.) *New York Cent. etc. R. R. Co. v. Williams*, 850.

Interference With Right of Employment.

24. EMPLOYMENT—Liability for Interference.—One who, with intent to deprive another of employment, makes false statements regarding him, is liable for the damage occasioned thereby. (N. H.) *Huskie v. Griffin*, 718.

25. EMPLOYMENT—Interference.—A Statement of the Truth, made for the sole purpose of damaging a person by causing a third person to refuse to further deal with or employ him, is actionable if damage ensues. (N. H.) *Huskie v. Griffin*, 718.

26. EMPLOYMENT—Malice in Interfering With Another's right to employment and preventing his employment may be inferred from the proved absence of other motive for the act done, and in case there is a sufficient justifiable motive, it may still be proved that in fact malice was the moving force. (N. H.) *Huskie v. Griffin*, 718.

27. EMPLOYMENT.—Justification for Interference With Another's right to employment may, in the absence of the elements of fraud and malice, be placed upon the ground that it was reasonable under all the circumstances of the case, and the issue thereby raised is one of fact. (N. H.) *Huskie v. Griffin*, 718.

28. EMPLOYMENT.—A Malicious Wish to Injure a person cannot constitute a justification for an interference with his right to employment. (N. H.) *Huskie v. Griffin*, 718.

Liability of Master to Stranger for Servant's Acts.

29. MASTER'S LIABILITY to Stranger for Servant's Acts.—The test to determine whether a master is liable to a stranger for the consequences of his servant's misconduct is to inquire whether the latter was doing what he was employed to do at the time he caused the injury complained of. If he was not acting within the scope of his employment, the master is not liable. (N. H.) *Danforth v. Fisher*, 670.

JUDGES.

1. **CHANGE OF JUDGES**—Motion for on Account of Bias or Prejudice.—Under section 6647, Snyder's Compiled Laws of 1909, and section 15, Bunn's Constitution, a motion for a change of judge on account of the bias or prejudice of a county judge is in time if presented before the trial begins. (Okl. Cr.) *Rea v. State*, 954.

2. **CHANGE OF JUDGES**—Constitutional Right in Case of Bias.—Section 15, Bunn's Constitution, provides that right and justice shall be administered without prejudice. Under this provision, when a motion, properly verified, is made before the trial begins for a change of judge upon the ground of the bias or prejudice of the trial judge, it is the constitutional right of the party making it that it shall be granted. (Okl. Cr.) *Rea v. State*, 954.

See New Trial, 1.

JUDGMENT.*Res Judicata.*

1. **JUDGMENTS**—*Res Judicata*.—When a Matter has Once properly passed to final judgment, it has become *res adjudicata* and, as between the same parties, cannot be reopened or subsequently considered save by direct appeal for reconsideration to the tribunal that gave the first judgment, or by proceedings for reversal in an appellate court. (Pa.) *Stradley v. Bath Portland Cement Co.*, 993.

2. **JUDGMENTS**—*Res Judicata*—Judgment by Default.—So long as a judgment stands unreversed and unappealed from, it may not be questioned in any other case, and the circumstance that the defendant let the matter go uncontested to judgment does not impair the effect. A judgment by consent or default raises an estoppel. (Pa.) *Stradley v. Bath Portland Cement Co.*, 993.

3. **JUDGMENTS**—*Res Judicata*—Matters That Might have been Considered.—A judgment is conclusive not only of the matters that were actually considered, but of those that might have been considered if the defendant had exercised the vigilance that the law requires. (Pa.) *Stradley v. Bath Portland Cement Co.*, 993.

4. **JUDGMENTS**—*Res Judicata*.—An Action on a Contract having gone to judgment, affects an action between the same parties subsequently for damages arising from a breach of that contract. The legal theory underlying the two actions may not be the same, but the doctrine of *res adjudicata* applies to the material issuable facts common to both. (Pa.) *Stradley v. Bath Portland Cement Co.*, 993.

Recorded Judgment as Lien on Another Judgment.

5. **RECORDED JUDGMENT** as Lien upon Another Judgment.—One holding a recorded judgment acquires no lien thereby upon another judgment obtained by the judgment debtor, as the latter judgment is merely in the nature of a chose in action, and not property subject "to levy and sale under execution," which is the only property subject to the statutory lien created by recordation. (Ala.) *Canterbury & Gilder v. Marengo Abstract Co.*, 30.

Enforcement of Judgment.

6. **JUDGMENT**—Suit on Judgment—*Scire Facias*.—The judgment at the end of a suit on a judgment is for the debt and damages; but on a *scire facias* it is that the plaintiff have execution. (Ala.) *Drennen v. Dunn*, 28.

7. **JUDGMENT**—Proceedings After Unsatisfied Execution.—The debtor of a judgment debtor, proceeded against jointly with him in equity, under the appropriate statute, after the issue of execution and the return "no property found" thereon, is a defendant to the

action and may have the latter transferred to the ordinary docket so as to avail himself of a jury trial. (Ky.) *Merriwether v. Bell*, 488.

8. JUDGMENT—Enforcement—Equitable Proceedings.—The rule whereby only a liquidated claim of a debtor against a third person may be subjected to the satisfaction of that for which the creditor sues such debtor gives way when, under an appropriate statute, such third person is made codefendant with the debtor in an equitable proceeding after judgment, issue of execution and the return "no property found." (Ky.) *Merriwether v. Bell*, 488.

9. JUDGMENT—Enforcement—Equitable Proceedings.—Under the Kentucky statute which authorizes a proceeding in equity, on the return "no property found," against the judgment debtor jointly with a debtor of his, a chose in action of the former as against the latter may be subjected to the payment of the debt for which the judgment was recovered. (Ky.) *Merriwether v. Bell*, 488.

Reversal of Judgment.

10. REVERSAL OF JUDGMENT—Restitution of Land—Rents and Interest.—If a party has been deprived of land by a decree which is subsequently reversed, and he is entitled to a judgment for the restoration of the land, he is also entitled to the rents received with the interest thereon during the time they were wrongfully withheld, and is not answerable for compensation for services by the wrongdoer in his assumption of control and management of the land. (Ala.) *Lehman-Durr Co. v. Folmar*, 37.

11. REVERSAL OF JUDGMENT—Restitution of Property—Nature of Remedy.—The restitution of property of which a person has been deprived by an erroneous judgment that has subsequently been reversed is a remedy to make such person whole. The decree of restitution is intended to restore to the aggrieved party that which he lost in consequence of the erroneous judgment reversed; and it may be a part of the reversed judgment, or it may be a separate judgment based on the one of reversal. (Ala.) *Lehman-Durr Co. v. Folmar*, 37.

12. REVERSAL OF JUDGMENT OF RESTITUTION.—A Judgment of Restitution of land, of which a party has been deprived by a judgment subsequently reversed, does not necessarily finally determine the rights of the parties to the property restored. (Ala.) *Lehman-Durr Co. v. Folmar*, 37.

See Equity, 1-3; *Scire Facias*.

JUDICIAL SALES.

In General.

1. JUDICIAL SALES—Confirmation—Written Objections.—The only office of a written objection to the confirmation of a sheriff's sale in foreclosure, under the act of March 12, 1880, and rule of court 205, is to urge the overthrow of the sale upon the sole ground that the property did not bring the highest and best price that could be obtained for it in cash, and an attack upon the sale on any other ground must be made the basis of an independent action either by bill or petition. (N. J. Eq.) *Cropper v. Brown*, 770.

2. JUDICIAL SALES—Contract Subject to Rules of Private Sale. When the judicial officer, observing proper legal formalities, at a public sale strikes off the property to a purchaser, who thereupon signs the conditions of sale, thereby entering into a contract to purchase the premises named, at the price named, the situation is exactly the same as if the contract were between private parties, and the same principles will control as would control private parties entering into a similar contract. (N. J. Eq.) *Cropper v. Brown*, 770.

3. JUDICIAL SALES—Deed Relates Back to Sale.—The giving of the officer's deed upon a judicial sale is a mere ministerial act, and not a substantial part of the sale. When given it relates back to the sale and the contract there made. (N. J. Eq.) *Cropper v. Brown*, 770.

Rights and Title of Purchaser.

4. JUDICIAL SALES—Rights of Purchaser.—A purchaser at a judicial sale becomes invested with a fixed and definite legal right, which is recognized and enforced by the law, and of which he cannot be deprived except upon some legal or equitable ground; and, although in those cases where confirmation is required the right is subject to be defeated, the right of the purchaser and the correlative rights of the judicial officer are established at the time of the sale and by the contract then made. (N. J. Eq.) *Cropper v. Brown*, 770.

5. JUDICIAL SALES—Title of Purchaser.—The legal title does not vest in the purchaser at a judicial sale until the delivery of the deed, but in the meantime it is held in trust for him. Since he has stipulated that he is not to receive possession until a future date, namely, the time the deed is to be delivered to him, he is not entitled to the fruits of possession, which are the current avails of the land, but he is vested with the beneficial ownership of the property, and any increase of value or decrease therein inures to him, and the loss or destruction of the property falls upon him and not upon the vendor. (N. J. Eq.) *Cropper v. Brown*, 770.

Relief of Purchaser.

6. JUDICIAL SALES—Relief of Purchaser.—In those cases in which the court itself is requested by the purchaser to relieve him of his purchase, the matter is dealt with as if it were an action of specific performance, and the same principles are applied. (N. J. Eq.) *Cropper v. Brown*, 770.

7. JUDICIAL SALES—Relief of Purchaser, How Obtained.—Any effort on behalf of the purchaser at a judicial sale to be relieved of his purchase must be by some independent proceeding, and not by mere objections to confirmation. It may be by petition to the court. (N. J. Eq.) *Cropper v. Brown*, 770.

8. JUDICIAL SALES—Petition by Purchaser for Release.—In the absence of a showing that the property did not bring the best price or that the sale was not properly conducted, a petition by a purchaser at a judicial sale to be released from his purchase, heard before confirmation of the sale, will be treated the same as if the sale had been, or was about to be, confirmed. (N. J. Eq.) *Cropper v. Brown*, 770.

Destruction of Property.

9. JUDICIAL SALE—Destruction of Property Pending Confirmation.—Where, subsequent to a judicial sale and the signing of the conditions of sale by the purchaser, but prior to confirmation, the property is destroyed, the purchaser must sustain the loss, and will not be relieved from his contract because of such destruction. (N. J. Eq.) *Cropper v. Brown*, 770.

JURISDICTION.

See Venue.

JURORS.

Challenges.

1. JURORS—The Right of Peremptory Challenge is not denied where it is restricted to a defined number of opportunities. There need not be a definite rule fixing the time when, or the manner in which, the right must be exercised; it may be controlled either by a

fixed rule, or by any reasonable limitation imposed in any specific case, so long as the right of peremptory challenge is not taken away. (Ind.) *McDonald v. State*, 383.

2. JURORS—Challenge to Array or Panel.—At common law no challenge to the array or panel could be made until the full jury was present, and the statute of this state upon the subject was evidently adopted with this practice in mind. (Ind.) *McDonald v. State*, 383.

Instructions as to Manner of Deliberations.

3. CRIMINAL TRIAL—Instructing Jury as to Manner of Deliberation.—An instruction that the jury should examine the questions submitted to them with candor, and with a proper regard and deference to the opinions of each other; that it is their duty to decide the case if they can conscientiously do so; that in conferring together they ought to pay a proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments; that a juror, dissenting from the majority, should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath; that a minority should seriously ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows, is not erroneous as invading the province of the jury, or attempting to dictate to them the manner in which they should conduct their deliberations. (S. D.) *State v. Egland*, 1066.

LANDLORD AND TENANT.

Fitness of Premises—Fraud—Damages.

1. LANDLORD AND TENANT—Fraud of Landlord—Damages.—A tenant, by remaining in possession, waives the right to rescind the lease for fraud or deceit of the landlord, whereby he was induced to enter into the lease, but he does not thereby waive his claim for damages occasioned by the fraud. (Mich.) *Morton v. Hanes*, 566.

2. LANDLORD AND TENANT—Fraud—Recoupment of Damages.—In an action for rent under a lease the tenant may show fraud and deceit of the landlord, whereby he was induced to enter into the lease, and recoup damages occasioned thereby. (Mich.) *Morton v. Hanes*, 566.

3. LANDLORD AND TENANT—Fitness of Premises—Covenants. In the absence of fraud, there is no implied covenant that premises are fit for the purpose for which they are leased. (Mich.) *Morton v. Hanes*, 566.

4. LANDLORD AND TENANT—Fitness of Premises—Damages.—Where a landlord makes false or fraudulent representations as to material facts not obvious to the lessee, or, knowing such facts, of which the lessee is excusably ignorant, conceals them, he may be held liable to the lessee for damages incurred in consequence thereof in an action for fraud and deceit, or the lessee may recoup such damages in the landlord's suit for rent. (Mich.) *Morton v. Hanes*, 566.

Holding Over.

5. LANDLORD AND TENANT.—A Tenant Holding Over more than thirty days after the expiration of his lease becomes a tenant at will, and thirty days' notice in writing is necessary to terminate the tenancy. (Iowa) *Hall v. Henninger*, 412.

6. LANDLORD AND TENANT—Holding Over by Tenant.—After the death of a lessor, owning a life estate, the tenant, if he continues in possession, is one holding over after the expiration of his term, and may be dispossessed by an action for the recovery of real property or by an action of forcible entry under the code. (Iowa) *Hall v. Henninger*, 412.

7. LANDLORD AND TENANT—Holding Over by Tenant.—After the death of a lessor owning a life estate, the remainderman may elect to allow a tenant holding over to remain subject to the obligation to pay rent, or by proper steps to oust him from possession. If he elects to allow the tenant to remain for thirty days, he is not entitled to either remedy until after service of thirty days' notice to quit as provided by statute. (Iowa) *Hall v. Henninger*, 412.

Note.

Legacies. See Wills.

LETTERS.

See Evidence, 6, 7.

LIBEL AND SLANDER.

In General.

1. LIBEL—Injury to Business.—An Allegation of Special Damage is not necessary in a complaint in libel when the charges complained of have a tendency to injure the plaintiff in his trade or business. Such charges are actionable per se. (Ky.) *Pennsylvania Iron Works Co. v. Vogt Machine Co.*, 504.

2. LIBEL—Malicious Intent Presumed—Punitive Damages.—When a letter is libelous per se, malicious intent in the publication is presumed, and the jury have a right to find punitive damages, in their discretion. (Ky.) *Pennsylvania Iron Works Co. v. Vogt Machine Co.*, 504.

3. LIBEL—Damage Presumed.—Where the Words Charged as libelous are actionable per se, the law presumes damages. No special evidence concerning them is required. It is for the jury to determine what amount by way of compensation shall be allowed for the injury. (Colo.) *Melcher v. Beeler*, 273.

4. LIBEL—Communication Invited by Plaintiff.—Alleged defamatory statements invited or procured by a plaintiff or person acting for him will not support an action for libel. (Colo.) *Melcher v. Beeler*, 273.

5. LIBEL—Prior and Contemporaneous Publications of similar import to those for which damages are claimed in an action for libel are competent to show malice. (Colo.) *Melcher v. Beeler*, 273.

6. LIBEL—Where Prior Publications of Similar import are admitted in evidence for the purpose of showing malice, and the jury is not cautioned to consider them for that purpose only, an instruction to the effect that the jury may award such damages as in the exercise of its reasonable judgment, "under all the evidence in the case," it may think the plaintiffs should have by way of compensation, etc., is erroneous. (Colo.) *Melcher v. Beeler*, 273.

Liability of Corporation.

7. LIBEL.—A Corporation is Responsible for a Libel, provided the publication can be shown to have been made by one of its servants or agents in the scope of his employment and in the course of the business in which he was employed. (Ky.) *Pennsylvania Iron Works Co. v. Vogt Machine Co.*, 504.

8. LIBEL.—The Facts That a Corporation Gave No Authority to its agent to insert libelous statements written by him as such agent,

and that such were written without its knowledge and consent, do not relieve it from liability, if the wrong was done in an effort to obtain business for it. (Ky.) *Pennsylvania Iron Works Co. v. Vogt Machine Co.*, 504.

9. **LIBEL**.—Words Written of a Corporation by the Agent of Another Corporation in a letter to a third, to which the first two had submitted competing bids for furnishing an ice machine, which words characterized the company written about as a second-hand dealer, ignorant of how to construct the needed article, foretold failure if it tried to do so, charged it with using inferior material and employing only "scab" labor, and denied its having "a mechanic in their whole establishment," are libelous. (Ky.) *Pennsylvania Iron Works Co. v. Vogt Machine Co.*, 504.

10. **LIBEL**.—Failure by a Corporation to Repudiate the libelous letter of its agent immediately upon obtaining knowledge of its publication amounts to a ratification. (Ky.) *Pennsylvania Iron Works Co. v. Vogt Machine Co.*, 504.

Privileged Communications.

11. **LIBEL**.—Privileged Communications—Social or Moral Duty.—A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains incriminatory matter which, without this privilege, would be actionable; and this though the duty is only a moral or social duty of imperfect application. (Colo.) *Melcher v. Beeler*, 273.

12. **LIBEL**.—Privileged Communications.—The Falsity of Statements of a privileged communication is not sufficient of itself to raise the inference that they were maliciously inspired. (Colo.) *Melcher v. Beeler*, 273.

13. **LIBEL**.—Privileged Communications—Questions for Jury.—The questions of the good faith of the defendant in making privileged communications, his belief in the truth of his statements and whether or not they were inspired by malice, are for the jury. (Colo.) *Melcher v. Beeler*, 273.

14. **LIBEL**.—Privileged Communications—Establishing Malice.—That a person was actuated by malice in making a defamatory communication which is privileged cannot be established alone by introducing other privileged communications, nor is the latter admissible for this purpose until there has been some other testimony tending to prove the malice of the person making the privileged communication. (Colo.) *Melcher v. Beeler*, 273.

See Partnership, 2.

LICENSE.

1. **LICENSE**.—The Wheel Tax Ordinance of Chicago is not unconstitutional for the reason that it is a revenue ordinance and imposes a penalty for its violation which may be enforced by arrest and imprisonment. (Ill.) *City of Chicago v. Morell*, 340.

2. **LICENSE TO RUN AUTOMOBILE**.—Enforcement by Fine.—The city of Chicago has a right to enforce, by fine and imprisonment, the wheel tax ordinance of that city, which requires the taking out of a license as a prerequisite to the running of an automobile upon the streets of that city. Such prosecution is not a proceeding to collect the wheel tax upon automobiles, but to collect the penalty imposed by the ordinance for using an automobile without having complied with the ordinance. (Ill.) *City of Chicago v. Morell*, 340.

LIEN.

See Judgments, 5.

Note.

Life Estates. See Wills.

right of life tenant to convey or mortgage fee, 114-117.

right and obligation of life tenant as to use of property, 118-120.

LIMITATION OF ACTIONS.

1. **LIMITATIONS**—Interruption by Service of Citation.—Prescription is not interrupted by the service of citation on a day of public rest other than Sunday. (La.) *Rady v. Fire Ins. Patrol*, 511.

2. **LIMITATIONS**—Computation of Time—Action for Death.—An action for damages for the death of a person is prescribed by one year from the day of the death. In the computation of time, the day a quo is excluded, and the day ad quem must have elapsed. Thus, where death occurred on June 25, 1905, citation served on June 25, 1906, before midnight, will interrupt prescription. (La.) *Rady v. Fire Ins. Patrol*, 511.

3. **STATUTE OF LIMITATIONS**—Fraud.—Under section 382, subdivision 5 of the code, an action in equity based on fraud, even where the jurisdiction in equity is only concurrent with that of law, may be brought at any time within six years after the discovery of the fraud. Nor does the fact that the ultimate relief sought is a money judgment take the case without the statutory provision. (N. Y.) *Lightfoot v. Davis*, 817.

4. **STATUTE OF LIMITATIONS**—Debt not Discharged.—While the statute of limitations may bar the remedy, it does not cancel or discharge the debt. It may operate to transfer title to property, as in case of adverse possession of real property. (N. Y.) *Lightfoot v. Davis*, 817.

See Adverse Possession; Equity, 10.

LOCAL OPTION.

See Intoxicating Liquors.

LOGS AND LOGGING.

See Timber.

MAILING LETTERS.

See Evidence, 6, 7.

MANSLAUGHTER.

See Homicide.

MARRIAGE.

MARRIAGE—Cohabitation After Removal of Impediment.—A woman will be regarded as the legal wife of a man at the time of his death where, in good faith and in ignorance of his prior undissolved marriage to another, she married him and cohabited with him during the lifetime of the former wife and after her death. (Brooke, Ostrander, Hooker and McAlvay, JJ., dissenting. (Mich.) *In re Fitzgibbons' Estate*, 570.

See Husband and Wife.

MASTER AND SERVANT.

Duty and Liability to Servant in General.

1. **MASTER AND SERVANT**—Safe Place—Assumption of Risk. At common law the master owed the servant the duty to provide a

reasonably safe place to work and reasonably safe appliances to work with, and the employee assumed the ordinary risks of the business which he knew, or as an ordinary, careful and intelligent man ought to have anticipated; among them, the likelihood of human infirmity in his fellow-workmen, so that they may be careless. (Wis.) *Massy v. Milwaukee Elec. Ry. & L. Co.*, 1096.

2. MASTER AND SERVANT—Safe Place.—A Promise Made by the chief engineer to the oiler of a private steam yacht to “fix” a dangerous place does not render the owner liable for injuries to the oiler subsequently by reason of the place not being made safe. (Pa.) *Hollis v. Widener*, 1010.

3. MASTER AND SERVANT—Warning of Danger.—In addition to using precaution to furnish servants a safe place to work, the master must warn them of secret dangers, and it does not absolve him to show that they could not have avoided the danger had they known of it. (N. H.) *Blaisdell v. Davis Paper Co.*, 735.

4. MASTER AND SERVANT—Unexploded Blast.—Where a servant is injured by the explosion of dynamite, which had failed to explode in a blast, while removing dirt loosened by the blast, the question of the negligence of the master should be left to the jury in the absence of evidence of careful inspection and the use of every precaution human ingenuity could suggest, and of warning to the workmen. (N. H.) *Blaisdell v. Davis Paper Co.*, 735.

5. MASTER AND SERVANT—Right to Rely on Customary Methods.—An employee has a right to rely upon the continued observance of proper and customary methods of conducting a particular business. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

6. MASTER AND SERVANT—Assumed Risk—Violation of Statute.—A master may not rightfully invoke the principle of assumed risk to defeat an action for injuries caused by his violation of a specific statutory mandate or prohibition. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

Minor Employees—Statutes.

7. MASTER AND SERVANT—Misrepresentation of Age by an Infant when seeking employment is no defense to the master who employs him under the age fixed by a statute and in violation of its provisions. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

8. MASTER AND SERVANT—Minor—Violation of Statute—Contributory Negligence.—A complaint by a boy thirteen years old, employed in a factory in violation of law, showing that by reason of exhaustion occasioned by excessive labor he fell asleep in a position, not ordinarily dangerous, where he was injured by the defendant moving cars contrary to its usual custom, does not show a case of contributory negligence. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

9. MASTER AND SERVANT—Minor—Violation of Statute.—The employment of a child of tender years and subjecting him to excessive hours of labor in violation of a statute, and the running of cars at unusual times whereby he is injured, constitute a violation of the master's duty not only to the servant but to the state as well. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

10. MASTER AND SERVANT—Minor.—The Violation of Statutes prohibiting the employment of children and fixing hours of labor constitutes negligence per se, but to make such negligence actionable it must be a proximate cause of the injury for which the action is brought. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

11. MASTER AND SERVANT—Minor—Duty to Instruct and Caution.—A master must give to a young and inexperienced servant such instruction and caution regarding the dangers of his employment as

are reasonably calculated to enable him to avoid injury. This duty becomes imperative and inflexible when the servant is forbidden by law to assume the hazard to which he is exposed. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

12. MASTER AND SERVANT—Minors—Violation of Statute.—*Allegations Showing a violation of the terms of a statute prohibiting the employment of a minor in a certain business, and requiring him to work a number of hours in excess of the maximum fixed by law, are sufficient to show negligence per se, in an action for personal injuries received during such employment.* (Ind.) *Inland Steel Co. v. Yedinak*, 389.

13. MASTER AND SERVANT—Minor—Violation of Statute.—A master who, in violation of a statute, employs an infant for an excessive number of hours has an exceptional responsibility for the care of the infant cast upon him, and must anticipate the happening of accidents and give warning and take precautions commensurate with the danger to be apprehended. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

14. MASTER AND SERVANT—Minor—Violation of Statute.—The employer of a child in violation of a specific statute cannot screen himself from liability for an injury sustained by the child in the service, because the injury was occasioned through such negligence, imprudence or childish traits as gave rise to the statute. (Ind.) *Inland Steel Co. v. Yedinak*, 389.

Fellow-servants.

15. FELLOW-SERVANTS—Chief Engineer and Oiler on Yacht.—The higher order of employment of the chief engineer of a private yacht over that of the oiler does not of itself make the holders of the two positions other than fellow-servants of the owner. (Pa.) *Hollis v. Widener*, 1010.

16. FELLOW-SERVANTS—Association Theory.—In applying the fellow-servant rule the Kentucky courts adopt the "association theory," by which the master is excused in cases only where the servants were so engaged and situated at the time of the injury that each by carefulness and attention to the performance of his duties might have protected himself from the effects of other's negligence. (Ky.) *Louisville Ry. Co. v. Hibbitt*, 464.

17. FELLOW-SERVANTS.—A Servant Assumes the Risk of being injured by a fellow-servant only when the two labor together in a common employment, each being so situated that he can observe the acts and conduct of the other. (Ky.) *Louisville Ry. Co. v. Hibbitt*, 464.

18. FELLOW-SERVANTS—Unreasonableness of Doctrine.—Nearly all of the courts seem to recognize that the fellow-servant doctrine is a harsh and unreasonable rule, and yet one that is so firmly fixed in the jurisprudence of the country that it cannot well be gotten rid of except by legislation. (Ky.) *Louisville Ry. Co. v. Hibbitt*, 464.

19. FELLOW-SERVANTS.—The Motormen of Two Trolley Cars, one of which collides with the other, are not fellow-servants so as to exempt from liability the master in an action by one of the motormen for injuries caused by the collision. (Ky.) *Louisville Ry. Co. v. Hibbitt*, 464.

20. MASTER AND SERVANT—Fellow-servants—Electrical Industries.—In such employments as the electrical industries, where constantly employees must work in places which are rendered safe or unsafe by other agents or employees hired to do the determining act for the very purpose of creating the safety, with whom the exposed

workmen have no contact or community save being employed to carry on the general business of the master, the two employees cannot be considered fellow-servants. (Wis.) *Massy v. Milwaukee Elec. Ry. & L. Co.*, 1096.

21. MASTER AND SERVANT—Switch Attendant and Lineman not Fellow-servants.—A distinct and independent employee to whom is delegated the duty to disconnect and make safe the wires of an electrical industry on which others must work is ordinarily a vice-principal, not a fellow-servant with the linemen and other like workmen. (Wis.) *Massy v. Milwaukee Elec. Ry. & L. Co.*, 1096.

Wages—Discharge of Servant.

See Commerce, 5; Constitutional Law, 15-26.

22. MASTER AND SERVANT—Action for Compensation—Installments.—A Discharged Servant who would recover of his employer upon a contract under which his services were to be paid for in periodical installments must bring his action for all the installments due at the time; otherwise he waives those due and unsued for. (Pa.) *Stradley v. Bath Portland Cement Co.*, 993.

23. MASTER AND SERVANT—Statute Regulating Payment of Wages.—A statute providing that the employees of a steam surface railroad company shall be paid semi-monthly and in cash, and inflicting a penalty for a violation thereof, operates as a restraint upon the freedom of such corporations to make any contract to pay the wages of their employees otherwise than semi-monthly and in cash. (N. Y.) *New York Cent. etc. R. R. Co. v. Williams*, 850.

Interference With Right of Employment.

24. EMPLOYMENT—Liability for Interference.—One who, with intent to deprive another of employment, makes false statements regarding him, is liable for the damage occasioned thereby. (N. H.) *Huskie v. Griffin*, 718.

25. EMPLOYMENT—Interference.—A Statement of the Truth, made for the sole purpose of damaging a person by causing a third person to refuse to further deal with or employ him, is actionable if damage ensues. (N. H.) *Huskie v. Griffin*, 718.

26. EMPLOYMENT.—Malice in Interfering With Another's right to employment and preventing his employment may be inferred from the proved absence of other motive for the act done, and in case there is a sufficient justifiable motive, it may still be proved that in fact malice was the moving force. (N. H.) *Huskie v. Griffin*, 718.

27. EMPLOYMENT.—Justification for Interference With Another's right to employment may, in the absence of the elements of fraud and malice, be placed upon the ground that it was reasonable under all the circumstances of the case, and the issue thereby raised is one of fact. (N. H.) *Huskie v. Griffin*, 718.

28. EMPLOYMENT.—A Malicious Wish to Injure a person cannot constitute a justification for an interference with his right to employment. (N. H.) *Huskie v. Griffin*, 718.

Liability of Master to Stranger for Servant's Acts.

29. MASTER'S LIABILITY to Stranger for Servant's Acts.—The test to determine whether a master is liable to a stranger for the consequences of his servant's misconduct is to inquire whether the latter was doing what he was employed to do at the time he caused the injury complained of. If he was not acting within the scope of his employment, the master is not liable. (N. H.) *Danforth v. Fisher*, 670.

30. A MASTER IS NOT LIABLE for an Injury Caused by the negligence of a servant using his property without his knowledge or consent and outside the scope of the servant's duty. (N. H.) Danforth v. Fisher, 670.

31. A MASTER IS NOT LIABLE to a Third Person for injury by a servant, known to him to be unskillful and careless, where the injury was not inflicted in the course of the servant's employment, and such employment was not the cause of the injury. (N. H.) Danforth v. Fisher, 670.

See Constitutional Law, 15-26.

Note.

Master and Servant, constitutionality of statutes relating to wages, 63.

MECHANICS' LIENS.

MECHANICS' LIENS.—Title of Statute Excludes Contractors and Subcontractors.—The "mechanic's liens law" (Burns Rev. Stats. 1908, sec. 8305, Acts 1889, p. 257, sec. 6) only embraces mechanics, laborers, and materialmen, and does not include contractors or subcontractors, for the reason that they are not within the scope of the title of the act. (Ind.) Korbly v. Loomis, 379.

MERCHANT'S LIABILITY.

See Negligence, 10-12.

MINES AND MINERALS.

1. MINERALS—Effect of Severance from Surface Ownership.—Where there has been a severance of oil, gas and minerals from the surface, in respect of the ownership, the separate ownership of these minerals constitutes an interest or estate in land. (Pa.) Rockwell v. Warren County, 1006.

2. MINING CLAIMS—Citizenship of Original Locators.—In an action to determine adverse claims to a mining claim, brought by a grantee of an original locator, the right of the original locator, such as citizenship or declaration of intention to become a citizen, must be shown by the grantee. (Colo.) Duncan v. Eagle Rock Gold Min. etc. Co., 288.

3. MINING CLAIMS—Location Certificates.—Certainty of Description is required in a location certificate, and in locating the claim that for which the certificate calls must alone be used. (Colo.) Duncan v. Eagle Rock Gold Min. etc. Co., 288.

4. MINING CLAIMS—Assessment Work—Group Claims.—To make work done outside the surface boundaries of a claim apply to it, the work must have been done for the express purpose of benefiting such claim, and for its development, and the question of such intent is a material issue. (Colo.) Duncan v. Eagle Rock Gold Min. etc. Co., 288.

5. MINING CLAIMS—Group Claims.—Apportionment of Work intended to aid in the development of a group of claims cannot be made between the several claims. The improvement constitutes a distinct entity. (Colo.) Duncan v. Eagle Rock Gold Min. etc. Co., 288.

6. MINING CLAIMS—Proceedings to Obtain Title to mining property are in the nature of "inquest of office." The sovereign is a party to the proceeding, which is a direct one for the procurement of title, and the objection of alienage is based solely upon the right of the government to interpose the fact of alienage as a bar to procuring or holding an interest in realty. (Colo.) Duncan v. Eagle Rock Gold Min. etc. Co., 288.

7. MINING CLAIMS—Adverse Proceeding—Essential Evidence.—In a proceeding to determine an adverse to a mining claim it is incumbent upon the plaintiff to clearly establish the segregation from the public domain and the appropriation of the particular territory claimed. Production in evidence of certificates of location, in accordance with law, covering or including the particular territory in dispute is essential. (Colo.) *Duncan v. Eagle Rock Gold Min. etc. Co.*, 288.

8. MINING CLAIMS—Adverse Proceeding—Issues and Burden of Proof.—In adverse proceeding the parties must bring forward proof of every material fact necessary to sustain the validity of their respective claims, including the doing of the requisite assessment work. (Colo.) *Duncan v. Eagle Rock Gold Min. etc. Co.*, 288.

9. MINING CLAIMS—Discovery and Appropriation are the source of title to mining claims, and assessment or development work is the condition of their continued possession, provided the location is valid and complete. (Cal.) *McLemore v. Express Oil Co.*, 147.

10. MINING CLAIMS—Necessity of Discovery.—A Mining Location is valid and complete only when after compliance with other requirements a discovery of valuable minerals in place has been made. (Cal.) *McLemore v. Express Oil Co.*, 147.

11. MINING CLAIMS—Necessity of Actual Possession.—Where a mining claim is held under a mining location, and assessment work has been done on it sufficient to satisfy the national statute in that regard, actual possession is no more necessary for the protection of the title than it would be in the case of any other description of grant from the United States. (Cal.) *McLemore v. Express Oil Co.*, 147.

12. OIL LANDS—Location—Discovery.—The Act of Congress whereby the locating of claims to oil lands was made to be regulated by the laws relating to placer mining claims gravely embarrassed the courts as well as the locators, since in locating a mining claim discovery is required as an initial step, whereas great length of time necessarily is consumed in efforts to discover an oil deposit. (Cal.) *McLemore v. Express Oil Co.*, 147.

13. OIL LANDS—Location—Boundaries and Discovery.—In view of, on the one hand, the requirement of discovery as an initial step in locating validly a placer mining claim, and, on the other hand, the long time consumed necessarily in discovering an oil deposit, the placer mining law becomes available to the oil claim locator only through his being permitted to mark his boundaries and post and record his notice, and being protected in possession while prosecuting with diligence his work toward discovery. (Cal.) *McLemore v. Express Oil Co.*, 147.

14. OIL LANDS—Rights of Locator Prior to Discovery.—Having made his location in good faith, one who maintains possession of an oil land claim and diligently pushes on toward a discovery is protected against all forms of forcible, fraudulent, surreptitious or clandestine entries or intrusions; still his location remains incomplete and merely inchoate until perfected by actual discovery. (Cal.) *McLemore v. Express Oil Co.*, 147.

15. OIL LANDS—Vested Rights Prior to Discovery.—Until the perfection of the inchoate and incomplete location by actual discovery, the locator of a mining claim has no vested rights which Congress is obliged to recognize, and it may change its policy in regard to the lands to the extent even of excluding from them the diligent operator who has not made discovery. (Cal.) *McLemore v. Express Oil Co.*, 147.

16. OIL LANDS.—The Diligent Prosecution of Work Toward Discovery required of the locator of an oil land claim, contemplates, not assessment work or the looking about for capital to push the enterprise or any attempted holding through the presence on the land of cabin, lumber pile or unused derrick, but just the diligent, continuous prosecution of the work itself, with the expenditure of whatever money may be necessary, to the end in view; and where the locator's "diligent prosecution of work" is not within such contemplation the land concerned is open to homestead entry. (Cal.) *McLemore v. Express Oil Co.*, 147.

See Mines and Minerals, 2; Taxation, 8, 9.

Note.

Mining Claims, association placer claim, sufficiency of single discovery for, 165, 166.

discovery shaft, time of sinking, local statutes, 164.

discovery of mineral, federal laws applicable, 155, 156.

discovery of mineral, whether a prerequisite to claim, 159-162.

discovery of mineral, purpose and necessity of, 160, 161.

discovery of mineral, locator not a trespasser prior to, 162.

discovery of mineral, whether may be by agent, 162.

discovery of mineral, presumption favoring from long-standing location, 162.

discovery of mineral, estoppel to deny, 162.

discovery of mineral, subsequent richness of mine as evidence of, 162.

discovery of mineral, time of with respect to other locatory acts, 162-164.

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discovery of mineral, single discovery for association placer claim, 165, 166.

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MISCEGENATION.

MISCEGENATION.—The Words "a Person of the Negro or black race," as used in section 1 of Act No. 87 of 1908, making concubinage between such person and a person of the Caucasian race a felony, mean a negro, properly so called, and do not include an octoroon. (La.) *State v. Treadaway*, 514.

MONOPOLY.

See Contracts, 17-19; Telegraphs and Telephones, 7, 8.

MORTGAGES.

1. **MORTGAGES**—Enjoining Execution of Power of Sale.—Equity will enjoin the execution of a power of sale contained in a mortgage only when the enforcement of the mortgage would be against good conscience, and would work great and irreparable injury. (*Ala.*) *Caldwell v. Caldwell*, 48.

2. **MORTGAGES**—Enjoining Execution of Power of Sale.—Equity will not enjoin the execution of a power of sale in a mortgage until an unliquidated demand due from the respondent to the complainant can be ascertained and set off, in the absence of an allegation of the defendant's insolvency, or other special equity; and the defendant's refusal to accept a conveyance of the property in full discharge of

the debt does not arm the complainant with any special equity. (Ala.) *Caldwell v. Caldwell*, 48.

Note.

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MUNICIPAL CORPORATIONS.

City Council—Voting—Minutes of Proceedings.

1. **MUNICIPAL CORPORATIONS—City Council—Voting—Minutes of Proceedings.**—Where the city council of a municipality is composed of eight members, and it appears from the minutes of a meeting that the eight members voted in favor of a resolution relating to a public improvement, this is equivalent to stating that eight members voted "yea," and there is a substantial and sufficient compliance with Revised Political Code of South Dakota, section 1209, requiring a yea and nay vote to be taken upon any resolution declaring the necessity of a public improvement. (S. D.) *Whittaker v. Deadwood*, 1076.

Ordinances.

2. **MUNICIPAL ORDINANCE—Source of Power to Enact.**—An ordinance may derive its validity from several different grants of power. Its validity does not necessarily depend upon any single clause or section of the statute concerning the power of the municipality to legislate upon the subject covered by the ordinance. (Ill.) *Goodrich v. Busse*, 335.

3. **MUNICIPAL CORPORATIONS—Ordinances—Change of Boundaries.**—A municipal law or ordinance designed for a city at large operates throughout its actual boundaries, whatever they are, and is not affected by the fact that these are enlarged from time to time. (Mich.) *People v. Detroit United Ry.*, 582.

4. **ORDINANCE—Publication.**—When a Statute Requires that a municipal ordinance be published a stated number of times, the ordinance, in the absence of an express provision to the contrary, does not await the last publication in order to become operative. (Cal.) *Gay v. Engebretsen*, 67.

Streets in General.

5. **STREETS—Title Acquired by Condemnation Proceedings.**—The acquisition of a street by condemnation proceedings leaves the fee to the center of the street in the abutting owners, subject to the easement held by the city for the use of the public. (Ill.) *Sears v. Chicago*, 319.

6. **STREETS—Dedication—Recording Plat.**—If title to the streets of a city is acquired by dedication of the owner in accordance with the statute relating to plats, the acknowledgment and recording of such plat have the effect, both in law and equity, of conveying a fee to the city of such portions of the premises platted as are noted on the plat as donated to the public. (Ill.) *Sears v. Chicago*, 319.

7. **STREETS—Held in Trust for the Public.**—Whatever title a city has in its streets is held in trust for the public, whether it owns the fee or only an easement. The primary object of the trust is the interest of the public, which must always be paramount to all other interests. (Ill.) *Sears v. Chicago*, 319.

8. **STREETS—Encroachment upon Rights of Public.**—A city cannot grant away the rights of the public in its streets, nor can such rights be encroached upon by private individuals, with or without the consent of the municipality, to the detriment of the superior rights of the public. (Ill.) *Sears v. Chicago*, 319.

9. STREETS—Use not Inconsistent With Public Purpose.—A city may, under the power of exclusive control of its streets, allow any use of them which is not inconsistent with the public objects for which they are held, and may regulate such use and fix a reasonable compensation to be paid for the same. (Ill.) *Sears v. Chicago*, 319.

10. STREETS—Power of City to Control and Regulate.—Where a city owns the fee to its streets, its power with respect to the control and regulation of them is subject to no limitation except that the exercise thereof shall be reasonable and in a manner to safeguard the paramount right of the public to the free and unobstructed use of the street for the purpose for which it was dedicated. (Ill.) *Sears v. Chicago*, 319.

Streets—Use by Abutting Owner.

11. STREETS.—An Abutting Lot Owner on a Street which has been dedicated to the public in accordance with the statute has the right of ingress and egress, and an easement for light and air in addition to the right to use the street in common with all other persons, but he has no right to an exclusive appropriation of the street, either on the surface or above or below it, without the consent of the municipality. (Ill.) *Sears v. Chicago*, 319.

12. STREETS—Use by Abutting Owner Who Holds Fee.—An abutting lot owner who owns the fee to the center of the street has the right to make any reasonable use of the same which does not interfere with the full enjoyment of the easement that is held for the use of the public; and the city cannot compel him to pay for thus using his own property. (Ill.) *Sears v. Chicago*, 319.

13. STREETS—Private Use by Abutting Owner.—The title of an abutting owner to the center of the street, where the city does not own the fee, is not a contingent interest, or a mere expectancy, but is a present subsisting ownership of the fee, subject to the easement of the public, which he may subject to any private use he sees fit, in connection with his premises, which is consistent with the dominant rights of the public in the easement. (Ill.) *Sears v. Chicago*, 319.

Use of Subsidewalk Space.

14. STREETS—Use of Subsidewalk Space.—An Ordinance providing that no person shall use space underneath the surface of a street, or construct or maintain any structure thereunder, without a permit from the city; that every applicant for a permit shall file a bond to save the city harmless from any claim for damages arising out of the use of such space or structure; and that a stated compensation shall be paid for such use, is valid when applied to the owners of lots located upon streets in which the city owns the fee, but cannot be enforced against the owners of lots abutting upon streets wherein the city has only an easement. (Ill.) *Sears v. Chicago*, 319.

Streets—Obstruction.

15. PUBLIC STREETS—Duty to Keep Unobstructed.—The charter of the city of New Orleans requires it to keep "open and free from obstruction all streets," and the right of a citizen to recover damages for injury sustained by reason of a failure in the discharge of the mandatory duty thus imposed is beyond question. (La.) *McCormack v. Robin*, 549.

16. PUBLIC STREETS—Right to Assume Safe Condition.—Streets and sidewalks are intended for free and constant use, and those who use them have the right to assume that they are safe, and are not expected to exercise the care that would be required in traversing a jungle. (La.) *McCormack v. Robin*, 549.

17. PUBLIC STREETS—Block of Stone as Obstruction.—A lady who starts from her home on one of the principal streets of New Orleans, after nightfall, to go to the theater, and, whilst putting on her gloves and contemplating the catching of an approaching street-car, fails to see, and falls over, a block of stone, which had been placed on the banquette by a paving contractor, employed by the city, is not guilty of such negligence as will preclude her from recovering damages for the injury thereby sustained. (La.) *McCormack v. Robin*, 549.

18. PUBLIC STREET—Stepping-stone as Nuisance.—An obstruction, like dirt upon a boy's face, is matter out of place, and that which may be a stepping-stone, when in a position where it is needed and can be used as such, becomes an obstruction when occupying a place intended for other use, and where it is not needed and cannot be so used. And so, though a block of stone which spans a gutter may serve a useful purpose, as a stepping-stone, where a pavement has been laid, the asphaltum surface of which runs smoothly down to the curb, which, there being no gutter, may serve as a stepping-stone, and, incidentally to the paving, the block has been removed from its position and placed within the curb, on the banquette, it ceases to be a stepping-stone and becomes a nuisance. (La.) *McCormack v. Robin*, 549.

19. PUBLIC STREET—Stepping-Stone—Who Liable for.—Where a paving contractor, employed and directed by the city, as an incident to his work, removes a stepping-stone, which spans a gutter, and places it on the banquette, where it becomes a nuisance, the city and the contractor, and not the owner of the property in front of which the paving is done, are the parties who are liable for the resulting damage to a citizen who falls over the stone. (La.) *McCormack v. Robin*, 549.

Street Work—Liability of Contractor and City.

20. MUNICIPALITY—Street Work—Liability of Municipality.—Damage or loss to a property owner resulting from a street improvement as such, apart from that due to the fault of the contractor in prosecuting the work, is properly to be met by the municipality ordering the improvement to be made. (Cal.) *Gay v. Engebretsen*, 67.

21. MUNICIPALITY—Street Work—Liability of Contractor.—Damage or loss to a property owner due wholly to the fault of the contractor in the prosecution of street work is properly to be met by the contractor. (Cal.) *Gay v. Engebretsen*, 67.

22. MUNICIPALITY—Street Work—Assumption of Liability by Contractor.—The requiring by a municipality that a contractor for street work shall assume its liability, as well as his own, in that connection tends to increase the cost of the work, and so gives a property owner just cause to complain that his burden is added to without authority of law. (Cal.) *Gay v. Engebretsen*, 67.

23. MUNICIPALITY—Street Work—Expression of Contractor's Liability.—No tendency to increase a property owner's burden is to be imputed to a contract for street work specifically imposing upon the contractor a liability already his by law. (Cal.) *Gay v. Engebretsen*, 67.

24. MUNICIPALITY—Street Work—Assumption of Liability by Contractor.—In a contract for street work, the language of which as a whole imports no more than an intent to impose upon the contractor the liability already his, the mere presence of the words "loss or damage arising from the nature of the work to be done" does not effect an assumption by the contractor of loss or damage for

which, but for it, the municipality would be liable. (Cal.) *Gay v. Engebretsen*, 67.

25. MUNICIPALITY—Street Work.—Publication of the Resolution of Intention is a prerequisite to the council's power to order the doing of street work and of the street superintendent's power to post notices of such work. (Cal.) *Gay v. Engebretsen*, 67.

26. MUNICIPALITY—Street Work—Bids.—Complete Publication of the passing of the council's resolution ordering that certain street work be done is not a prerequisite to a valid call for bids for the contract. (Cal.) *Gay v. Engebretsen*, 67.

Special Assessments.

27. SPECIAL ASSESSMENTS.—Property Owned by the United States government is exempt from municipal assessment for street improvement. (S. D.) *Whittaker v. Deadwood*, 1076.

28. SPECIAL ASSESSMENTS—Exemption of Public Property.—A special assessment for local street improvement is not taxation, within the meaning of section 5, article 11, state constitution of South Dakota, providing that the property of the state, county, and municipal corporations shall be exempt from taxation. (S. D.) *Whittaker v. Deadwood*, 1076.

29. SPECIAL ASSESSMENTS.—The "Front-foot" Rule for Computing the amount of special assessments, established by Revised Political Code of South Dakota, section 1304, is not unconstitutional on the ground of being unequal and unjust. (S. D.) *Whittaker v. Deadwood*, 1076.

30. SPECIAL ASSESSMENTS—Improvement Districts.—Under Revised Political Code of South Dakota, section 1303, providing that "Whenever a city council shall deem it necessary to pave . . . or otherwise improve any street, alley or highway . . . within the city limits, for which a special assessment is to be levied, the city council shall by resolution declare such work or improvement necessary," no authority or power is granted to include more than one street in a single pavement improvement or district. (S. D.) *Whittaker v. Deadwood*, 1076.

31. SPECIAL ASSESSMENTS—Description of Improvement.—A Resolution of a city council by which a special assessment is declared to be necessary should specify the extent of the work or improvement, by showing height, width, and thickness, or should appropriately refer to the plans and specifications therefor then on file, so that the property owner may determine for himself what the probable expense will be, in order that he may determine whether or not to enter protest against the improvement. (S. D.) *Whittaker v. Deadwood*, 1076.

32. SPECIAL ASSESSMENTS—Schedule and Estimate by City Auditor.—Revised Political Code of South Dakota, section 1246, providing that "The city auditor shall make or cause to be made an estimate of the work proposed to be done by the city . . . and before the levy by the city council of any special tax upon property in the city, of any part thereof, shall report to the city council a schedule of all parcels or lots of land which may be subject to the proposed special tax or assessment, and also the amount of such special tax or assessment which it may be necessary to levy on such lots and parcels of land," is mandatory, and constitutes the schedule and estimate therein provided for a condition precedent to the making of a valid special assessment. (S. D.) *Whittaker v. Deadwood*, 1076.

33. TAXATION—Special Assessments.—There is a Well-defined Distinction between general taxation and a local assessment for public

improvements, such as pavements, sewerage, etc. (Ala.) City of Huntsville v. Madison County, 45.

Special Assessments—Exemptions—County Property.

34. **TAXATION—Exemption from Special Assessment.**—A constitutional or statutory exemption of public property from general taxation does not necessarily exempt it from special local assessment for public improvements. (Ala.) City of Huntsville v. Madison County, 45.

35. **SPECIAL ASSESSMENTS—Exemption of County Property.**—General language in a statute giving a city power to levy assessments for street improvements does not embrace county property within the city, devoted strictly to public uses; nor authorize the city to enforce a special assessment for such improvement against the county, under a general judgment against the latter. (Ala.) City of Huntsville v. Madison County, 45.

36. **SPECIAL ASSESSMENTS—No Lien can be Fixed on County Property,** such as a courthouse square and the buildings thereon, situated within a city, for a special assessment levy against such property for street improvements. (Ala.) City of Huntsville v. Madison County, 45.

37. **SPECIAL ASSESSMENTS—County Property.—No Benefit is** derived by the taxpayers of a county, generally, who own a courthouse square and the buildings thereon, from the improvement of streets abutting on the square, in a city, within the meaning of a provision of the constitution which limits special assessments to the increased value resulting from the benefit to be derived from such improvements. (Ala.) City of Huntsville v. Madison County, 45.

Railway Viaducts.

38. **MUNICIPAL CORPORATIONS—Building of Railway Viaducts.**—In granting to a railway company the right to construct its railway in a city, the municipal authorities may lawfully require the company to construct and maintain proper crossings at streets, alleys, and highways; or, if the safety and security of the public require, to erect and maintain viaducts with proper approaches thereto. (Ill.) Chicago v. Pittsburgh etc. Ry. Co., 329.

39. **MUNICIPAL CORPORATIONS—Approach to Railway Viaduct.** Ordinarily, an approach to a viaduct in a city is considered a part of the viaduct; but what is a viaduct proper and what is an approach, where one begins and the other ends, and what is a street or highway as distinguished from the approach, are more questions of fact than of law, and sometimes not easy to decide. They must be determined by what is reasonable in the particular case. (Ill.) Chicago v. Pittsburgh etc. Ry. Co., 329.

40. **MUNICIPAL CORPORATIONS—Approach to Railway Viaduct.** A railroad company must keep and maintain its crossings so that they will continue to meet the needs and requirements of an increasing population in respect to the safety of persons and property; but this does not necessarily require it to keep and maintain that which is, for every practical purpose, a street or highway, even though incidentally it is used as a part of the ascent or approach to reach a viaduct. (Ill.) Chicago v. Pittsburgh etc. Ry. Co., 329.

41. **MUNICIPAL CORPORATIONS—Approach to Railway Viaduct.** A railway company cannot be compelled by a city to repave the surface of a street, where the grade thereof, for an entire block, has been raised, from building line to building line, to the necessary height to conform to the ascent to a railroad viaduct, and where the surface has been paved, manholes provided, curbing set, and sidewalks built. Such ascent having, except for the slope or grade, all the ap-

pearances of a city street, must be regarded as a street and not merely as an approach to the viaduct. (Ill.) *Chicago v. Pittsburgh etc. Ry. Co.*, 329.

See Licenses; Penalties; Quo Warranto.

NEGLIGENCE.

Proximate Cause.

1. **NEGLIGENCE**—**Proximate Displacing Primary Cause of Injury.**—The independent wrongful act, to constitute the proximate cause by displacing the original primary cause, must be so disconnected in time and nature as to make it plain that the damage was in no way a natural or probable consequence of the original wrong or omission. (Cal.) *Merrill v. Los Angeles Gas & Elec. Co.*, 134.

Contributory Negligence.

2. **NEGLIGENCE**—**The Plea of Contributory Negligence is an affirmative defense.** It is a charge, in substance, that the cause of the injury complained of was plaintiff's own negligence, but for which negligence the injury would not have happened. (Ky.) *Louisville Ry. Co. v. Hibbitt*, 464.

3. **NEGLIGENCE**—**Plea of Contributory Negligence.**—Agreeably to the Kentucky code, which, for the purposes of the action, attaches truth to every material allegation in a pleading not specifically traversed, the plea of contributory negligence must, unless denied, stand as true. (Ky.) *Louisville Ry. Co. v. Hibbitt*, 464.

4. **NEGLIGENCE**—**Plea of Contributory Negligence.**—**Failure to Reply to the plea of contributory negligence is not cured by defendant going to trial and producing testimony in support of the plea and having the court charge the jury to find for him in case they believe such testimony, if before producing this testimony and also after all the testimony was in he asked the court to direct a verdict in his favor.** (Ky.) *Louisville Ry. Co. v. Hibbitt*, 464.

5. **NEGLIGENCE**—**Pleading.**—**Contributory Negligence constitutes an affirmative defense which the complaint need not disavow.** (Ind.) *Inland Steel Co. v. Yedinak*, 389.

6. **NEGLIGENCE**—**Contributory Negligence as a Question of Law.** Contributory negligence is peculiarly a question of fact, and the court should not attempt to dispose of it peremptorily, save where the circumstances are clear and undisputed, and are of such character that fair and unprejudiced minds cannot arrive at different conclusions therefrom. (Iowa) *Dieckmann v. Chicago & Northwestern Ry. Co.*, 420.

Firemen Entering Burning Building.

7. **NEGLIGENCE**—**Firemen Entering Burning Building.**—In the absence of some ordinance or statute changing the common-law rule in this regard, a fireman entering a building under imperative public necessity is but a licensee, who assumes risks as he finds them and to whom the owner of the premises owes no special duty to maintain those premises in a safe condition. (Cal.) *Pennebaker v. San Joaquin Light etc. Co.*, 202.

8. **ELECTRIC COMPANY**—**Liability to Firemen.**—The duty of an electric light and power company, whose wire runs into a private house, is not the same as that of the owner of the house as to a fireman who enters the premises in the line of his vocation and is exposed to peril from the wire; but, without proof that the company had knowledge of the peril in time to avert it, liability does not follow. (Cal.) *Pennebaker v. San Joaquin Light etc. Co.*, 202.

Insurance Patrol.

9. INSURANCE PATROL—Liability for Negligence of Servants. The Fire Insurance Patrol of the City of New Orleans is not a public charitable association, and is responsible in damages for injuries occasioned by the negligence of its servants in driving its wagon into a truck of the city fire department. Conceding that such patrol and the fire department have the same rights of way in the streets, it does not follow that the former is not responsible for injuries inflicted through the negligence of its servants. (La.) *Rady v. Fire Insurance Patrol of New Orleans*, 511.

Merchant's Premises.

10. NEGLIGENCE.—A Merchant Maintaining a Wareroom for the exhibition and sale of goods is bound to exercise reasonable care to keep his premises safe for the ingress, progress and egress of authorized visitors. The measure of his duty is reasonable prudence and care. (N. Y.) *Weller v. Consolidated Gas Co.*, 798.

11. NEGLIGENCE.—A Merchant is Required to Light the premises to which strangers are invited, to a degree sufficient to disclose differences in floor levels. It is ordinarily sufficient to light a stairway sufficiently to disclose its existence and character. The persons who make use of it can reasonably be expected to exercise their faculties to some extent in order to ascertain its precise length. (N. Y.) *Weller v. Consolidated Gas Co.*, 798.

12. NEGLIGENCE.—Descending Insufficiently Lighted Stairway.—Where there is an obvious descent in a passageway which a visitor to the premises is about to enter, the very fact that the light therein is not uniform imposes upon him the duty to proceed with circumspection, and not move blindly on regardless of what may be ahead. A person who knowingly approaches a step beyond which is a darkened space may not assume that such space is level and proceed without the exercise of any care to ascertain whether it is or not. If he does so he acts at his own risk. (N. Y.) *Weller v. Consolidated Gas Co.*, 798.

Driving Horse Close to Car.

13. NEGLIGENCE—Driving Horse Close to Car.—The driving, in a wide driveway, of a horse so close to both the side and end of a car that a stop cannot be made in season to avoid a collision with a foot-traveler who might step from behind the car may constitute such negligence as to render the driver liable for injury to the foot passenger. (N. H.) *Chatel v. Schonland*, 739.

Crossing Street Behind Car.

14. NEGLIGENCE—Crossing Street Behind Car.—One who crosses a street behind a car in the customary manner cannot be said, as matter of law, to be guilty of negligence contributing to an injury occasioned by a team being driven so close to the car as to be dangerous to those so crossing or alighting from the car. (N. H.) *Chatel v. Schonland*, 739.

See Charities; Electric Company; Ferries; Gas Explosion.

NEGRO.

See Words and Phrases.

NEW TRIAL.

1. NEW TRIAL—Death of Judge Before Settlement of Case-made.—Under the provisions of the law in force at the date of this trial, the judge who presided at the trial was the only person authorized to settle and sign a case-made, and, such judge having died after the completion of the trial and before the case-made had been

settled and signed, the defendant, without fault on his part, was thereby deprived of his constitutional right to present a complete appeal to this court, and is thereby entitled to a new trial. (Okl. Cr.) *Tegler v. State*, 976.

2. **NEW TRIAL—Accident and Surprise.**—Where the ruling on an offer by a party to prove certain facts is misunderstood by counsel and they are thereby prevented from showing certain competent facts, the remedy is by motion for a new trial on the ground of accident and surprise. (N. H.) *Taggart v. Jaffrey*, 729.

3. **NEW TRIAL—Appeal from Order Granting or Refusing.**—The granting or denying of a new trial is largely in the sound, judicial discretion of the trial court; and unless there is a manifest abuse of such discretion, the ruling upon such a motion will not be reversed by the supreme court. (S. D.) *State v. Egland*, 1066.

Note.

New Trial, right to in case of loss of record, 978, 979.

Nurses, liability of charitable hospital for negligence of, 902.

OFFICERS.

In General.

1. **OFFICERS—Right to Hold Office.**—There is no such thing as a right to hold office. This is a mere privilege at all times within the control of the legislature, save where limited by some constitutional provisions. (Iowa) *State ex rel. Jones v. Sargent*, 439.

Qualifications—Political Test—Appointments from Different Parties.

2. **OFFICERS—Statute Prescribing Qualifications.**—The constitutional guaranty of a republican form of government is not violated by a statute prescribing certain qualifications for the holding of certain offices. (Iowa) *State ex rel. Jones v. Sargent*, 439.

3. **OFFICERS.—The Fixing of Qualifications** for office is a legislative, not a judicial, function, and it cannot be said, as a matter of law, that any qualification for office fixed by the legislature is arbitrary or oppressive, or so much so as to be set aside by the courts. (Iowa) *State ex rel. Jones v. Sargent*, 439.

4. **OFFICERS—Qualifications—Political Test.**—In the absence of constitutional limitation imposing restraints upon the legislature with reference to qualifications for office, political tests or other qualifications may be used. (Iowa) *State ex rel. Jones v. Sargent*, 439.

5. **OFFICERS—Prescribing Qualifications.**—In the absence of constitutional prohibition the legislature has plenary power in fixing the qualifications of municipal officers. In creating such an office and delegating power to it, the legislature has the right to say who shall exercise the functions so delegated. (Iowa) *State ex rel. Jones v. Sargent*, 439.

6. **OFFICERS—Appointment from Leading Parties.**—A statute providing for the appointment of fire and police commissioners from the two leading political parties does not contravene a constitutional provision that the legislature shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens. That provision does not apply to legislative enactments fixing the qualifications for municipal office. (Iowa) *State ex rel. Jones v. Sargent*, 439.

7. **OFFICERS—Selection from Different Political Parties.**—A statute providing that fire and police commissioners shall be appointed by the mayor and be selected by him "from the two leading political parties, so that, as far as practicable, two members of the board shall be members of the dominant political party and one member of the board shall be a member of the political party next in numerical strength

as shown by the votes cast at the last state or national election," does not prescribe qualifications for the office, and leaves in the mayor some discretion to determine whether it is practicable to have the board selected as indicated. (Iowa) State ex rel. Jones v. Sargent, 439.

8. OFFICERS—Appointment from Leading Political Parties.—A statute requiring the appointment of fire and police commissioners to be made, so far as practicable, from the two leading political parties, is not violative of the constitutional guaranty that all laws shall be of uniform operations. (Iowa) State ex rel. Jones v. Sargent, 439.

9. OFFICERS—Appointment from Leading Parties.—A statute providing for the appointment of fire and police commissioners from the members of the two leading political parties is not an unconstitutional limitation upon political rights, as interfering with the privileges of electors or imposing unconstitutional restraints upon them. (Iowa) State ex rel. Jones v. Sargent, 439.

Qualifications—Learned in the Law.

10. OFFICERS—Qualifications.—"Learned in the Law," when used in connection with the word "attorney" in prescribing the qualifications of an officer, is surplusage, and is controlled by the more limited term "attorney." (S. D.) Danforth v. Egan, 1030.

11. OFFICERS—Qualifications—"Learned in the Law."—A Disbarred Attorney who has been found by the judgment of disbarment to have violated many of the ethical laws which should control the conduct of an attorney cannot be held to be "learned in the law" within the meaning of that term as used in prescribing the qualifications of an officer. (S. D.) Danforth v. Egan, 1030.

12. OFFICERS—Qualifications—"Learned in the Law."—Admitted to Practice, or entitled to be admitted to practice, in the courts is contemplated by the use of the phrase "learned in the law" in prescribing the qualifications of an officer. (S. D.) Danforth v. Egan, 1030.

13. OFFICERS.—One Who cannot Perform the Duties of an office cannot qualify therefor. (S. D.) Danforth v. Egan, 1030.

14. OFFICERS—Qualifications—Disbarred Attorney.—An attorney who has been disbarred and who cannot by reason thereof practice in any of the courts of the state is not eligible to the office of "state's attorney," being unable to perform a great part of the duties thereof. (S. D.) Danforth v. Egan, 1030.

15. OFFICERS—Knowledge of Disqualification—Fraud on Public. One who allows his name to be voted for for public office, knowing or believing that if elected he will be unable to perform the most important duties of the office, is guilty of a fraud upon the people in allowing his name to go and remain upon the ballot. (S. D.) Danforth v. Egan, 1030.

16. OFFICERS—Qualifications—How Far may Act by Deputy.—One must be qualified to discharge all of the duties of the office to which he is elected or aspires, and the fact that he may appoint a deputy to discharge certain duties which he is not qualified to perform will not render him eligible or qualify him for the office. (S. D.) Danforth v. Egan, 1030.

17. OFFICERS.—The Use of the Word "Attorney" in the Title of an officer means one holding a license from the courts to practice law. (S. D.) Danforth v. Egan, 1030.

Resignation or Abandonment.

18. OFFICERS—Abandonment of Office.—In Order to Constitute an abandonment of office, it must be total, and under such circum-

stances as clearly to indicate an absolute relinquishment. Temporary absence is not sufficient. (Ind.) State v. Huff, 355.

19. **OFFICER—Resignation.—In Order to Constitute** a resignation, it must be unconditional with intent that it shall operate as a resignation. There must be an intention to relinquish a portion of the term of office, accompanied by the act of relinquishment. (Ind.) State v. Huff, 355.

20. **OFFICER.—Resignations must be Made** to the appointing power, or power authorized to call an election. (Ind.) State v. Huff, 355.

21. **OFFICER.—Withdrawal of a Resignation** may be made if it is not accepted. (Ind.) State v. Huff, 355.

22. **OFFICER—Resignation—Conditional and to Wrong Power.—**A paper addressed by a township assessor to the board of commissioners of the county, which has no power to accept a resignation or appoint a successor, asking the appointment of a certain person as his successor, and "If you cannot appoint him as my successor, I decline to resign, and will have him appointed as my first deputy," followed by a temporary absence at a time when there are no duties of the office to be performed, does not constitute a resignation or create a vacancy in the office. (Ind.) State v. Huff, 355.

23. **OFFICER—Resignation.—Where Conditions or Terms** are attached to a resignation, it must be accepted, if at all, subject to them. If they are such as cannot be lawfully attached, the resignation is of no effect. (Ind.) State v. Huff, 355.

24. **OFFICERS—Validity of Agreement to Resign.—Contracts** between persons whereby a public officer agrees to resign his office in another's favor, or to give another a chance of promotion or appointment, are void as against public policy, and cannot be enforced at the instance of either party. (Ind.) State v. Huff, 355.

Removal from Office.

25. **OFFICERS—Power of Removal Judicial.—Statutes** authorizing the removal of officers for cause confer judicial powers on the body that is to exercise them. (N. H.) Attorney General v. Crowley, 725.

26. **OFFICERS—Removal for Cause.—The Word "Cause"** in a statute authorizing the removal of officers for cause means legal cause, and contemplates a charge, notice, hearing, and judgment of removal upon cause. (N. H.) Attorney General v. Crowley, 725.

27. **OFFICERS—Removal—Power of Court on Certiorari.—The** power of the court upon a certiorari is limited to the correction of errors of law apparent upon the record. On the review of a proceeding removing an officer, the right of a subsequent appointee to the office cannot be determined. (N. H.) Attorney General v. Crowley, 725.

OIL LANDS.

See Mines and Mining, 12-16; Taxation, 9.

Note.

Oil Lands, discovery and location of claims, 154.

ORDINANCES.

See Municipal Corporations.

PARDON.

1. **PARDON—Grant Pending Appeal.—A Pardon Granted** and accepted after conviction and pending an appeal in the criminal court of appeals is valid under constitution, article 6, section 10, wherein

the governor is empowered to grant, after conviction, reprieves, commutations, paroles and pardons. (Okl. Cr.) *Gilmore v. State*, 981.

2. **PARDON.**—The Term "Conviction," in Article 6. section 10, of the constitution, denotes the final judgment of the trial court, upon a plea of or verdict of guilty. (Okl. Cr.) *Gilmore v. State*, 981.

See Appeal and Error, 15.

PARENT AND CHILD.

1. **PARENT AND CHILD**—Right to Child's Earnings.—The parent's right to the services and earnings of his minor child is not absolute, but contingent upon his actually providing support for the child and retaining parental control over him. (N. H.) *Chaloux v. International Paper Co.*, 690.

2. **PARENT AND CHILD**—Damages for Death of Child.—At common law no civil action could be maintained by a parent for the death of his child, and no recovery for loss of the child's services after the death could be had; and that rule is in force in this state. (N. H.) *Chaloux v. International Paper Co.*, 690.

PAROL EVIDENCE.

See Contracts, 8-10.

PARTNERSHIP.

1. **PARTNERSHIP**—Failure to File Affidavit.—Statute (Laws 1897, p. 248; Mills' Stats., Rev. Supp., sec. 3387a; Rev. Stats., sec. 4778) requiring the filing of an affidavit showing the names of members of partnership, etc., applies only to suits for the collection of debts due the firm doing business, to which it applies. It does not apply to suits for torts. (Colo.) *Melcher v. Beeler*, 273.

2. **PARTNERSHIP**—Libel of Firm by Libel of Member.—Partners may maintain a joint action for libel or slander which tends to injure the business of their firm, even though the defamatory words refer to or concern but one of its members. (Colo.) *Melcher v. Beeler*, 273.

PASSENGERS.

See Carriers.

PATENTS.

PATENTED ARTICLES—Expiration of Patent—Unfair Competition.—Upon the expiration of a patent the right to make the patented article passes to the public. The patentee cannot enjoin its manufacture, but he is entitled to protection against unfair competition. (N. Y.) *Westcott Chuck Co. v. Oneida Nat. Chuck Co.*, 907.

See Trademark, 1.

PEDDLERS.

1. **PEDDLERS**—Ordinance Forbidding Outcry or Noise.—An ordinance prohibiting any person from advertising or calling attention to his wares by noise made by public outcry, or by means of devices for making a noise, may be sustained under a grant of power authorizing the city to regulate traffic and sales upon its streets, and to regulate, suppress, and prohibit hawkers and peddlers. (Ill.) *Goodrich v. Busse*, 335.

2. **PEDDLERS**—Ordinance Concerning—Discrimination.—An ordinance prohibiting any person from advertising or calling attention to his wares by noise made by public outcry, or by means of devices for making a noise, excepting in amusement grounds, parks, halls, and

other places duly licensed by the city, is not, because of such exception, void for unjust discrimination against the business of hawking and peddling on the streets, as the differences in the conditions between the places mentioned furnishes a reasonable basis upon which to rest a classification. (Ill.) *Goodrich v. Busse*, 335.

3. PEDDLERS—Ordinance Concerning—Due Process.—An ordinance prohibiting any person from advertising or calling attention to his wares by noise made by public outcry, or by means of devices for making a noise, does not deprive hawkers and peddlers on the streets of property without due process of law. It is at most but a mere regulation of a business which, if not controlled, might become a public nuisance. (Ill.) *Goodrich v. Busse*, 335.

PENALTIES.

1. MUNICIPAL CORPORATIONS.—An Action to Recover a Penalty for the violation of a municipal ordinance is a civil action. Although commenced by affidavit and warrant, it is not a criminal proceeding. (Ill.) *City of Chicago v. Morell*, 340.

2. MUNICIPAL CORPORATION.—The Penalty Imposed for the Violation of a municipal ordinance is not a debt within the meaning of the constitution. (Ill.) *City of Chicago v. Morell*, 340.

Note.

Physicians and Surgeons, liability of charitable hospitals for negligence of physicians or surgeons, 902.

PLEADING.

1. PLEADING IN A CIRCLE.—The Proper Way to reach a defect in a plea which is not a sufficient answer to a count is by demurrer. It is not proper to reply to it, for this would be pleading in a circle. (Ala.) *Broyles v. Central of Georgia Ry. Co.*, 50.

2. PLEADING.—Counts in a Complaint Should be Construed most strongly against the pleader. (Ala.) *Broyles v. Central of Georgia Ry. Co.*, 50.

3. DEMURRER.—It is Harmless Error to Sustain a demurrer to a replication containing the same averments as are contained in the complaint, to which the general issue is filed. (Ala.) *Broyles v. Central of Georgia Ry. Co.*, 50.

4. PLEADING.—A Demurrer to an Answer containing two paragraphs in the following form: "Neither of said paragraphs of answer contains facts sufficient to constitute an answer to plaintiff's complaint and information," presents no question. (Ind.) *State v. Huff*, 355.

5. PLEADING—Demurrer to Answer—Code Form.—The code provides but one form of demurrer to an answer, and it must be substantially followed. (Ind.) *State v. Huff*, 355.

6. PLEADING—Form of Answer.—In determining the sufficiency of an answer the question is not whether the facts alleged are sufficient to constitute an answer to the complaint, but whether, taken as a whole, the pleading states facts sufficient to constitute a defense to the action. (Ind.) *State v. Huff*, 355.

7. PLEADING—Amendment.—The Striking Out of an Improper Party does not work a discontinuance of the case; and it cannot be material how the fact comes to the knowledge of the court that such person is an improper party; whether it appears upon the face of the pleading, or is brought to the attention of the court by demurrer, or is subsequently made to appear in the evidence. (Ala.) *Shriner v. Craft*, 19.

8. PLEADING—Effect of Supplemental Pleadings.—Events happening after the bringing of the original suit are interjected into it by leave of the court by supplemental bill or supplemental answer, and, when these go in, the adjudication, as to the facts set up therein, will relate to the dates of the happening thereof. (N. J. Eq.) *Von Bernuth v. Von Bernuth*, 752.

9. PLEADING—Variance.—A Plaintiff must Recover, if at all, upon the contract alleged in his complaint; thus in an action to recover commissions under an express contract, the plaintiff cannot recover compensation for a different transaction. (Colo.) *Chaffee v. Widman*, 220.

POSTAL CLERKS AS PASSENGERS.

See Carriers, 19–28.

Note.

Power of Appointment. See Wills.

Power of Disposition. See Wills.

PRELIMINARY HEARING.

See Indictment and Information, 9, 10.

PRESCRIPTION.

See Adverse Possession.

PRESENCE OF ACCUSED.

See Criminal Law, 4.

PRINCIPAL AND AGENT.

See Brokers; Corporations, 22–25.

Note.

Principal and Agent. See Brokers.

PRIVILEGED COMMUNICATIONS.

See Libel and Slander, 11–14.

PROBATE LAW.

See Descent and Distribution; Executors and Administrators; Guardianship; Wills.

PUBLIC LAND.

1. PUBLIC LAND—Requisites of Homestead Entry.—To constitute an entry on public land under the homestead law, the applicant must make an affidavit of facts entitling him to enter, he must make formal application, and make payment of the money required. With these things done and the certificate issued, the entry is complete. (Cal.) *McLemore v. Express Oil Co.*, 147.

2. PUBLIC LANDS—Agricultural Lands—Mineral Entry.—No right of entry, upon lands already held under agricultural entry, exists in favor of a mineral claimant, unless he can show by a preponderance of testimony that as a present fact the land is more valuable for mining than for agricultural purposes. (Cal.) *McLemore v. Express Oil Co.*, 147.

Note.

Public Lands, discoveries of mineral in national forest, right of land department to investigate, 166.

discovery of mineral after final proof by entrymen, 193.

entry, meaning of term, 190.

QUO WARRANTO.

1. QUO WARRANTO—Testing Municipal Franchise.—Quo warranto is the proper remedy to test the right to the exercise of a particular franchise not embraced within those granted by the charter of a municipality, and to oust the corporation from the exercise of such franchise. (Ala.) *City of North Birmingham v. State*, 17.

2. QUO WARRANTO—Corporate Limits of Municipality.—Quo warranto does not lie for the purpose of testing the validity of the corporate limits of a municipality. (Ala.) *City of North Birmingham v. State*, 17.

3. QUO WARRANTO—Limits of Municipality—Injunction.—Where city authorities assume to exercise mere corporate powers beyond the territorial boundaries of the corporation, the remedy is not quo warranto, but injunction. (Ala.) *City of North Birmingham v. State*, 17.

RAILROADS.*In General.*

1. RAILROADS—The Crossing of Railroad Tracks with knowledge of an approaching train is not, under all circumstances, negligence. The question is one of fact, depending upon the relative distance of the person and the train from the crossing and all the circumstances of the particular case. (Iowa) *Dieckmann v. Chicago etc. Ry. Co.*, 420.

2. RAILROAD—Duty to Fence and Drain—Grantees of Land.—Where a railroad acquires land with the obligation to fence and drain it and construct crossings thereon, this right is a servitude in favor of the land, and the right to enforce it passes with the title. (La.) *Taylor v. New Orleans Terminal Co.*, 537.

Speed of Trains.

3. RAILROADS—Speed in Open Country.—No conceivable rate of speed of a railroad train in the open country will be held to constitute negligence as a matter of law. (Iowa) *Dieckmann v. Chicago etc. Ry. Co.*, 420.

4. RAILROADS—Speed Over Streets and Through Stations.—The running of railroad trains over streets or crossings, or on station grounds where passengers may rightfully be, at a high rate of speed, may constitute negligence as a matter of fact. (Iowa) *Dieckmann v. Chicago etc. Ry. Co.*, 420.

Horses and Vehicles Near Track.

5. RAILROADS—Horses and Vehicles Near Track.—The law recognizes railroads, prudently operated, as being as necessary as horses and vehicles, but when these come into proximity one with the other, imposes upon the more dangerous agency the greater degree of care to avoid impeding the other and putting it in peril needlessly. (Ky.) *Louisville & Nashville R. R. Co. v. Street*, 471.

6. RAILROADS—While Operators of Trains must Recognize the rights of the public in and to the streets adjacent to the railroads and be vigilant accordingly, the public is charged with knowledge of the usual and ordinary conditions on the tracks and, moreover, of extraordinary and unexpected conditions likely to arise there. (Ky.) *Louisville & Nashville R. R. Co. v. Street*, 471.

7. RAILROADS—Frightened Horse.—The Law Does not Require railway operatives to be on the lookout lest some horse on a neighboring highway become frightened, or to stop their train in case such an event seems imminent. (Ky.) *Louisville & Nashville R. R. Co. v. Street*, 471.

8. RAILROADS—Frightened Horse.—The Utmost Required of a Trainman, mindful of a horse near by frightened by the train, is that he operate the latter without unusual and unnecessary noise, and, if possible, with less noise than was being made before his becoming thus mindful. (Ky.) Louisville & Nashville R. R. Co. v. Street, 471. See Attachment; Carriers; Negligence, 13, 14; Receivers; Street Railways; Taxation, 15-19.

RAILWAY VIADUCTS.

See Municipal Corporations, 38-41.

RECEIVERS.

1. RAILROADS—Receivers—Effect of Appointment.—The appointment of a receiver of the property of a railroad corporation has no effect to dissolve the corporation or to divest its title to its property, but the possession of such property passes, for the time being, to the receiver, who is usually empowered to operate the road. Except as thus interfered with, the corporation retains its corporate functions and may sue and be sued. (Iowa) Fountain v. Stickney, 410.

2. RAILROADS—Receiver—Nature of Office.—A receiver of a railroad corporation is not a representative of the company, but is rather an officer or representative of the court. His relation to the corporation is analogous to that of a sheriff holding its property under judicial order or process. (Iowa) Fountain v. Stickney, 410.

3. RAILROADS—Receivers—Liability for Torts.—Receivers, upon taking temporary possession and control of the property of a railroad corporation for the purpose of preserving it pendente lite, do not assume liability for corporate torts, the injurious effects of which had culminated while the road was still operated by the corporation. (Iowa) Fountain v. Stickney, 410.

RECORDS.

See Judgments, 5.

REFERENDUM.

See Initiative and Referendum.

Note.

Reformatory Institutions, liability for torts of agents, 906.

RELIGIOUS SOCIETIES.

1. RELIGIOUS SOCIETIES—Power to Hold Property.—An unincorporated religious society is without capacity to acquire or hold title to property. (Ala.) Gewin v. Mt. Pilgrim Baptist Church, 41.

2. RELIGIOUS SOCIETIES.—The Jurisdiction of Equity over voluntary religious associations and their property is maintainable, independently of the English statute of charitable uses and of any prerogative power of the court, on the ground of the trust nature of the property, the charitable uses for which it is designed, and the inadequacy of legal remedies. (Ala.) Gewin v. Mt. Pilgrim Baptist Church, 41.

3. RELIGIOUS SOCIETIES—Power to Compel Conveyance to Church.—Equity has power to compel the specific performance of an agreement to convey land, made to the trustees of a religious society before it was incorporated, upon the application of the society after its incorporation. (Ala.) Gewin v. Mt. Pilgrim Baptist Church, 41.

4. RELIGIOUS SOCIETIES—Effect of Incorporation.—An organization, under the statute, by the majority of a religious society,

operates, ipso facto, as a transfer of the rights and interests of individual members to the corporation thereby created. (Ala.) *Gewin v. Mt. Pilgrim Baptist Church*, 41.

5. RELIGIOUS SOCIETIES.—Courts have No Power to revise ordinary acts of church discipline or pass upon controverted rights of membership; but such considerations are attended to when they form the basis upon which civil rights and rights of property depend. While the courts cannot decide who ought to be members, they may inquire whether any disputed act of the church affecting property rights was the act of the church or of persons having no authority. (Ala.) *Gewin v. Mt. Pilgrim Baptist Church*, 41.

6. RELIGIOUS SOCIETIES.—Factional Divisions.—Title to Property.—The rule of the civil courts is, where factional differences occur in an ecclesiastical body, that the title to church property is in that part of it which is acting in harmony with its own law, and the ecclesiastical laws, and usages, customs, and principles which were accepted among the members before the dispute began, are the standards for determining which party is right. (Ala.) *Gewin v. Mt. Pilgrim Baptist Church*, 41.

7. RELIGIOUS SOCIETIES.—Property.—Where a Minority Withdraws from a church, organized and governed as is the Baptist Church, it relinquishes all right in the property of the church abandoned, and the court, being properly invoked, must so declare. (Ala.) *Gewin v. Mt. Pilgrim Baptist Church*, 41.

8. RELIGIOUS SOCIETIES.—Property.—Division in Congregation. If an agreement is made to convey land to the trustees of a certain church, an unincorporated religious society, but the church divides upon questions not of religious doctrine or denominational practice, and a majority of the members organize as a corporation, maintaining the same doctrine as the church had before its differences, the minority cannot defeat the specific performance of such agreement on a bill filed by the corporation. (Ala.) *Gewin v. Mt. Pilgrim Baptist Church*, 41.

See Charities.

Note.

Religious Organizations, liability for torts of agents, 905.

Remainders. See Wills.

RENT.

See Landlord and Tenant, 2.

RESCISSION.

See Contracts, 4.

RES JUDICATA.

See Judgments, 1-4.

RESTITUTION ON REVERSAL OF JUDGMENT.

See Judgments, 10-12.

RESTRAINT OF TRADE.

See Contracts, 17-19; Telegraphs and Telephones, 7, 8.

RETROSPECTIVE STATUTE.

See Constitutional Law, 8.

REVERSAL OF JUDGMENT.

See Judgments, 10-12.

RULES OF COURT.

See Courts, 1.

SALES.

1. **SALE.**—Voluntary Payment for goods lost in transit from the seller to the purchaser cannot be recovered by counterclaim or otherwise. (Colo.) *Heert v. Ridenour-Raymond Grocer Co.*, 259.

2. **SALE.**—Necessity of Money Consideration.—A sale is a contract for a money consideration only, and a consideration in the shape of a mortgage bond, which is a promise to pay money, does not satisfy the requirement. (Pa.) *Koehler v. St. Mary's Brew. Co.*, 1024.

3. **SALE.**—The Delivery of Goods to a Carrier by the seller, pursuant to instructions of the purchaser, passes title to him and renders him liable for the purchase price, even though the goods are lost in transit. (Colo.) *Heert v. Ridenour-Raymond Grocer Co.*, 259.

4. **SALE.**—Delivery to Carrier.—Prepayment of Freight by the seller, but without intent to retain the title, on delivery of goods to a carrier, does not affect the purchaser's liability for the purchase price in case the goods are lost in transit. (Colo.) *Heert v. Ridenour-Raymond Grocer Co.*, 259.

Note.

Schools, liability of educational institutions for torts of agents, 905.

SCIRE FACIAS.

1. **SCIRE FACIAS.**—Nature of Writ—Concurrent Remedy.—The writ of scire facias is not a substitute for the action of debt upon the judgment, but is an independent, concurrent remedy, and, until the debt evidenced by the judgment has been satisfied, the plaintiff may prosecute his action of debt and his proceeding by scire facias at the same time, and the pendency of one is no defense against the other. (Ala.) *Drennen v. Dunn*, 28.

2. **SCIRE FACIAS.**—Concurrent Remedies.—A Plaintiff in Judgment may have his remedy by a rule to show cause why execution should not issue and his action of debt on the judgment concurrently. (Ala.) *Drennen v. Dunn*, 28.

SEDUCTION.

1. **SEDUCTION.**—Marriage After Conviction a Bar to Judgment. A prosecution for seduction under promise of marriage is not terminated until judgment is actually rendered, and a marriage of the parties after a plea or verdict of guilty, but before the rendition of judgment, terminates the prosecution and is a bar to judgment. (N. Y.) *People v. Frost*, 801.

2. **SEDUCTION.**—Subsequent Marriage—Plea not Necessary.—In a prosecution for seduction under promise of marriage it is not necessary to plead a subsequent marriage in order to constitute it a bar; it is sufficient if it is proved in any manner to the satisfaction of the court. (N. Y.) *People v. Frost*, 801.

3. **SEDUCTION.**—Marriage After Conviction—Remedy.—Where the court pronounces judgment against the defendant in seduction after being apprised of his marriage to the prosecutrix subsequent to conviction, his remedy is not habeas corpus, but motion in arrest of judgment, and upon denial thereof to review the action of the trial court on appeal. (N. Y.) *People v. Frost*, 801.

SENATORIAL DISTRICTS.

See Constitutional Law, 10-12.

SENTENCE.

See Criminal Law, 12-14.

SHOPKEEPER'S LIABILITY.

See Negligence, 10-12.

SIDEWALKS.

See Municipal Corporations, 14.

SLANDER.

See Libel and Slander.

SPECIAL ASSESSMENTS.

See Municipal Corporations, 27-37.

STARE DECISIS.

See Courts, 2.

STATIONS.

See Carriers, 29-32.

STATUTES.

In General.

1. **STATUTES—When in Effect.**—It is the Ordinary Rule that legislative enactments become operative upon their passage, unless there is some express provision of law to the contrary. (Cal.) Gay v. Engebretsen, 67.

2. **STATUTES—Conflicting State and Federal Acts.**—A statute does not become controlling until it actually becomes operative, and hence a state statute upon a subject on which Congress has also passed a statute remains in force until the federal statute goes into effect. (N. Y.) People v. Erie R. R. Co., 828.

Title of Act.

3. **CONSTITUTIONAL LAW—Title of Local Option Law.**—The local option law must be considered to have been framed and enacted with reference to the existing laws upon the subject, and the expression "intoxicating liquor," used in the title of the act, to be used in the sense given it and as defined by the general law of the state then in force, and as meaning any beverage containing alcohol in any quantity whatever. (Mo.) State v. Martin, 628.

Construction.

4. **STATUTES—Construction—Popular Meaning of Words.**—The words of a statute are not to be understood in their technical, but in their popular, sense. The dictionaries are the exponents of the popular meaning of the words of the language, and they may be referred to to ascertain and determine such meaning. (La.) State v. Treadaway, 514.

5. **STATUTES—Construction—Reference to Common Law.**—Statutes which are intended to remedy defects in or supersede the common law must be read and construed in the light of that law. When words of a definite signification under the common law are used in such statutes, and there is nothing to show that they are used in a different sense, they are deemed to be employed in their known and defined common-law meaning. (Ind.) Truelove v. Truelove, 404.

6. **STATUTES—Construction—Change in Meaning of Words.**—The popular meaning of words is constantly changing, but in construing a statute long in force and dealing with rights or things long established, the meaning of the words used must be taken as that given them at the enactment of the statute, in order that rights do not change with fashions in the use of words. (Wis.) *St. John's Military Academy v. Edwards*, 1123.

7. **STATUTES—Construction When Taken from Another State.**—When a statute has received a judicial construction in another state, and is then adopted, it is taken with the construction which has been so given it. (Wis.) *Estate of Bullen*, 1114.

See Constitutional Law.

STAY OF PROCEEDINGS.

See Equity, 3.

STOCK AND STOCKHOLDERS.

See Corporations.

STOLEN PROPERTY.

1. **STOLEN PROPERTY—Recovery of Proceeds from Estate of Thief.**—Where certain bonds, together with all evidence of their identity, were stolen from the owner, who was thereby rendered unable to stop payment thereon or trace them, and years after, upon the death of the father in law of the owner, evidence of the theft and collection of the bonds by him was found among his papers, the owner may, upon discovery of the facts, recover the value of the bonds and interest thereon from the estate of the thief. (N. Y.) *Lightfoot v. Davis*, 817.

2. **STOLEN PROPERTY—Equitable Action to Recover Proceeds—Theory of Action.**—The basis of an action in equity to recover from the thief the proceeds of stolen property is that of fraud, and the method by which equity proceeds is to turn the wrongdoer into a trustee. (N. Y.) *Lightfoot v. Davis*, 817.

3. **STOLEN PROPERTY—Recovery of Proceeds from Estate of Thief.**—Where bonds were stolen and collected by one whose identity as the thief was not discovered until after his death, the owner of the bonds may recover the amount thereof from the estate of the thief, although he fails to identify in the estate the proceeds of his bonds, in an equitable action, for in equity "the relief to be administered will be adapted to the exigencies of the case as they exist at the close of the trial." (N. Y.) *Lightfoot v. Davis*, 817.

See Adverse Possession, 2.

STREET RAILWAYS.

1. **STREET RAILWAYS—Extension of Line and of City Limits.** An ordinance granting certain privileges to a street railway company, and requiring it to carry passengers within the city limits on certain terms, applies to the city limits as subsequently extended and to an extension of the line by purchase or otherwise. (Mich.) *People v. Detroit United Ry.*, 582.

2. **STREET RAILWAYS—Extension of System.**—There are Two Methods of extending street railways. One is by construction and the other by purchase. A purchased railway becomes as much a part of the system as does the road as constructed. (Mich.) *People v. Detroit United Ry.*, 582.

3. **STREET RAILWAYS—Franchise—Construction of Ordinance.** An ordinance granting certain privileges to a street railway company

and requiring it to carry passengers within the city limits on certain terms, accepted by the company, must be held to have been granted and accepted in view of the power to change or extend such limits, and that neither the city nor the company contemplated a change of the terms in the event of an extension of the city limits or an extension of the lines within the city. (Mich.) *People v. Detroit United Ry.*, 582.

STREETS.

See Municipal Corporations.

SUCCESSION.

See Descent and Distribution.

SUPPLEMENTARY PROCEEDINGS.

See Execution.

SUPPORT OF GRANTOR.

See Deeds, 3-6.

TAXATION.

Method of Collection.

1. **TAXATION—Method of Collection—Action.**—Where the legislature has not authorized any method for collecting a tax, an action at law will lie to collect it; but where it has authorized a method of collection, the method is exclusive, and generally no action lies unless the statute expressly authorizes it. (Ala.) *City of Huntsville v. Madison County*, 45.

Exemption of Property.

See Municipal Corporations, 34-37.

2. **TAXATION—Exemption.**—County Property, owned and held for public purposes, is generally exempt from taxation of any description, and is not to be deemed subject to taxation in any form, unless the intent of the legislature to render it so clearly appears. (Ala.) *City of Huntsville v. Madison County*, 45.

3. **TAXATION—Exemptions—Strict Construction of Law.**—Laws exempting property from taxation are construed strictly against the privilege claimed; but strict construction does not mean that we are not to search for and ascertain, if possible, the true meaning of the language used. It comes into play only when the language, after analysis and subjection to the ordinary rules of interpretation, presents ambiguity. (Wis.) *St. John's Military Academy v. Edwards*, 1123.

4. **TAXATION—Exemptions—"Association" Includes a Corporation.**—The word "association," as used in subdivision 3, section 1038, Statutes of 1898, exempting from taxation property owned by any religious, scientific, literary or benevolent association, includes corporations of such character. (Wis.) *St. John's Military Academy v. Edwards*, 1123.

5. **TAXATION—Exemption—School and Academy.**—Under subdivision 3, section 1038, Statutes of 1898, exempting the property of any religious, scientific, literary or benevolent association from taxation, a school and academy is such an association, and entitled to the benefit of the exemption. (Wis.) *St. John's Military Academy v. Edwards*, 1123.

6. **TAXATION—Exemption—School Corporation.**—The Payment of Dividends for certain years by a corporation conducting a school and academy, if subjecting its property to taxation for those years,

would not affect its exemption in subsequent years for which no dividends are paid. (Wis.) *St. John's Military Academy v. Edwards*, 1123.

7. **TAXATION—Exemption—"Use of Property" for School.**—The creating of debts for the purpose of purchasing apparatus, building or repairing, and afterward paying these debts from the proceeds of tuition, by a school and academy, is using the property for the purposes of the school. (Wis.) *St. John's Military Academy v. Edwards*, 1123.

Severance of Estates—Oil and Minerals.

8. **TAXATION—Severance of Estates in Land.**—The authority to tax and the manner of its exercise have nothing to do with the right of the owner either to hold his tract of land entire or to sever it by the grant of different estates therein. (Pa.) *Rockwell v. Warren County*, 1006.

9. **TAXATION.**—When There has been a Severance of the Oil, Gas and minerals from the surface, this constitutes an estate in land subject to taxation, even if this mineral estate underlies unseated lands. (Pa.) *Rockwell v. Warren County*, 1006.

Franchises.

10. **TAXATION OF FRANCHISE—Corporations Liable.**—Corporations organized for the purpose of buying, selling, leasing, renting and owning real estate, and of erecting buildings and other structures thereon, are subject to the franchise tax provided by the corporation tax laws. (N. Y.) *People v. Williams*, 809.

11. **TAXATION OF FRANCHISE—Capital Employed.**—From the moment a corporation organized for the purpose of owning and improving real estate begins to use its money to purchase real estate for the purposes of its incorporation, it employs its capital in the state within the purview of the corporation tax law. (N. Y.) *People v. Williams*, 809.

12. **TAXATION OF FRANCHISE—Earning of Dividends Immaterial.**—The corporation tax law provides for the taxation of corporations which neither earn nor declare dividends. (N. Y.) *People v. Williams*, 809.

13. **TAXATION OF FRANCHISE—Construction of Statute.**—Sections 182 and 190 of the former tax laws (Consol. Laws, c. 60) must be construed together and read as a whole, and, where so construed, provide that the tax upon a corporation having an excess of liabilities over assets, the average sale price of whose stock during the year did not equal or exceed its par value, and which paid no dividends, should be assessed upon the actual value of its capital stock and not upon the par value thereof. (N. Y.) *People v. Williams*, 809.

14. **TAXATION OF FRANCHISE—Appraisal of Stock.**—In assessing the franchise of a corporation, the controller is not bound by the appraisal of the officers of the corporation under section 190 of the franchise tax law as it stood in 1907. (N. Y.) *People v. Williams*, 809.

Railroads.

15. **TAXATION—Railroads.**—At the Time of the Adoption of the present constitution, in 1891, it was the settled policy of the state of Kentucky that local taxation of railroads should be based entirely on the assessment made by the railroad commission. (Ky.) *Board of Equalization of Campbell Co. v. Louisville etc. R. R. Co.*, 482.

16. **TAXATION—Railroads.**—The Kentucky Constitution of 1891, now prevailing, declared expressly against any construction of its

words to prevent the General Assembly providing for how railroads and railroad property should be assessed. (Ky.) Board of Equalization of Campbell Co. v. Louisville etc. R. R. Co., 482.

17. **TAXATION—Railroad Commission.**—By the act of April 19, 1882, which was unrepealed in 1891, when the present constitution was adopted, the power of assessing railroads and railroad property was vested in a railroad commission; and such constitution declared that until otherwise provided the law on the subject then prevailing should remain in force. (Ky.) Board of Equalization of Campbell Co. v. Louisville etc. R. R. Co., 482.

18. **TAXATION—Railroads.**—Since the Adoption, in 1891, of the present constitution of Kentucky, the legislature of that state has done nothing to change the system then prevailing as to the assessment of railroads and railroad property. (Ky.) Board of Equalization of Campbell Co. v. Louisville etc. R. R. Co., 482.

19. **TAXATION—Railroads.—A Bridge Owned by a Railway** company and used by it in connection with the operation of its road is, in Kentucky, assessable by the railroad commission as railroad property, although there are street-car tracks on it, a wagonway and paths for foot-passengers. (Ky.) Board of Equalization of Campbell Co. v. Louisville etc. R. R. Co., 482.

Inheritance Tax.

20. **INHERITANCE TAX—Nature of the Tax.**—An inheritance tax is not a tax upon property or property rights in any sense, but purely an excise tax levied upon the "transfer" or transaction, and merely measured in amount by the amount of property transferred. (Wis.) Estate of Bullen, 1114.

21. **INHERITANCE TAX.—A Life Insurance Policy** payable to the wife of the insured is no part of his estate, and is therefore not liable to the payment of an inheritance tax, nor is this affected by the wife joining with the insured in an assignment in trust of the policy, she not relinquishing any of her rights thereunder. (Wis.) Estate of Bullen, 1114.

22. **INHERITANCE TAX—Charity.**—A Provision in a Will, making bequests to various individuals, to various charitable institutions, and to individuals in trust for a charitable use, that the executors pay from the estate any and all inheritance and succession taxes upon any legacies given to individuals, has no reference to the legacy given to the individuals in trust for a charitable use. (N. H.) Kingsbury v. Bazeley, 664.

23. **INHERITANCE TAX—Transfer in Contemplation of Death—When Liability Accrues.**—The liability to the inheritance tax in case of a transfer made in contemplation of death accrues at the time of the transfer, and hence is not affected by the circumstance that at the time of the maker's death the property was in another state. (Wis.) Estate of Bullen, 1114.

24. **INHERITANCE TAX—Transfer—Enjoyment Postponed.**—If the actual intention of the parties to a deed is that possession or enjoyment of the land shall be postponed until after the grantor's death, the transfer is subject to an inheritance tax, though the intention is not evidenced in writing. (Ill.) People v. Burkhalter, 351.

25. **INHERITANCE TAX—Transfer in Contemplation of Death.**—An absolute gift, though followed by possession and enjoyment of the property in the donor's lifetime, is subject to an inheritance tax if made in contemplation of death, without regard to any intent to evade the payment of the tax. (Ill.) People v. Burkhalter, 351.

26. **INHERITANCE TAX.—An Owner may Give Away or otherwise** dispose of his property, or any part of it, in any manner he

sees fit, and if such disposition takes effect, in possession and enjoyment, during his lifetime, it will not be subject to an inheritance tax unless made in contemplation of his death. (Ill.) *People v. Burkhalter*, 351.

27. **INHERITANCE TAX.**—The Contemplation of Death must be the impelling motive, without which the conveyance would not be made, in order to subject a transfer of property to the inheritance tax. (Ill.) *People v. Burkhalter*, 351.

28. **INHERITANCE TAX.**—A Transfer of Property to one not related to the transferor, either by blood or marriage, as the consideration for a contract whereby the transferee is to attend and care for the deaf and dumb daughter of the transferor as long as she lives, is not subject to an inheritance tax, as having been made in contemplation of death, where the performance of the contract, on both sides, has been completed during the transferor's lifetime, although he may have expected his daughter to outlive him, and where it was not his impending death which was the impelling motive for making this disposition of his property, but his desire to provide for his daughter's future, whether he lived or died. (Ill.) *People v. Burkhalter*, 351.

29. **INHERITANCE TAX.**—*Situs of Personalty.*—The inheritance tax law of Wisconsin was borrowed from New York, and prior to its adoption by Wisconsin had received judicial construction in New York that in respect to personal property not within the state at the time of the resident decedent's death the court will apply the maxim, "*Mobilia sequuntur personam*," the effect of which is to make the legal situs of personal property at the domicile of the decedent, and this construction was adopted with the statute. (Wis.) *Estate of Bullen*, 1114.

30. **INHERITANCE TAX.**—*Situs—Personal Property Transferred to Trustee—Transfer in Contemplation of Death.*—Where one formerly a resident of Chicago took up his residence in Wisconsin, but continued to transact some business in Chicago and had money in banks and other personal property, including stocks, bonds, life insurance policies, notes, etc., situated there, which were never actually brought into the state of Wisconsin, some two years after his removal to Wisconsin executed at Chicago a deed or assignment in trust to an Illinois trust company transferring the property in Chicago to it, and delivered to it the stocks, bonds, notes and securities properly indorsed, the assignment providing for the investment of the trust fund and the payment of the income thereof, but reserving to the maker the right to the income and control of the property and the right to at any time revoke the trust during his life, and providing for the distribution of the property held by the trustee at the death of the maker, and the maker thereafter, after having become technically repossessed of the property, executed a second deed or assignment to the trustee, the manual possession of the securities being at all times in the trustee, it holding the legal title at the time of the maker's death, the maker at the time of the creation of the trust knowing himself to be afflicted with locomotor ataxia, it must be held that the legal situs of the property affected by the deed or assignment was in the state of Wisconsin, where the maker lived and died; that the transfer was one made in contemplation of death, and, therefore, subject to the Wisconsin inheritance tax. (Wis.) *Estate of Bullen*, 1114.

31. **INHERITANCE TAX.**—*Payment in Foreign State—Double Taxation.*—The fact that personal property is situated in another state where an inheritance tax has been imposed upon it does not prevent the imposition of an inheritance tax in the state of the deceased owner's domicile, although such may result in a double taxation. (Wis.) *Estate of Bullen*, 1114.

32. INHERITANCE TAX—Deducted from Legacy.—The inheritance tax imposed upon property distributed through the courts of this state is deducted from the legacy, and is not a part of the expenses of administration. (N. H.) *Kingsbury v. Bazeley*, 664.

33. INHERITANCE TAX—Conflict of Laws—Expense of Administration.—The payment of an inheritance tax by the executors to a foreign state in order to obtain property there situated should, in the absence of a contrary intention expressed in the will, be regarded as an expense of administration, to be paid from the general property of the estate, and not as a charge pro rata upon specific legacies. (N. H.) *Kingsbury v. Bazeley*, 664.

See Licenses; Municipal Corporations, 27-37.

TELEGRAPHS AND TELEPHONES.

Negligence and Damages.

1. TELEGRAMS—Care and Skill in Transmitting.—Telegraph companies exercise a quasi-public employment, with duties analogous to those of common carriers, and are required to use a high degree of care and skill in the correct and prompt transmission of messages. (Ill.) *Providence-Washington Ins. Co. v. Western Union Tel. Co.*, 314.

2. TELEGRAMS—Failure to Deliver.—Where Insured Property is destroyed by fire, but the policy would have been canceled had it not been for the negligence of a telegraph company in missending a telegram, the proximate cause of the loss to the insurance company, by reason of the policy not having been canceled, is the negligence of the telegraph company and not the fire. (Ill.) *Providence-Washington Ins. Co. v. Western Union Tel. Co.*, 314.

3. TELEGRAM—Notice of Importance—Negligence.—When a message delivered to a telegraph company for transmission relates to an important business transaction, and discloses the nature of the business, the company has all the information necessary to show that prompt delivery is important, and to charge it with damages resulting directly from negligent failure to deliver. (Ill.) *Providence-Washington Ins. Co. v. Western Union Tel. Co.*, 314.

4. TELEGRAM—Failure to Deliver Message to Cancel Insurance.—If property is destroyed by fire while a policy of insurance thereon is in force which would have been canceled but for the negligence of a telegraph company in missending a telegram authorizing the cancellation of the policy, the loss of the insurance company is the direct result of the negligence of the telegraph company, and the telegraph company is liable for the amount of the loss sustained by the insurance company, and not merely for the difference between the reasonable value of carrying the risk for the additional time and the amount of the unearned premium. (Ill.) *Providence-Washington Ins. Co. v. Western Union Tel. Co.*, 314.

5. TELEGRAM—Mental Anguish—Absence from Funeral.—In assessing damages, in an action against a telegraph company for failing to deliver a message, mental anguish is not to be attributed to the plaintiff, prevented by such failure from attending a funeral, unless the deceased was a near relative. (Ky.) *Randall v. Western Union Tel. Co.*, 477.

6. TELEGRAM—Mental Anguish—Funeral of Fiancée.—A marriage engagement does not render the parties such near relatives as that a telegraph company is answerable in damages for the mental anguish of one of them, the failure of the company to deliver a telegram having caused his absence from the funeral of the other. (Ky.) *Randall v. Western Union Tel. Co.*, 477.

Contract in Restraint of Trade.

7. TELEGRAPHS AND TELEPHONES—Contract in Restraint of Trade.—Telegraph and telephone companies are public service corporations, affected by a public interest, and hence contracts tending to restrict the free and general use of their lines are invalid. (N. Y.) Central New York Tel. & Tel. Co., v. Averill, 878.

8. TELEGRAPHS AND TELEPHONES—Contracts in Restraint of Use.—The feature of a telephone system which constitutes its public value and affects it with a public interest is its ability to bring each customer into vocal communication with others, the usefulness of the service being directly proportionate to the number of persons who can be reached thereby, and its franchise is granted because of this element. Any contract by which a telephone company seeks the exclusion of any other telephone service from the premises of its customers is against public policy, and in restraint of trade, and therefore void. (N. Y.) Central New York Tel. & Tel. Co. v. Averill, 878.

TIMBER.

1. STANDING TIMBER—Construction of Instrument of Sale.—In the construction of an instrument for the sale of standing timber and the growth of timber on certain land, no consideration need be given the fact that its title or heading is "Bill of Sale," nor that a part of the description in the warranty clause is of "goods and chattels," nor that it is recorded in the chattel mortgage records, save as possibly throwing light on the intent of the parties. As against the plain terms of the recitals of the granting clause and covenant, such circumstances are entitled to no weight. (Iowa) Baker v. Kenney, 456.

2. STANDING TIMBER—Not Interest in Land.—A purchaser of standing timber to be cut and taken from land within a specified time acquires no interest in the land. (Iowa) Baker v. Kenney, 456.

3. STANDING TIMBER—License to Remove.—A license to cut and remove standing timber may be established by parol evidence, because it conveys no interest in land, and the right to the timber which the licensee is authorized to remove becomes vested only when the trees are severed and converted into chattel property. (Iowa) Baker v. Kenney, 456.

4. STANDING TIMBER—Sale—Right of Removal.—There may be an irrevocable license to cut and remove standing timber, created in writing or provable by parol evidence, on account of performance or payment of consideration, which is an interest in the land, and the right acquired under such a license is in effect an easement or right analogous thereto. (Iowa) Baker v. Kenney, 456.

5. STANDING TIMBER.—The Right to Cut and Remove standing timber may exist in gross and need not be appurtenant to any other land. (Iowa) Baker v. Kenney, 456.

6. STANDING TIMBER—Construction of Grant—Irrevocable License or Easement.—An instrument by which the owner of land grants "all timber and growth of timber" thereon, with the privilege at all times to enter to cut and haul the same, etc., "to have and to hold the same unto the said party of the second part, his executors, administrators and assigns forever," may be construed to grant an interest in the land and a perpetual right to the timber and growth of timber with the right to remove the same. (Iowa) Baker v. Kenney, 456.

7. STANDING TIMBER—Sale.—The Terms "Timber" and "Growth of timber" in a contract for the sale of "standing timber" and "growth of timber" are not synonymous, the latter term meaning the future growth. (Iowa) Baker v. Kenney, 456.

TORTS.

See Charities.

TRADEMARKS.

1. **TRADEMARKS.**—The Expiration of a Patent does not give to one thereafter manufacturing the article the right to use trademarks and names adopted by the patentee, so as to represent such articles to be those manufactured by the patentee, and the use of such marks and names may be permanently enjoined. (N. Y.) *Westcott Chuck Co. v. Oneida Nat. Chuck Co.*, 907.

2. **TRADEMARKS.**—Damages for Infringement.—A Stipulation made on the trial of a suit for infringement of trademark, fixing the profits made, etc., will be treated as fixing the rule of damages in case the plaintiff is successful. (N. Y.) *Westcott Chuck Co. v. Oneida Nat. Chuck Co.*, 907.

TRADE NAMES.

See Banks and Banking; Corporations, 10-12.

TRESPASS.

TRESPASS.—Entry on Land by Mistake.—Where one has entered upon and taken sand from the lot of another, mistaking the lot for his own, and the true owner as mistakenly has permitted him to do so, there has been no trespass. (Ky.) *Merriwether v. Bell*, 488.

See Injunctions, 2.

TRIAL.*In General.*

1. **TRIAL.**—Order of Proof in Discretion of Court.—It is not error for the court to allow the plaintiff, after the close of the defendant's case, to prove a fact he should have proved as part of his case in chief. Such matters rest in the sound discretion of the trial court. (Wis.) *Siemers v. Meeme Mut. Home Protection Ins. Co.*, 1083.

2. **TRIAL.**—Province of Jury.—Where from the Evidence different conclusions may be reached, the question should be left to the jury. (Colo.) *Heert v. Ridenour-Raymond Grocer Co.*, 259.

Instructions.

3. **INSTRUCTIONS.**—Weight of Evidence.—It is Error for the court to single the defendant out and instruct the jury upon the weight of his evidence. (Okla. Cr.) *Price v. United States*, 930.

4. **INSTRUCTIONS.**—General Exception.—The rule that when an instruction embraces several distinct propositions of law, some of which are correct, a general exception to the whole instruction is not good, does not apply where the instruction authorizes the wrong application of that which is correct. (Colo.) *Melcher v. Beeler*, 273.

5. **INSTRUCTIONS.**—Request to Cure Erroneous Instruction.—Where the court has given an erroneous instruction, the party against whom it operates is not required to propose or request a correct instruction on the point. (Colo.) *Melcher v. Beeler*, 273.

6. **TRIAL.**—Instructions.—An Objection to the Refusal of the court to submit a specific question to the jury loses its force where the question, in a less suggestive form, was in fact submitted to the jury and fully answered by its verdict. (Cal.) *Merrill v. Los Angeles Gas & Elec. Co.*, 134.

Directing Verdict.

7. **TRIAL.**—A Verdict is Properly Directed for the defendant where the evidence, with all inferences which can justifiably be drawn

therefrom, is insufficient to support a verdict for the plaintiff. (S. D.) *Watters v. Dancy*, 1071.

8. **TRIAL**—Motion for Verdict Overruled—Resumption of Trial.—A defendant who, after presentation of the plaintiff's case, without producing his evidence moves for a peremptory instruction to the jury to find for him, waives no rights by proceeding to produce his evidence after his motion is denied. (Ky.) *Louisville Ry. Co. v. Hibbitt*, 464.

See Criminal Law; Jurors.

TRUSTS.

1. **RESULTING TRUST**—Parol Promise of Grantee.—A mere parol promise of a grantee or devisee to hold the title in trust, unattended with any fraud in procuring the conveyance or devise to be made, does not raise a resulting trust. (Ill.) *Evans v. Moore*, 302.

2. **TRUST**—Enforcement Against Transferee.—Wherever property, real or personal, which is already impressed with or subject to a trust, express or by operation of law, is transferred by the trustees, not in the course carrying into effect the terms of an express trust, or devolves from a trustee to a third person who is a mere volunteer, or is a purchaser with notice of the trust, such heir, devisee, successor, or other voluntary trustee, or such purchaser, acquires the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary. (Ill.) *Evans v. Moore*, 302.

3. **TRUST**—If an Uncle Agrees, in Writing, to Devise property to his nephew if the latter will leave his parents, brothers, sisters, and other relatives, renounce allegiance to the land of his birth, come to this country to live, and become a citizen of the United States, the agreement is based upon a legal, valid consideration, and, when performed by the nephew, the agreement becomes binding upon the uncle and his devisees, who are then trustees of the legal title for the nephew. (Ill.) *Evans v. Moore*, 302.

4. **TRUST**—Agreement to Devise—Enforcement.—An agreement, based upon a valuable consideration, to make a particular disposition of property by will, will be enforced in equity against those to whom the legal title has descended, and the remedy will not be allowed to be defeated by a devise or conveyance during the lifetime, inconsistent with the agreement, unless rights of purchasers deserving of protection have intervened; and, where specific performance would be decreed between the original parties to the contract, it will be decreed as to all who claim under them, unless intervening equities would make the decree an injustice to the parties. (Ill.) *Evans v. Moore*, 302.

5. **TRUST**—Agreement to Devise—Enforcement—Laches.—Where an uncle agreed to devise property to his nephew, but, on account of the latter's dissipation, placed the property in trust for him until his habits should improve; and the property was devised to a third person upon his verbal promise to hold in trust for the nephew; and the trustee held the property for about two years and a half after the uncle's death, when he died, devising the property to his own children, the nephew is not barred either by the statute of limitations or laches, from asserting his rights against such devisees, especially where the trustee had led the nephew to believe that he would do as he said he would, and that there was no necessity for any resort to the courts; and where nothing inequitable stands in the way of enforcing the rights of the nephew. (Ill.) *Evans v. Moore*, 302.

6. **TRUST**—Agreement to Devise—Enforcement.—Where an uncle has agreed, in writing and for valid consideration, to devise property to his nephew, the latter may, in equity, enforce the agreement against a

subsequent voluntary grantee or devisee of his uncle, where no rights of bona fide purchasers have intervened. (Ill.) *Evans v. Moore*, 302.

7. TRUST FOR PIOUS USE—Conditions and Limitations.—A donation of property for a pious use creates a trust in the donees; and the conditions and limitations upon which the trust is created are to be regarded as regulations to guide the trustees, enforceable in a court of equity. (N. H.) *Lyford v. Laconia*, 680.

VENDOR AND VENDEE.

1. VENDOR AND VENDEE—Question—Equivocal Answer—Fraud.—When, after an offer made by a contracting party having sole knowledge of a fact which if known to the other might cause such offer to be rejected, such party gives an equivocal or misleading answer to a question, pertinent to the fact, put to him by the other, such answer amounts to deceit or fraud. (Ky.) *Hays v. Meyers*, 493.

2. PURCHASE OF REMAINDER—Fraud of Vendee in Suppressing Information.—One who makes an offer for a remainder, having at the time knowledge not had by the remainderman, that the life tenant is dying, and, in answer to a question put by the remainderman as to how the life tenant is, says, "I think they are getting along a little smoother than they have been," is subject to have the acceptance, following the offer so made, rescinded later on the ground of fraud. (Ky.) *Hays v. Meyers*, 493.

3. VENDOR AND VENDEE—Waiver of Vendee's Default.—Acceptance by a vendor, without objection, of money past due as part of the price, payable under the contract in installments on specified days, time being of the essence of the contract, is a waiver of all breaches past and present and avoids a forfeiture. (Cal.) *Boone v. Templeman*, 126.

4. VENDOR AND VENDEE—Waiver of Vendee's Default.—Acceptance by a vendor, without objection, of one payment long after maturity is no waiver of his right to declare a forfeiture for installments becoming delinquent on some future day. (Cal.) *Boone v. Templeman*, 126.

5. VENDOR AND VENDEE—Although Forbearance by the Vendor to declare a forfeiture for one overdue payment does not waive his right to declare such for a subsequent delinquency of the sort, still, after a long course of such indulgence and the suffering of the vendee to remain in possession meantime, equity would require the vendor to give definite and specific notice before being allowed to act on the right. (Cal.) *Boone v. Templeman*, 126.

6. VENDOR AND VENDEE—Default in Payments—Remedies.—When a contract for the sale of land calls for payment of the price by the vendee at different times in installments, and the delivery of a deed by the vendor upon the final payment, the vendor may sue for any installment immediately upon its becoming delinquent; but if he fails to do this and waits until the time specified for the final payment, he must tender a deed before demanding payment, and without such tender he cannot declare a forfeiture or maintain a suit for either the whole price or an intermediate installment. (Cal.) *Boone v. Templeman*, 126.

7. VENDOR AND VENDEE—Time Material—Vendee's Right.—When time is material to the contract, rather than of its essence, and the vendee is in possession with the vendor's consent, the vendee's mere delay in either bringing suit or paying will not prevent his compelling a conveyance when at last he does pay or tender the amount due. His right to relief endures until the vendor shall have

duly demanded payment within some named period with rescission as the alternative, and the vendee shall have thereupon defaulted. (Cal.) *Boone v. Templeman*, 126.

8. VENDOR AND VENDEE—Time as Essence.—When under a contract for the sale of land time was originally essential, but for sufficient cause a forfeiture for default has been waived, time ceases to be essential and becomes only material thereafter until the vendor makes it essential again by proper notice and demand. (Cal.) *Boone v. Templeman*, 126.

9. VENDOR AND VENDEE—Waiver of Vendee's Delinquency.—Where a vendee, under a written contract for the sale of land which provided for payment of the deferred part of the price in installments on a named day of each month from the date onward, and the execution of a deed to him at last upon full payment—time being of the essence—the vendor having the right meanwhile to declare a forfeiture upon an installment being in arrears for sixty days, paid installments now and then for a time with indifference to the days named, sometimes with intervals of more than sixty days, the vendor not objecting, and then suspended payments, and the vendor never notified him of the delinquency until more than three years from the last actual payment, but served him then with a writing, in form a rescission, and thereupon he, the vendee, demanded a statement of the amount due and offered to pay up, which offer was rejected, a forfeiture had been waived and thereafter time was not essential, but its efflux was a material fact bearing upon the right of the vendee to enforce performance by suit. (Cal.) *Boone v. Templeman*, 126.

10. VENDOR AND VENDEE.—The Defense of Laches may be Made when the lapse of time is less than the statutory period of limitation, but in such cases it can be maintained only when from the delay and circumstances there appears either actual or presumptive injury or prejudice to the other party. (Cal.) *Boone v. Templeman*, 126.

11. VENDOR AND VENDEE—Delay in Payments—Interest.—The fact that the agreed price under a contract for the sale of land draws eight per cent annual interest and up to the becoming due of the final installment of such price is payable monthly and compounded monthly is to be regarded, in the lack of a showing to the contrary, as indicating that the vendor is sufficiently compensated for delay in the payment of the principal and that he is not prejudiced by such delay. (Cal.) *Boone v. Templeman*, 126.

See *Timber*.

VENUE.

1. VENUE—Action Against Corporation for Injuries.—It is not required by the Alabama statute that an injury for which a corporation is sued should have wholly occurred within the county in which suit is brought. (Ala.) *Southern Ry. Co. v. Harrington*, 59.

2. VENUE—Action for Injuries—Residence of Plaintiff.—It is enough that the plaintiff, in an action for damages for wrongs and injuries suffered, resides in the county when suit is brought; it is not necessary that he should have resided in the county at the time of the injury. (Ala.) *Southern Ry. Co. v. Harrington*, 59.

VIADUCTS.

See *Municipal Corporations*, 38–41.

VOTING.

See *Elections*.

WAGES.

See Commerce, 5; Constitutional Law, 24-26; Master and Servant, 22, 23.

Note.

Wages, constitutionality of statutes relating to, 63.

WATERS AND WATERCOURSES.

1. **WATERS—Diminution of Flow.**—Evidence that a shortage of water was caused by other means than the diversion by the defendant is admissible, but evidence that the plaintiff might have used better methods of conservation is not admissible. (N. H.) Taggart v. Jaffrey, 729.

2. **WATERS—Taking for Public Use—Compensation.**—The waters of a stream flowing through private lands cannot be taken for public use without compensation to the owners of the land. (N. H.) Taggart v. Jaffrey, 729.

3. **WATERS—Artificial Channel.**—Riparian Rights may be acquired along the artificial channel of a natural stream, and where such artificial channel was intended to be permanent and has existed for over sixty years, a proprietor on the bank thereof has the same rights as the proprietor on the bank of a natural channel. (N. H.) Taggart v. Jaffrey, 729.

See Boundaries.

WEAPONS.

WEAPONS—Care in Handling.—The Law Imposes upon persons handling deadly weapons the duty of exercising such care as an ordinarily cautious and prudent person would exercise under similar circumstances. (Okl. Cr.) O'Barr v. United States, 959.

WILLS.

In General.

1. **A WILL IS THE LEGAL DECLARATION** of a Man's Intention which he wills to be performed after his death, and, under the Pennsylvania wills act, this declaration must be in writing and signed at the end by the testator. (Pa.) Stinson's Estate, 1014.

2. **WILLS.**—The Word "Now" as Used in wills has been construed in different ways, the construction depending always upon the intent of the testator as gathered from the whole will. (Iowa) Luers v. Luers, 453.

3. **WILLS—Presumption Against Intestacy.**—There is a presumption against one's intending a partial intestacy which may aid in construing a will. (Iowa) Luers v. Luers, 453.

4. **WILL—Construction—Decree of Partial Distribution.**—Where the superior court has had jurisdiction of an estate, its decree of partial distribution as modified by the district court of appeal is a conclusive adjudication as to the construction to be given a will produced in the proceedings, and the rights of the respective parties must be measured solely by that decree. (Cal.) Hardy v. Mayhew, 73.

5. **WILLS—Vesting of Remainder.**—In the Enjoyment of the estate, or the period of distribution, is postponed for the convenience of the funds of the estate, and not for reasons personal to the devisees, the remainder is vested. (Ill.) Thomas v. Thomas, 347.

Signing.

6. **WILL—What is Signing at the End of a Will.**—A testator's written declaration is his animus testandi, and when this is fully expressed,

his will is finished and the end of it reached. It is there that his signature must appear as evidence that it is his will. (Pa.) Stinson's Estate, 1014.

7. **WILL—Irregular Paging—Signature in Middle.**—A written instrument occupying three pages of a sheet of paper in the irregular order, 1, 3, 2, and signed in the middle of the second page, is valid as a will, provided that throughout this order there is a connected internal sense containing a clear expression of testamentary intention and excluding, from an inspection of it, any conclusion but that the testatrix signed her name at the place she regarded as the end of her will. (Pa.) Stinson's Estate, 1014.

Presumption of Due Execution from Due Attestation.

8. **WILLS—Due Execution—Presumption from Due Attestation.**—The due attestation of a will is itself *prima facie* proof of all facts essential to due execution, to which attesting witnesses could depose if present, including the authenticity of the testator's signature, whether autographic, by mark, or in the handwriting of another, also his volition in signing and his mental capacity and understanding of his act. (Wis.) Will of Hawkinson, 1091.

9. **WILLS—Due Execution—Presumption not Destroyed.**—The presumption of the due execution of a will from the attestation thereof is not destroyed or overcome by a showing that the testator could not read or write English, qualified by a showing that he had lived in this country thirty years, served in the Civil War, and was a prosperous farmer of average intelligence. (Wis.) Will of Hawkinson, 1091.

Revocation.

10. **WILLS—Question of Revocation—How Presented.**—The question whether any part of a paper admitted to probate as a will should be rejected as revoked may properly be raised by a petition to the county court, by one entitled to the residue of the estate, to have such part adjudged annulled. (Wis.) Will of Battis, 1101.

11. **WILLS—Implied Revocation—Changed Conditions and Circumstances.**—The subsequent changes in the condition and circumstances of the testator which will revoke a will, or a part thereof, by implication have commonly been applied to a change in the testator's property, in his family, or in the beneficiaries, as such changes, imposing different moral and legal duties, afford strong evidence that the testator intended that his will should become revoked as to provisions affected by such change. (Wis.) Will of Battis, 1101.

12. **WILLS—Implied Revocation—Divorce.**—The change in the condition and circumstances of one who has made a will, brought about by a divorce accompanied by an adjudication making a final division and distribution of his estate, both real and personal, as between him and his wife, in the light of their legal and equitable rights, is of such probative force as to sustain the conclusion that the husband intended that the provision he had theretofore made in his will for his wife's benefit should be revoked thereby. (Wis.) Will of Battis, 1101.

13. **WILLS—Implied Revocation—Changed Conditions—Presumption.**—Evidence cannot be received to rebut the presumption of an implied revocation of the provisions in a will, or to show the testator meant his will to stand as written, unless such evidence amounts to a republication of it. (Wis.) Will of Battis, 1101.

Admission to Probate.

14. **WILLS—Admission to Probate—Essential Findings.**—Before a will can be admitted to probate and before there can properly be any

conclusion of law that an instrument "is the last will and testament" of anyone, the court must be convinced that the testator signed it in the presence of witnesses and that they attested it with the formalities prescribed by law, and the statute requires a written finding on the subject. (Wis.) Will of Hawkinson, 1091.

15. **WILLS**.—In a Proceeding for the Admission of a Will to Probate, the question is whether the writing propounded as the decedent's will is entitled to probate as such, and no other question is involved. The legal effect and validity of the contents of the writing are not involved. (Wis.) Will of Battis, 1101.

Petition for Construction.

16. **WILL**.—Petition for Construction.—An Amendment praying that the executor be directed to perform the directions of the will will be allowed to a petition praying for a construction of the will. (N. J. Eq.) Allen v. Allen, 758.

After-acquired Property.

17. **WILLS**.—After-acquired Property—Code Provision.—The purpose of section 3271 of the Code is to make the rule that a will speaks from the time of the death and not from the date of its execution applicable to real as well as personal property, and to allow a devise of after-acquired real property. (Iowa) Luers v. Luers, 453.

18. **WILLS**.—Devise Carrying After-acquired Property.—A devise of "all my real estate which is," followed by a description of specific lands, and then, "also including all other real estate now owned by me," passes real property acquired after the execution of the will. (Iowa) Luers v. Luers, 453.

Devise to Class.

19. **WILLS**.—Rule Concerning a Devise to a Class.—The rule that where a devise is to a class, none will be permitted to take except such as are in esse at the time of distribution, is applicable in cases where the postponement of the period of distribution is for reasons personal to the devisees, or in cases where the language clearly indicates an intention that the remainder is to vest only in such members of the class as survive the period of distribution; but if there is nothing to show that the postponement is for any other reason than to let in a life estate, the rule is not applicable. (Ill.) Thomas v. Thomas, 347.

20. **WILLS**.—Vesting of Remainder Devised to Class.—A remainder devised to a class will, unless a contrary intention clearly appears, vest in those members of the class in esse at the testator's death, notwithstanding the possibility of after-born children coming into the class as the estate vested will open up to let such children in, if the postponement of the period of distribution appears to be for no other purpose than to let in a life estate. (Ill.) Thomas v. Thomas, 347.

21. **WILLS**.—Devise to a Class—Vested Remainder.—Where land was devised to the testator's daughter for life, at her decease to be divided among her children in fee, share and share alike; and the daughter had three children living when the testator died, but one of the children died intestate before the death of her mother, leaving her father, mother, and two brothers as her heirs, the remainder vested in the devisee's children immediately on the testator's death, and the deceased child's interest passed to her heirs. (Ill.) Thomas v. Thomas, 347.

Legacies.

22. **WILLS**.—Whether Annual Payments of the Interest on a certain sum for life provided for by a will is a charge upon the whole

residuary estate or a specific bequest of the sum must be determined from the language of the bequest. (N. J. Eq.) *Lister v. Hardin*, 767.

23. WILLS.—Annual Payments as Charge on Estate.—A provision in a will giving fifty thousand dollars to the testator's wife, provided she waives her dower rights, and if she does so, "I direct my executor to pay her annually during her lifetime the income derived from the investment of the sum of fifty thousand dollars in addition to the above," does not create a charge upon the whole residuary estate but is a bequest of a definite sum of money. (N. J. Eq.) *Lister v. Hardin*, 767.

24. LEGACIES—Payment and Interest.—Ordinarily, in the absence of any provision in the will as to the time of payment, pecuniary legacies are payable at the end of the year from the death of the testator, without interest, but if not then paid, they bear interest at the legal rate. (N. H.) *Kingsbury v. Bazeley*, 664.

25. WILLS—Specific Legacy—Gift of Security.—At the time of making his will the testator's estate consisted of certain securities (bonds and mortgages) of which he thereafter died possessed. In the second item of his will he provided as follows: "I do give and bequeath unto my wife Georgia M. Allen, the sum of \$17,000.00, to be paid to her out of the securities which I now hold, instead of cash." Held, that the legacy is a specific one, and is to be paid out of the securities which came to the executor as part of the estate of the testator. (N. J. Eq.) *Allen v. Allen*, 758.

26. WILLS—Specific Legacy Carries Income.—A specific legacy carries with it the income thereof from the death of the testator. (N. J. Eq.) *Allen v. Allen*, 758.

Life Estate and Remainders.

27. WILL—Life Estate in Principal—Bequest Over.—A decree in distribution to a person of money "for his use during his natural life, and on his death the unused portion of said sum" to other persons named, creates a life estate in the first taker with power of disposing of the principal, even to the entire consuming of it, in such ways as might be consistent with his "use" of it, and a vested remainder in the other persons. (Cal.) *Hardy v. Mayhew*, 73.

28. WILL—Construction—Effect of Words—"Unused Portion."—In a decree of distribution the employment of the words "the unused portion" to express what is to go to the remainderman implies that the first taker may, during his lifetime, use the estate without limit, even to the consuming of it; otherwise the disposition to the first taker would be merely such a "use" of the estate as would not impair the principal. (Cal.) *Hardy v. Mayhew*, 73.

29. WILL—Life Estate in Principal—Rights to Alien.—Under a bequest for life with right to use the principal according to his discretion, a legatee may not cut off the remainderman either by a will or by a gift inter vivos. (Cal.) *Hardy v. Mayhew*, 73.

30. WILL—Bequest of Principal for Life—Power of Disposal.—The mere fact that the first taker under a will is invested with power to dispose of or consume the whole of the property for certain purposes does not invest him with the absolute ownership and render void the gift over when, taking the whole instrument together, it is to be concluded that the intent was to give only an estate for life with limited power of disposal and consumption. (Cal.) *Hardy v. Mayhew*, 73.

31. WILL—Death of First Taker—Proceedings on His Estate.—In case of a bequest of the principal sum for life and a bequest over of what portion may remain unused by the first taker, no proceed-

ings on the estate of the first taker need be taken, on his death, in order that the remainderman may come into the enjoyment of such unused portion. (Cal.) *Hardy v. Mayhew*, 73.

32. WILL—Death of First Taker—Further Proceedings on Estate. Necessarily any interest in property created by a will is to be adjudicated and distributed by decree of distribution, and the fact that it is a future interest with respect to the time of enjoyment is immaterial; and the death of the first taker would not in such case entail the necessity of further proceedings in the matter of the estate of his testatrix to vest in the remainderman the right to immediate possession of such of the property as had not been appropriated by him to an authorized use. (Cal.) *Hardy v. Mayhew*, 73.

33. WILL—Life Tenant as Trustee for Remaindermen.—In case of a bequest to a legatee of the principal for his use during life, with a gift over of the unused portion, the first taker is a trustee only in the sense that a duty rests on him as life tenant to have merely due regard for the remainderman, a duty giving him the character rather of a quasi trustee. (Cal.) *Hardy v. Mayhew*, 73.

34. WILL—Disposal by Life Tenant—Remedies of Remainderman. Under a bequest of the principal to one for life and a bequest over of the unused portion to others, children of the first taker, the latter do not take by descent as heirs of the first taker but as remaindermen under the original will; and so these others can follow the estate in the hands of any invalid donees of the first taker without resort first to proceedings against the donor's estate, and his legal representatives are not necessary parties. (Cal.) *Hardy v. Mayhew*, 73.

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Note.

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WITNESSES.

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WORDS AND PHRASES.

1. WORDS AND PHRASES—Popular Meaning—How Determined. Apart from the dictionaries, the only source from which can be derived information as to the meaning of words is the literature of the language, including in that literature the evanescent newspaper writings of the day. (La.) *State v. Treadaway*, 514.

2. WORDS AND PHRASES—Chose in Action.—Where one has taken valuable material out of the soil of property belonging to another, mistaking such property for his own, the claim against him coming thereby to the true owner is a chose in action. (Ky.) *Merriwether v. Bell*, 488.

3. WORDS AND PHRASES.—The Word "Cohabit" implies a dwelling together for some period of time, and is to be understood as something different from occasional, transient interviews for unlawful and illicit intercourse. (Ind.) *Richey v. State*, 362.

3a. "LEARNED IN THE LAW." (S. D.) *Danforth v. Egan*, 1030.

4. WORDS AND PHRASES—"Negro."—In the Absence of a definition of the term contained in the statute itself, the use of the term "negro" in a statute means a black man, especially one of a race of black or very dark persons who inhabit the greater part of tropical Africa and are distinguished by certain physical characteristics, and the descendants of such men. It is used in the popular sense; the sense given it by the recognized dictionaries of the language, and does not include octoroons, mulattoes and persons of mixed blood. (La.) *State v. Treadaway*, 514.

5. WORDS AND PHRASES.—The Word "Colored," when used to designate the race of a person, is unmistakable, at least in the United States. It means a person of negro blood, pure or mixed; and the term applies no matter what may be the proportions of the admixture, so long as the negro blood is traceable. (La.) *State v. Treadaway*, 514.

6. WORDS AND PHRASES—"Negroes" and "Colored" Persons.—When it has become necessary to use a word comprehending within its meaning both negroes, properly so called, and persons of mixed negro blood, in the constitution and laws of the state, the term "colored" has invariably been used, and the same is true in other states, except where a definition of the word "negro" has been given once for all in the code or general statutes; and in the judicial literature of the country is found the same approximate uniformity in the use of the word "colored" whenever the idea is to refer to persons in general having negro blood; and the use of the word "negro" unqualified only when the reference is to the negro, properly so called, or blacks. (La.) *State v. Treadaway*, 514.

7. WORDS AND PHRASES—"Colored Person."—A Negro is necessarily a person of color, but a person of color is not necessarily a negro. The term "colored" as applied to race was given the meaning of the word "negro" for the very purpose of having a term including within its meaning both negroes and descendants of negroes; but the converse is not true. The term "negro" was never adopted for the purpose of designating persons of mixed blood. (La.) *State v. Treadaway*, 514.

8. **WORDS AND PHRASES.**—"Griff" Indicates the Issue of a negro and a mulatto; a person too black to be a mulatto and too light in color to be a negro. (La.) State v. Treadaway, 514.

9. **WORDS AND PHRASES.**—"Mulatto."—A Person Too Dark to be a white and too light to be a griff is a mulatto. (La.) State v. Treadaway, 514.

10. **WORDS AND PHRASES.**—"Quadroon" Indicates a person distinctly whiter than a mulatto. (La.) State v. Treadaway, 514.

11. **WORDS AND PHRASES.**—"Colored," When Applied to Race, has the definite and well-known meaning of a person having negro blood in his veins. (La.) State v. Treadaway, 514.

12. **WORDS AND PHRASES.**—"Negro," of Itself, Unqualified, does not necessarily include within its meaning persons possessed of only an admixture of negro blood. (La.) State v. Treadaway, 514.











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